BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 1091 of 2021
First date of hearing: 28.07.2021
Date of decision : 15.02.2022

Anindya Das Gupta
R/O: 7, Tanjong Rhu Road, #05-03, The Waterside, Singapore 436887 **Complainant**

Versus

M/S Ireo Residencies Company Pvt. Ltd.
Regd. Office: IREO Campus, Archview Drive, Ireo City, Golf Course Extension Road, Gurgaon - 122101 **Respondent**

CORAM:
Dr. KK Khandelwal **Chairman**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Shri Pawan Bhushan Advocate for the complainant
Shri M.K Dang Advocate for the respondent

ORDER

1. The present complaint dated 03.09.2021 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with Rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations,

responsibilities and functions under the provision of the Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of unit details, sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Description
1.	Name of the project	"Grand Hyatt Gurgaon Residencies"
2.	Nature of the project and location of the project	Luxury Residential, Sector-58, Gurgaon.
3.	Project area	17.224 acres
4.	DTCP license no. and validity status	Not Mentioned
5.	Name of the license holder	Not Mentioned
6.	RERA registration number	Not Mentioned
7.	Unit no.	T1-29-NS, 29th floor, tower I (annexure C/3 on page no. 63 of complaint)
8.	Unit area admeasuring	4625 sq. ft. of super area (annexure C/3 on page no. 63 of complaint)
9.	Date of allotment letter	18.03.2013 (annexure C-2 on page no. 56 of complaint)
10.	Date of approval of building plans	03.07.2013 (annexure R-4 on page no. 51 of reply)

11.	Date of environment clearance	25.11.2013 (annexure R-5 on page no. 54 of reply)
12.	Date of fire approval	08.01.2015 (annexure R-6 on page no. 59 of reply)
12.	Date of builder buyer agreement	09.01.2014 (annexure C/3 on page no. 59 of complaint)
13.	Total consideration (Basic sale price)	Rs 12,18,73,375/- [annexure C/3 on page no. 87 of complaint]
14.	Total amount paid by the complainant	Rs. 10,76,33,849/- [annexure C/4 on page no. 117 of complaint]
15.	Due date of delivery of possession as per the clause 14.3 mentioned in the agreement i.e., "The company proposes to offer the possession of the said Residence-unit to the allottee **within a period of 48 months from the date of approval of building plan and/or fulfilment of the preconditions imposed thereunder.** The allottee further agrees and understands that company shall additionally be **entitled to a period of 180 days after expiry of the said**	03.01.2017 [calculated from the date of approval of building plans] **Note:** Grace Period is not allowed.

	commitment period to allow for unforeseen delays beyond the reasonable control of company."	
16.	Occupation certificate	Not yet obtained
17.	Offer of possession	Not offered
18.	Delay in handing over the possession till the date of this order i.e 15.02.2022	5 years 1 month 12 days
19.	Status of project	Ongoing

B. Facts of the complaint

The complainant has submitted as under: -

3. That the respondent i.e., M/S Ireo Residencies Company Pvt. Ltd. is a company incorporated under the provisions of the companies Act, 1956 having its registered office at A-11, 1st Floor, Neeti Bagh, New Delhi-110049.
4. That the respondent launched the project in the name of "Grand Hyatt Gurgaon Residences" in 2012-2013 and invited the public at large to apply for luxury residential units.
5. That the complainant, had applied for booking an independent unit admeasuring an approximate super area of 4625 Sq. Ft bearing unit no. GHGR TI - 29 - NS on 04.03.2013 and had received a booking confirmation on 09.03.2013 from the promoter company upon an initial first payment of Rs 1 crore for the unit.

6. That a residence purchase agreement dated 09.01.2014 was executed between the parties with respect to unit.
7. That the complainant as per the payment plan has made a total payment of Rs. 10,76,33,849/- out of the total sale price of Rs. 12,18,73,375/- .
8. That the complainant is aggrieved by the lack of progress in the project. Even after the due date of the completion of the project, the complainant sent a legal notice to the respondent on 21.06.2019. Till date, there has been no response to this legal notice. That notice was emailed, couriered as well as hand delivered to the IREO Offices.
9. That the respondent has failed to deliver possession to the complainant and the dwelling units in the project are languishing at the stage of skeletal structures, and that the non-completion of the project is not attributable to any circumstances provided for in the force majeure clause of the builder-buyer agreement.
10. That the respondent has breached the terms of the agreement entered into with the complainant and failed to deliver the unit by the agreed possession date. The conduct, deficiency of service and unfair trade practices employed by the respondent has caused harassment and immense mental agony to the complainant. So, he is entitled to refund of the total amount deposited along with an interest of the SBI Marginal Cost of Lending Rate (currently 7.30 %) plus two percent per annum from the date of deposits/payments.

C. Relief sought by the complainant:

11. The complainant has sought following relief(s):

    1. Direct the respondent to refund the entire amount deposited by the complainant towards the total sale consideration of the allotted unit as provided under Section 18(1) of the Real Estate Regulation Act,2016.
    2. Direct the respondent to pay an interest of the state bank of India MCLR plus two percent p.a. compounded annually to the complainant on the amount deposited with the respondent from the date of respective deposits till the date of realization, as per section 18(1) of the Real Estate Regulation and Development Act,2016.

12. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent.

The respondent has contested the complaint on the following grounds: -

13. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The Residence Purchase Agreement was executed between the complainant and the respondent prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid down in the said Act cannot be applied retrospectively.

14. That there is no cause of action to file the present complaint.
15. That the complainant has no locus standi to file the present complaint.
16. That the complainant is estopped from filing the present complaint by his own acts, omissions, admissions, acquiescence's, and laches.
17. That this authority does not have the jurisdiction to try and decide the present complaint.
18. That the respondent has filed the present reply within the period of limitation as per the provisions of Real Estate (Regulation and Development) Act, 2016.
19. That the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e., clause 36 of the residence purchase agreement.
20. That the complainant has not approached this authority with clean hands and have intentionally suppressed and concealed the material facts in the present complaint. The present complaint has been filed by him maliciously with an ulterior motive and it is nothing but a sheer abuse of the process of law. The true and correct facts are as follows:
    - That the complainant, after checking the veracity of the project namely, 'Grand Hyaat, Gurugram had applied for allotment of an apartment vide his Booking Application

Form. The complainant agreed to be bound by the terms and conditions of the Booking Application Form.

- That the respondent allotted to the complainant unit no. T1-29-NS having tentative super area of 4625 sq.ft for a sale consideration of Rs. 12,18,73,375/-. It is submitted that the complainant signed and executed the residence purchase agreement on 09.01.2014 and the complainant agreed to be bound by the terms contained therein.
- That the respondent raised payment demands from the complainant in accordance with the mutually agreed terms and conditions of the allotment as well as of the payment plan and the complainant made the payment of certain instalments. It is submitted that the respondent had raised the payment demand dated 04.09.2017 towards the instalments amount for the net payable amount of Rs. 16,30,286.38. However, the complainant failed to remit the due amount and the same was adjusted in the next instalments demand dated 01.12.2017 as arrears.
- That the complainant has made the part-payment out of the total sale consideration and is bound to pay the remaining amount towards the total sale consideration of the unit along with applicable registration charges, stamp duty, service tax as well as other charges payable along with it at the applicable stage.

- That the possession of the unit was supposed to be offered to the complainant in accordance with the agreed terms and conditions of the buyer's agreement and the time was to be computed from the date of receipt of all requisite approvals. Even otherwise, construction can't be raised in the absence of the necessary approvals. It is pertinent to mention here that it has been specified in Sub- clause (iv) of clause 17 of the approval of building plan dated 03.07.2013 of the said project that the clearance issued by the ministry of environment and forest, Government of India has to be obtained before starting the construction of the project. The environment clearance for construction was obtained on 25.11.2013. Furthermore, in Clause 39 of Part-A of the Environment Clearance dated 25.11.2013, it was stated that Fire Safety Plan was to be duly approved by the fire department before the start of any construction work at site.
- That the last statutory approvals which forms apart of the preconditions was the fire scheme approval which was obtained on 08.01.2015 and that the time period for offering the possession, according to the agreed terms of the buyers agreement would have expired only on 08.07.2020.

21. That the implementation of the project was hampered due to non-payment of instalments by allotees on time and several

other issues also materially affected the construction and progress of the project.

- Inability to undertake the construction for approx. 7-8 months due to Central Government's notification with regard to demonetization : The respondent had awarded the construction of the project to one of the leading construction companies of India. The said contractor/ company could not implement the entire project for approx. 7-8 months w.e.f from 9-10 November 2016 the day when the central government issued notification with regard to demonetization. During this period, the contractor could not make payments to the labour in cash and as majority of casual labour force engaged in construction activities in India do not have bank accounts and are paid in cash on a daily basis. During demonetization the cash withdrawal limit for companies was capped at Rs. 24,000 per week initially whereas cash payments to labour on the site of the magnitude of the project in question are Rs. 3-4 lakhs per day and the work at site got almost halted for 7-8 months as bulk of the labour being unpaid went to their hometowns, which resulted into shortage of labour. Hence the implementation of the project in question got delayed due on account of issues faced by contractor due to the said notification of central government.

There are also studies of Reserve Bank of India and independent studies undertaken by scholars of different institutes/universities and also newspaper reports of Reuters of the relevant period of 2016-17 on the impact of demonetization on real estate industry and construction labour.

Thus, in view of the above studies and reports, the said event of demonetization was beyond the control of the respondent, hence the time period for offer of possession should deemed to be extended for 6 months on account of the above.

- Orders passed by National Green Tribunal: In last four successive years i.e., 2015-2016-2017-2018, Hon'ble National Green Tribunal has been passing orders to protect the environment of the country and especially the NCR region. The Hon'ble NGT had passed orders governing the entry and exit of vehicles in NCR region. The Hon'ble NGT has passed orders with regard to phasing out the 10-year-old diesel vehicles from NCR. The pollution levels of NCR region have been quite high for couple of years at the time of change in weather in November every year. The Contractor of Respondent could not undertake construction for 3-4 months in compliance of the orders of Hon'ble National Green Tribunal. Due to that, there was a delay of 3-4 months as labour went back to their hometowns, which resulted in

shortage of labour in April -May 2015, November-December 2016 and November- December 2017. The district administration issued the requisite directions in this regard.

In view of the above, construction work remained badly affected for 6-12 months due to the above stated major events and conditions which were beyond the control of the respondent and the said period is also required to be added for calculating the delivery date of possession.

- Non-Payment of Instalments by Allottees: Several other allottees were in default of the agreed payment plan, and the payment of construction linked instalments was delayed or not made resulting in badly impacting and delaying the implementation of the entire project.
- Inclement weather conditions viz. Gurugram: Due to heavy rainfall in Gurugram in the year 2016 and unfavourable weather conditions, all the construction activities were badly affected as the whole town was waterlogged and gridlocked as a result of which the implementation of the project in question was delayed for many weeks. Even various institutions were ordered to be shut down/closed for many days during that year due to adverse/severe weather conditions.

22. That the complainant is a real estate investor who had booked the unit in question with a view to earn quick profit in a short

period. However, it appears that his calculations have gone wrong on account of severe slump in the real estate market and the complainant now wants to somehow get out of the concluded contract made by him on highly flimsy and baseless grounds. Such malafide tactics of the complainant cannot be allowed to succeed.

23. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority

24. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

25. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

26. The authority is well within its jurisdiction to procced further in the matter to grant refund to the complainant in view of the recent judgement of the Hon'ble Apex court in the case of ***"Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors." SC/1056/2021 decided on 11.11.2021*** observes that: -

> *"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon Under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. If the adjudication Under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer Under Section 71 and that would be against the mandate of the Act 2016"*

27. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondent.

F.I Objection regarding jurisdiction of the complaint w.r.t the apartment buyer's agreement executed prior to coming into force of the Act.

28. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the residence purchase agreement was executed between the complainant and the respondent prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.

29. The authority is of the view that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. The Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors***

Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)

which provides as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter...*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

30. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

> *"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."*

31. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

F.II Objection regarding complainant is in breach of agreement for non-invocation of arbitration

32. The respondent submitted that the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute and the same is reproduced below for the ready reference:

> *"36. Dispute Resolution by Arbitration*
> *"All or any disputes arising out or touching upon in relation to the terms of this Agreement or its termination including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled*

amicably by mutual discussions failing which the same shall be settled through reference to a sole Arbitrator to be appointed by a resolution of the Board of Directors of the Company, whose decision shall be final and binding upon the parties. The allottee hereby confirms that it shall have no objection to the appointment of such sole Arbitrator even if the person so appointed, is an employee or Advocate of the Company or is otherwise connected to the Company and the Allottee hereby accepts and agrees that this alone shall not constitute a ground for challenge to the independence or impartiality of the said sole Arbitrator to conduct the arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereto and shall be held at the Company's offices or at a location designated by the said sole Arbitrator in Gurgaon. The language of the arbitration proceedings and the Award shall be in English. The company and the allottee will share the fees of the Arbitrator in equal proportion".

33. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer

Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.

34. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainant and builder could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows:-*
>
> > *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
>
> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.*

...

56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

35. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the Hon'ble Supreme Court **in case titled as M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018** has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant para of the judgement passed by the Supreme Court is reproduced below:

"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or

deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."

36. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainant is well within right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily. In the light of the above-mentioned reasons, the authority is of the view that the objection of the respondent stands rejected.

G. Findings on the relief sought by the complainant.

Relief sought by the complainant: The complainant has sought following relief(s):

i. Direct the respondent to refund the entire amount deposited by the complainant towards the total sale consideration of the allotted unit as provided under Section 18(1) of the Real Estate Regulation Act,2016.

ii. Direct the respondent to pay an interest of the state bank of India MCLR plus two percent p.a. compounded annually to the complainant on the amount deposited with the respondent from the date of respective deposits till the date of realization, as per section 18(1) of the Real Estate Regulation and Development Act,2016.

37. In the present complaint, the complainant intends to withdraw from the project and is seeking refund of the amount paid by him as provided under section 18(1) of the Act. Sec. 18(1) reads as under: -

> ***"Section 18: - Return of amount and compensation***
>
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
> *(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
>
> *(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,*
>
> *He shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:."*
>
> .....

38. Clause 14 of the flat buyer's agreement provides the time period of handing over possession and the same is reproduced below:

> *"Clause14- 14.3 Subject to force majeure, as defined herein and further subject to the allottee having complied with all obligations under the terms and conditions of this agreement and not having defaulted under any provision(s) of this agreement including but not limited to the timely payment of all dues and charges including the total sale consideration, registration charges, stamp duty and other charges and also subject to the allottee*

having complied with all formalities or documentation as prescribed by the company, the company proposes to offer the possession of the said residence unit to the allottee within a period of 48 months from the date of approval of building plan and/or fulfilment of the preconditions imposed thereunder ***(commitment Period).***

The allottee further agrees and understands that the company shall additionally be entitled to a period of 180 days ***(Grace Period),*** *after the expiry of the said commitment period to allow for unforeseen delays beyond the reasonable control of the company.*

39. The residence buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builder/promoter and buyer/allottee are protected candidly. The buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit. In pre-RERA period it was a general practice among the promoter/developer to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoter/developer. It had arbitrary,

unilateral, and unclear clauses that either blatantly favoured the promoter/developer or gave them the benefit of doubt because of the total absence of clarity over the matter.

40. The respondent/ promoter has proposed to handover the possession of the subject apartment within a period of 48 months from the date of approval of building plans and/or fulfilment of the preconditions imposed thereunder plus 180 days grace period for unforeseen delays beyond the reasonable control of the company i.e., the respondent/promoter.

41. Further, in the present case, it is submitted by the respondent promoter that the due date of possession should be calculated from the date of fire scheme approval which was obtained on 08.01.2015, as it is the last of the statutory approvals which forms a part of the preconditions and in this regard, the counsel for the respondent placed reliance on case titled as **Ireo Grace Realtech Pvt. Ltd. Versus Abhishek Khanna and Ors.** passed by the Hon'ble Supreme Court of India in Civil Appeal no. 5785 of 2019.

42. The counsel for the complainant while rebutting the claims of the respondent submitted that the case cited by the counsel for the respondent belong to the project namely, "The Corridors". However, in the present matter, the subject unit belongs to the project "Grand Hyatt Gurgaon Residencies".

43. The authority is of the considered view that every case needs to be considered in the light of the facts and circumstance of

that case. The nature and extent of relief are always fact dependent and vary from case to case. Further, it is pertinent to mention here that in the case cited above it is a matter of fact that on 23.07.2013, the building plans of the project were sanctioned by the Directorate of Town and Country Planning, Haryana. Clause 3 of the sanctioned plan stipulated that an NOC/ clearance from the fire authority shall be submitted within 90 days from the of issuance of the sanctioned building plans which expired on 23.10.2013. But it is pertinent to mention over here that the developer applied for the provisional fire approval on 24.10.2013 (**as contented by the respondent herein the matter of Civil Appeal no. 5785 of 2019 titled as 'IREO Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors.**) after the expiry of the mandatory 90 days period got over. The application filed was deficient and casual and did not provide the requisites, the respondent submitted the corrected set of drawings as per the NBC-2005 fire scheme only on 13.10.2014 which reflected the laxity of the developer in obtaining the fire NOC. The approval of the fire safety scheme took more than 16 months from the date of the building plan approval i.e., from 23.07.2013 to 27.11.2014. Thus, the builder failed to give any explanation for the inordinate delay in obtaining the fire NOC.

44. In view of the above, in complaints bearing nos. CR/4325/2020, CR/3020/2020, CR/3361/2020, CR/5003/2020, CR/2549/2020, the authority had struck

down the ambiguous possession clause of the buyer's agreement and calculated the due date of handing over possession from the date of approval of building plan.

45. The authority has gone through the possession clause of the agreement in the present matter. On a bare reading of the said clause of the agreement reproduced above, it becomes clear that the possession in the present case is linked to the "fulfilment of the preconditions" which are so vague and ambiguous in itself. Nowhere in the agreement, it has been defined that fulfilment of which conditions forms a part of the pre-conditions, to which the due date of possession is subjected to in the said possession clause. If the said possession clause is read in entirety, the time period of handing over possession is only a tentative period for completion of the construction of the unit in question and the promoter is aiming to extend this time period indefinitely on one eventuality or the other. Moreover, the said clause is an inclusive clause wherein the "fulfilment of the preconditions" has been mentioned for the timely delivery of the subject apartment. It seems to be just a way to evade the liability towards the timely delivery of the subject unit. According to the established principles of law and the principles of natural justice when a certain glaring illegality or irregularity comes to the notice of the adjudicator, the adjudicator can take cognizance of the same and adjudicate upon it. The inclusion of such vague and ambiguous types of clauses in the agreement

which are totally arbitrary, one sided and totally against the interests of the allottee must be ignored and discarded in their totality. In the light of the above-mentioned reasons, the authority is of the view that the date of sanction of building plans ought to be taken as the date for determining the due date of possession of the unit in question to the complainant. Accordingly, in the present matter the due date of possession is calculated from the date of approval of building plan i.e., 03.07.2013 which comes out to be 03.07.2017.

46. **Admissibility of grace period:** The respondent promoter had proposed to hand over the possession of the unit within 48 months from the date of sanction of building plan and/or fulfilment of the preconditions imposed thereunder which comes out to be 03.07.2017. The respondent promoter has sought further extension for a period of 180 days after the expiry of 48 months for unforeseen delays in respect of the said project. The respondent raised the contention that the construction of the project was delayed due to *force majeure* conditions including demonetization and the order dated 07.04.2015 passed by the Hon'ble NGT including others.

(i) **Demonetization:** It was observed that due date of possession as per the agreement was 03.07.2017 wherein the event of demonetization occurred in November 2016. By this time, major construction of the respondents' project must have been completed as per timeline mentioned in the agreement

executed between the parties. Therefore, it is apparent that demonetization could not have hampered the construction activities of the respondents' project that could lead to the delay of more than 2 years. Thus, the contention raised by the respondent in this regard are rejected.

(ii) **Order dated 07.04.2015 passed by the Hon'ble NGT:** The order dated 07.04.2015 relied upon by the respondent promoter states that

> *"In these circumstances we hereby direct state of U.P., Noida and Greater NOIDA Authority, HUDA, State of Haryana and NCT, Delhi to immediately direct stoppage of construction activities of all the buildings shown in the report as well as at other sites wherever, construction is being carried on in violation to the direction of NGT as well as the MoEF guideline of 2010."*

A bare perusal of the above makes it apparent that the above-said order was for the construction activities which were in violation of the NGT direction and MoEF guideline of 2010, thereby, making it evident that if the construction of the respondents' project was stopped, then it was due to the fault of the respondent itself and he cannot be allowed to take advantage of his own wrongs/faults/deficiencies. Also, the allottee should not be allowed to suffer due to the fault of the respondent/promoter. It may be stated that asking for extension of time in completing the construction is not a statutory right nor has it been provided in the rules. This is a concept which has been evolved by the promoter itself and now it has become a very common practice to enter such a clause in the agreement executed between the promoter and

the allotee. It needs to be emphasized that for availing further period for completing the construction the promoter must make out or establish some compelling circumstances which were in fact beyond his control while carrying out the construction due to which the completion of the construction of the project or tower or a block could not be completed within the stipulated time. Now, turning to the facts of the present case, the respondent promoter has not assigned such compelling reasons as to why and how it shall be entitled for further extension of time 180 days in delivering the possession of the unit. Accordingly, this grace period of 180 days cannot be allowed to the promoter.

47. **Admissibility of refund along with prescribed rate of interest:** The complainant is seeking refund of the amount paid by him. However, allottee intends to withdraw from the project and is seeking refund of the amount paid by him in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
>
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates*

which the State Bank of India may fix from time to time for lending to the general public.

48. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

49. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., **15.02.2022** is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

50. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*

(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

51. The counsel for the complainant submitted that there is already an inordinate delay of almost of almost four and a half year in the construction of the subject project and to add to the misery, there are no signs of completion of the subject project in the near future. Therefore, in the present matter, the allottee intends to withdraw from the project, which is his statutory right as per the provisions of section 18 of the Act. The authority is of the view that the allottee cannot be made to wait indefinitely for possession of the unit allotted to him. Further, the occupation certificate is not available even as on date, which clearly amounts to deficiency of service and hence the allottee is well within his rights to claim a relief of refund under section 18(1) of the Act. Furthermore, the authority has no hitch in proceeding further to grant the relief of refund along with prescribed interest to the complainant in view of law laid down in case of **Imperia Structures Ltd. vs. Anil Patni and Anr.** 2020(10) SCC 783 wherein it was held that section 18 confers an unqualified right upon an allottee to get refund of the amount deposited with the promoter and interest at the prescribed rate, if the promoter fails to complete or is unable to give possession of an apartment as per the date specified in the home buyer's agreement. The

same view was upheld by the Hon'ble Apex Court of the land in case of **M/s Newtech Promoters and Developers Pvt. Ltd. Vs. State of Uttar Pradesh and Ors. decided on 11.11.2021 (MANU/SC/1056/2021)** and was observed that in terms of section 18 of the Rera Act, if a promoter fails to complete or is unable to give possession of the apartment duly completed by the date specified in the agreement, the promoter would be liable, on demand, to return the amount received by him in respect of that apartment if the allottee wishes to withdraw from the project. Such right of the allottee is specifically made "without prejudice to any other remedy available to him". The right so given to the allottee is unqualified and if availed, the money deposited by the allottee has to be refunded with interest at such rate as may be prescribed.

52. Therefore, the authority directs the respondent-promoter to return the amount received by them i.e., **Rs. 10,76,33,849/-** along with interest at rate of 9.30% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 within 90 days from the date of this order.

H. Directions of the authority

53. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

i. The respondent is directed to refund the complainant the principal sum of Rs. **10,76,33,849/-** paid by complainant on account of failure of the respondent in handing over the possession.

ii. The respondent is directed to give interest to the complainant at the prescribed rate of 9.30% on the amount deposited by the complainant. The interest will be given from the date of receipt of payments till actual date of refund of the deposited amount within 90 days from the date of this order.

54. Complaint stands disposed of.

55. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Date 15.02.2021

Judgement uploaded on 21.03.2022.