BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 5048 of 2021
First date of hearing: 12.01.2022
Date of decision : 11.03.2022

Bibha Singh w/o Saurabh Singh
R/O: H.no. G-104, Saraswati Apartment,
I.P Extension, Patparganj, New Delhi-110092 **Complainant**

Versus

Ireo Private Limited
Regd. Office: - A-11, 1st Floor, Neeti
Bagh, New Delhi-110049 **Respondent**

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

APPEARANCE:
Shri Gaurav Rawat Advocate for the complainant
Shri Garvit Gupta Advocate for the respondent

ORDER

1. The present complaint dated 24.12.2021 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 complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No	Heads	Information
1.	Project name and location	"Ireo (Managed serviced apartments)", sector 59, Gurugram
2.	Licensed area	3.937 acres
3.	Nature of the project	Commercial Project
4.	DTCP license no.	56 of 2010 dated 31.07.2010
	License valid up to	30.07.2020
	Licensee	Hardcore Realtors Pvt. Ltd. and others
5.	RERA registered/not registered	Registered Registered vide no. 102 of 2017 dated 24.08.2017
	Validity	Valid up to 30.06.2020
6.	Unit no.	R0904 ,9th floor, Tower R [Page no. 46 of the complaint]
7.	Unit measuring	1241.67 sq. ft. [Page no. 46 of the complaint]

8.	Date of allotment	26.09.2012 [annexure R-2 on page no. 65 of reply]
9.	Date of approval of building plan	05.09.2013 [annexure R-26 on page no. 92 of reply]
10.	Date of execution of flat buyer's agreement	18.11.2013 [page no. 38 of complaint]
11.	Date of environment clearance	12.12.2013 [annexure R-27 on page no. 95 of reply]
12.	Date of consent to establish	07.02.2014 [annexure R-28 on page no. 101 of reply]
13.	Payment plan	Construction linked payment plan (Page no. 84 of the complaint)
14.	Total consideration	1,83,33,179/- [as per statement of account on page no. 92 of complaint]
15.	Total amount paid by the complainant	Rs. 1,26,41,487/- [as per statement of account on page no. 92 of complaint]
16.	Due date of delivery of possession	**05.09.2017** (As per clause 13.3 of the apartment buyer's agreement- within 42 months from the date of approval of the building plans and/or fulfilment of the preconditions imposed

		thereunder along with 180 days grace period to allow for unforeseen delays) **Note:** **1.Calculated from date of approval of building plan.** **2. Grace period of 180 days is not allowed in the present case.**
17.	Offer of possession	Not offered
18.	Occupation certificate	Not obtained
19.	Period of delay in handing over possession till the date of decision i.e., 11.03.2022	4 years 6 months 6 days

B. Facts of the complaint

The complainant has submitted that:

3. That the respondent, Ireo private Limited advertised about its new project namely 'managed service apartment in Ireo City Central' on the 2.236 acres of land, in sector 59 of the Gurgaon. The respondent painted a rosy picture of the project in its advertisements making tall claims.

4. That the respondent advertised its new project namely "managed service apartment in ireo city central" under the license no. 56 of 2010 dated 31.07.2010, issued by DTCP, Haryana, Chandigarh, situated at sector 59, Gurugram, Haryana and thereby invited applications from prospective

buyers for the purchase of units in the said project. Respondent confirmed that the projects had got building plan approval from the authority.

5. That the complainant while searching for an apartment was lured by such advertisements and calls from the brokers of the respondent for buying apartment in their project namely managed service apartment in ireo city central. The respondent told the complainant about the moonshine reputation of the company and the representative of the respondent made huge presentations about the project mentioned above and also assured that they have delivered several such projects in the national capital region. The respondent handed over one brochure to the complainant which showed the project like heaven and in every possible way tried to hold the complainant and incited the complainant for payments.

6. That relying on various representations and assurances given by the respondent the complainant booked a unit in the project by paying an amount of Rs. 15,00,000 dated 25.01.2012

7. That further the agreement was executed between the complainant and the respondent on 18.11.2013 for a total sale consideration of Rs. 1,83,33180.00 which includes basic price, car parking charges and working capital deposit and development charges and other specifications of the allotted unit and providing the time frame within which the next instalments was to be paid.

8. That as per clause 13.3 of the buyer's agreement, the respondent had to deliver the possession within a period of 42 months from the approval of building plan or fulfilment of the preconditions imposed there under.

9. That though the payment by the complainant was to be made based on the construction on the ground but unfortunately, the demands being raised were not corresponding to the factual construction situation on ground.

10. That the complainant went to the office of respondent several times and requested them to allow to visit the site but it was never allowed saying that they do not permit any buyer to visit the site during construction period, Once the complainant visited the site but was not allowed to enter the site. The complainant even after paying amount still received nothing in return but only loss of the time and money invested by her.

11. That complainant contacted the respondent on several occasions and was regularly in touch with it, but it never gave any satisfactory response to her regarding the status of the construction and was never definite about the delivery of the possession. The complainant kept pursuing the matter with the representatives of the respondent by visiting their office regularly as well as raising the matter as to when would they deliver the project and why construction was going on at such a slow pace, but to no avail. Some or the other reason was being given in terms of shortage of labour etc.

12. That the respondent has played a fraud upon the complainant and has cheated her fraudulently and dishonestly with a false promise to complete the construction over the project site within stipulated period. The respondent had further malafidely failed to implement the agreement executed with the complainant. Hence, the complainant is aggrieved by the offending misconduct, fraudulent activities, deficiency and failure in service of the respondent.
13. That the complainant has suffered a loss and damage in as much as she had deposited the money in the hope of getting the said unit. She has not only been deprived of the timely possession of the said unit but the prospective return she could have got if had invested in fixed deposit in bank.
14. That complainant on 06.09.2020 sent an email to respondent stating that there has not been any communication from their side on the status of the project.
15. That the respondent is guilty of deficiency in service within the purview of provisions of the Real Estate (Regulation and Development) Act, 2016 (Central Act 16 of 2016) and the provisions of Haryana Real Estate (Regulation and Development) Rules, 2017.

C. Relief sought by the complainants:

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

(i) Direct the respondent to handover the possession of the said unit with the amenities and specifications as

promised in all completeness without any further delay and not to hold delivery of the possession for certain unwanted reasons much outside the scope of agreement.

(ii) Direct the respondent to pay the interest on the total amount paid by the complainant at the prescribed rate of interest as per RERA from the due date of possession till actual physical possession as the possession is being denied by the respondent in spite of the fact that the complainant desires to take the possession.

17. 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.

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

I. That the complaint is neither maintainable nor tenable and is liable to be out-rightly dismissed. The apartment buyer's 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.

II. That there is no cause of action to file the present complaint.

III. That the complainant has no locus standi to file the present complaint.

IV. That the complainant is estopped from filing the present complaint by her own acts, omissions, admissions, acquiescence's, and laches.

V. That this authority does not have the jurisdiction to try and decide the present complaint.

VI. 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.

VII. 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 34 of the buyer's agreement.

VIII. That the complainant has not approached this authority with clean hands and has intentionally suppressed and concealed the material facts in the present complaint. The present complaint has been filed by her 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:

19. That the complainant, after checking the veracity of the project namely, 'Ireo City Managed Service Apartments; sector 59,

Gurugram applied for allotment of an apartment vide booking application form. The complainant agreed to be bound by the terms and conditions of the booking application form.

20. That based on the said application, respondent vide its offer letter dated 26.09.2012 allotted to the complainant's apartment no. R0904 having tentative super area of 1241.67 sq. ft. for a sale consideration of Rs. 1,83,36,209/-. It was submitted that three copies of the apartment buyer's agreement were sent to the complainant by respondent vide letter dated 10.05.2013. The apartment buyer's agreement was executed between the parties on 18.11.2013 after reminders dated 25.09.2013 and 30.10.2013. It is pertinent to mention herein that when the complainant had booked the unit with the respondent, the Real Estate (Regulation and Development) Act, 2016 was not in force and the provisions of the same cannot be applied retrospectively.

21. That the respondent raised payment demands from the complainant in accordance with the agreed terms and conditions of the allotment as well as of the payment plan and she defaulted from the very inception. It was submitted that the respondent had sent payment demand dated 26.09.2012 to the complainant for net payable amount of Rs. 20,70,834/-. However, the complainant made the payment only after reminders dated 22.10.2012, 14.11.2012 and final notice dated 18.12.2012 was sent by the respondent to her.

22. That vide payment demand dated 15.04.2015, the respondent had raised the payment demand towards the 4th instalment for the net payable amount of Rs.17,97,480.35. However, the complainant failed to make the payment towards the due amount despite reminders dated 13.05.2015, 08.06.2015 and final notice dated 03.07.2015.

23. That vide instalment dated 08.10.2015, payment towards 5th instalment was sent by the respondent. Yet again, the complainant failed to make payment towards the due amount despite reminders dated 09.11.2015 and 02.11.2015.

24. That vide payment demand dated 28.12.2015, the complainant was bound to remit payment of Rs.56,72,815.26. However, despite reminders dated 25.01.2016, letter dated 09.02.2016, reminder dated 18.02.2016 and final notice dated 05.07.2016, the complainant remitted only a part payment out of the total demanded amount and the rest of the amount was accordingly adjusted in the next instalment demand.

25. That the respondent had sent an instalment demand dated 24.08.2016 to the complainant for the amount of Rs.56,75,415.24. Yet again, the complainant failed to remit the complete amount and only made part payment even after reminders dated 19.09.2016, 13.10.2016 and final notice dated 07.11.2016 were sent by the respondent.

26. 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. It is submitted that clause

13.3 of the buyer's agreement and clause 38 of the schedule – I of the booking application form states that the '...subject to force majeure conditions and 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 apartment to the allottee within a period of 42 months from the date of approval of the building plans 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) ...' From the aforesaid terms of the buyer's agreement, it is evident that 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 (xv) of clause 16 of the building plan dated 05.09.2013 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. It is submitted that the environment clearance for construction of the said project was granted on 12.12.2013. Furthermore, in clause 1 of part-A of the environment clearance dated 12.12.2013 it was stated that 'consent to establish' was to be obtained before the start of any construction work at site. The consent to establish was granted on 07.02.2014 by the concerned authorities.

Therefore, the pre-condition of obtaining all the requisite approvals was fulfilled only on 07.02.2014.

27. That in terms of the buyer's agreement, the proposed time for handing over of possession has to be computed from 07.02.2014. Moreover, as per clause 13.5 of the buyer's agreement, 'extended delay period' of 12 months from the end of grace period is also required to be granted to the respondent. The due date to handover the possession was to lapse on 07.02.2019. However, it is submitted that the said due period was subject to the occurrence of the force majeure conditions and the complainant complying with the terms of the allotment. It is submitted that the complainant had admitted and acknowledged in clause 13.6 of the buyer's agreement that in case, the completion of the apartment is delayed due to the force majeure, then the commitment period and/or the grace period and/or the extended delay period shall stand extended automatically to the extent of the delay caused under the force majeure conditions and that the complainant shall not be entitled to any compensation whatsoever.

28. That although the tower in which the unit allotted to the complainant is located almost complete, it is pertinent to mention herein that the implementation of the said project was hampered due to non-payment of instalments by the allottees on time and also due to the events and conditions which were beyond the control of the respondents, and which have materially affected the construction and progress of the project.

Some of the *force majeure* events/conditions which were beyond the control of the respondents and affected the implementation of the project and are as under

I. Inability to undertake the construction for approx. 7-8 months due to Central Government's notification with regard to demonetization: The respondents 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 that period, the contractor could not make payment in cash to the labour. 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 magnitude of the project in question is Rs. 3-4 lakhs approx. 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 on account of the issues faced by contractor due to the said notification of Central Government.

II. Further there are 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.

III. The Reserve Bank of India has published reports on impact of demonetization. In the report- Macroeconomic Impact of Demonetization, it has been observed and mentioned by Reserve Bank of India in the said report that the construction industry was in negative during Q3 and Q4 of 2016-17 and started showing improvement only in April 2017.

IV. That 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.

V. 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. Also, the Hon'ble NGT has passed orders with regard to phasing out the 10 years 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 the respondents could not undertake construction for 3-4 months in compliance of the orders of Hon'ble National Green Tribunal. Due to this, 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.

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

VII. 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.

VIII. 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.

29. That the complainant is real estate investor who made the booking with the respondent with a view to earn quick profit in a short period. However, it appears that the calculations went wrong on account of severe slump in the real estate market and the complainant now wants to harass and pressurize the respondent to submit to the unreasonable demands on highly flimsy and baseless grounds. Such malafide tactics of the complainant cannot be allowed to succeed. The complainant furthermore is also liable to make payment towards the holding charges on account of the delay in taking over the possession as well as delayed payment interest as per the terms of the allotment even after a notice of possession has been issued by the respondent to the complainant.

30. 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 submission made by the parties.

E. Jurisdiction of the authority

The respondent has raised objection regarding jurisdiction of authority to entertain the present complaint and the said objection stands rejected. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

E. I Territorial jurisdiction

31. 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

32. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*

The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

33. 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 respondents.

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.

34. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the apartment buyer's 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.

35. 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."

36. 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."

37. 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

38. 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:

> ***"34. 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".*

39. 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.

40. 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 complainants and builders 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."

41. 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."*

42. 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 the rights 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 respondents stands rejected.

G. Findings regarding relief sought by the complainants.

(i) **Delay possession charges**: Direct the respondent to pay the interest on the total amount paid by the complainant at the prescribed rate of interest as per RERA from the due date of possession till actual physical possession as the possession is being denied by the respondent in spite of the fact that the complainant desires to take the possession.

43. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges at prescribed rate of interest on amount already paid by her as provided under the proviso to section 18(1) of the Act which 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, —*
>
> .....
>
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

44. Clause 13.3 of the apartment buyer's agreement (in short, the agreement) dated 18.11.2013, provides for handing over possession and the same is reproduced below:

> *"**13.3** Subject to Force Majeure, as defined herein and further subject to the Allottees having complied with all its*

*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 Allottees having complied with all formalities or documentation as prescribed by the Company, the company proposes to offer the possession of the said apartment to the allottees within a period of 42 months from the date of approval of the Building plans and/or fulfilment of the preconditions imposed thereunder ("**Commitment Period**"). The Allottees 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 reasonable control of the company."*

45. The apartment buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottee are protected candidly. The apartment 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 apartment 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 promoters/developers to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoters/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.

46. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainant not being in default under any provisions of this agreements and in compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the apartment buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has

misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

47. The respondent promoter has proposed to handover the possession of the subject apartment within a period of 42 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.

48. 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 consent to establish which was obtained on 07.02.2014, as it is the last of the statutory approval which forms a part of the preconditions. The authority in the present case observes that, the respondent has not kept the reasonable balance between his own rights and the rights of the complainant/allottee. The respondent has acted in a pre-determined and preordained manner. The respondent has acted in a highly discriminatory and arbitrary manner. The unit in question was booked by the complainant on 25.01.2012 and the apartment buyer's agreement was executed between the respondent and the complainant on 18.11.2013. The date of approval of building plan is 05.09.2013. It will lead to a logical conclusion that the respondent would have certainly started the construction of the project. On a bare reading of the

clause 13.3 of the agreement reproduced above, it becomes clear that the possession in the present case is linked to the "fulfilment of the preconditions" which is 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 flat in question and the promoters are 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 apartment. 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 allottees 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.

49. **Admissibility of grace period:** The respondent promoter had proposed to hand over the possession of the apartment within 42 months from the date of sanction of building plan and/or fulfilment of the preconditions imposed thereunder which comes out to be 05.09.2013. The respondent promoter has sought further extension for a period of 180 days after the expiry of 42 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 05.09.2017 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 contentions raised by the respondents 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 promoters 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 cannot be allowed to take advantage of its 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 themselves 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 promoters has not assigned such

compelling reasons as to why and how they 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 promoters at this stage.

50. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the rate of 18% p.a. however, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed 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.*

51. 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

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cases. The Haryana Real Estate Appellate Tribunal in **Emaar MGF Land Ltd. vs. Simmi Sikka** observed as under: -

> *"64. Taking the case from another angle, the allottee was only entitled to the delayed possession charges/interest only at the rate of Rs.15/- per sq. ft. per month as per clause 18 of the Buyer's Agreement for the period of such delay; whereas, the promoter was entitled to interest @ 24% per annum compounded at the time of every succeeding instalment for the delayed payments. The functions of the Authority/Tribunal are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the homer buyers. This Tribunal is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the Buyer's Agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the Buyer's Agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the Buyer's Agreement dated 09.05.2014 are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the Buyer's Agreement will not be final and binding."*

52. 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 11.03.2022 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30% per annum.

53. 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;"*

54. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainant in case of delay possession charges.

55. On consideration of the circumstances, the evidence and other record and submissions made by the parties, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of apartment buyer's agreement executed between the parties on 18.11.2013, the possession of the booked unit was to be delivered within 42 months from the date of approval of building plan (05.09.2013) which comes out to be 05.09.2017. The grace period of 180 days is not allowed in the present complaint for the reasons mentioned above. Accordingly, non-compliance of

the mandate contained in section 11(4) (a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the complainant is entitled to delayed possession charges at the prescribed rate of interest i.e., 9.30% p.a. for every month of delay on the amount paid by her to the respondent from due date of possession i.e.,05.09.2017 till offer of possession of the subject flat after obtaining occupation certificate from the competent authority plus two months or handing over of possession whichever is earlier as per the provisions of section 18(1) of the Act read with rule 15 of the rules.

H. Directions of the authority: -

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

i. The respondent is directed to pay the interest at the prescribed rate i.e., 9.30 % per annum for every month of delay on the amount paid by the complainant from due date of possession i.e., 05.09.2017 till the offer of possession of the subject flat after obtaining occupation certificate from the competent authority plus two months or handing over of possession whichever is earlier.

ii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order and thereafter monthly payment of interest to be paid till date of handing over of possession shall be paid on or before the 10th of each succeeding month.

iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

iv. The respondent shall not charge anything from the complainant which is not part of the apartment buyer's agreement.

57. Complaint stands disposed of.

58. File be consigned to the registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 11.03.2022