

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no. 2448 of 2018
Date of First Hearing: 04.04.2019
Date of Decision 04.04.2019

1.Mr. Nitin Kumar Gupta
R/o 302 A , Rasvilas, District Centre,
Saket, New Delhi

Complainants

2.Mr. Harinder Singh Sandhu
R/o I-1A, City Centre, Sector 25A, Noida

Versus

M/s Ireo Grace Realtech Pvt Ltd
Registered office:304, Kanchan House,
Karampura, Commercial Complex, New
Delhi-110015

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Subhash Chander Kush

**Chairman
Member**

APPEARANCE:

Shri Chetan Dhingra proxy Advocate for complainant
counsel for Shri Pawan
Kumar Ray
Shri M.K. Dang with Shri Advocate for the respondent
Garvit Gupta

ORDER

1. A complaint dated 16.01.2019 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and

Development) Rules, 2017 by the complainants Mr. Nitin Kumar Gupta and Mr. Harinder Singh Sandhu against the promoter M/s Ireo Grace Realtech Pvt. Ltd. with respect to the apartment described below, on account of violation of obligations of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since, the apartment buyer agreement has been executed on 27.08.2014 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot initiated retrospectively, hence, the authority has decided to treat the present complaint as an application for noncompliance of contractual obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.

3. The particulars of the complaint are as under: -

1.	Name and location of the project	The Corridors, sector 67-A, Gurugram, Haryana
2.	Nature of real estate project	Residential group housing colony
3.	Area of the project	37.5125 acres
4.	Unit no.	CD-B5-07-703(tower B5) 17 th floor
5.	Area of unit	1321.15 sq. ft

6.	Registered/not registered	Registered (Phase1, Phase2 and Phase 3)
7.	RERA registration no	378 of 2017 (Phase 1) 377 of 2017 (Phase 2) 379 of 2017 (Phase 3)
8.	Completion date as per RERA registration certificate	30.06.2020 phase 1 30.06.2020 phase 2 31.12.2023 phase 3
9.	Date of allotment letter	07.08.2013
10.	Date of agreement	27.08.2014
11.	Total consideration	Rs. 1,30,35,970.80/- (annexure C4)
12.	Total amount paid by the complainant	Rs. 1,27,12,349/- (annexure C4)
13.	Due date of possession Clause 13.3- 42 months plus 180 days grace period from date of approval of buildings plans and fulfilment of preconditions Date of approval of firefighting scheme i.e. 27.11.2014	27.11.2018
14.	Payment plan	Instalment payment plan(pg 59 of complaint)
15.	Delay in handing over the possession	4 months 8 days
16.	Approval of firefighting scheme	27.11.2014
17.	Penalty Clause (As per clause 13.4 of Apartment Buyer Agreement)	Rs 7.50 per sq. ft of Super Area for every month of delay

4. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and appearance. The respondent appeared on 04.04.2019. The case came up for

hearing on 04.04.2018. The reply has been filed by the respondent and the same have been perused. The respondent has supplied the details and status of the project along with the reply.

Facts of the case

5. The complainants submitted that relying on the assurances made by the respondent company they applied for booking in the project of the respondent vide their application dated 22.03.2013 for an apartment bearing no. 703,7th floor, tower B5, 1321.15 sq. ft.
6. The complainants submitted that the respondent on 07.08.2013 served an allotment letter on them, allotting them a residential apartment no. CD-B5-07-703.
7. The complainants submitted that apartment buyer's agreement was executed between the parties on 27.08.2014 under which the complainants were constrained to accept various arbitrary and unilateral clauses made in favour of the respondent as they had paid a considerable amount towards the booking of apartment. That by the agreement ,unit no. CD-B5-07-703 was allotted to the complainants at a basic sales

price of Rs. 1,21,54,580/- (Rs. 9,200 x 1321.15 sq. ft.). It is noted that the total consideration of the apartment after the inclusion of development charges, PLC and club membership charges and various other charges, had reached to a total of Rs. 1,30,35,970.80/-. That the complainants have paid more than 97% of the total consideration of the apartment but no signs of completion of the project nor the delivery of the possession of the apartment has been shown by the respondent leading to a loss of confidence of the complainants on the project. The complainant till date have paid Rs.1,27,12,349.56/-. That the complainants have been constrained to file the present complaint to get a refund of their hard-earned money as the respondent has miserably failed to complete the construction at the site and is in no position to deliver the possession of the apartment anytime in the near future.

8. The complainants submitted that the building plan of the respondent had been approved by the competent authority on 23.07.2013. That the building plans of the group housing colony (the respondent) measuring 37.5125 acres had been approved by the Directorate of Town & Country planning,

Haryana on 23.07.2013 after which the respondent was to commence construction and as per the agreements was to deliver the possession of the units to the allottees within 42 months of 23.07.2013, that is by 23.01.2017.

9. The complainants submitted that the possession was to be handed over to the complainants by 23.01.2017 but far from handing over the possession, the respondent has miserably failed to complete the construction of the project and is in no position to deliver the possession anytime soon in the near future. Thus, the complainants now seek the intervention of the Hon'ble authority to grant refund of the amount of Rs.1,27,12,349.56/- deposited by them with the respondent along with prescribed rate of interest.

10. The complainants submitted that a perusal of various clauses of the agreement executed between the parties represents that the present agreement is unilateral and arbitrary where the respondent has an upper-hand in the entire transaction. That as per the agreement the respondent had the authority to impose an exorbitant rate of interest on the complainants to the tune of 20% on delayed payments whereas, the

respondent was only liable to pay a meagre amount in case of delayed possession to the tune of Rs. 7.50 per sq. ft. of the super built up area of the flat. That the said clauses are unilateral as the respondent has only tried to save itself from compensating the complainants in case of a delay in completion of the project and in giving the possession of the apartment to the complainants.

11. The complainants submitted that the respondent has also wielded power to the extent of being the sole authority for making any changes to the allotment of the complainant. That as per the agreement the number of flats, area, location and other crucial details are to be managed by the respondent solely without obtaining consent of the complainants. This does not leave any scope of negotiation or consent from the complainants and they either have to make the payment or get a refund without any interest which is liable to put them in a difficult situation, as they are forced to accept the changes or get their allotment cancelled.
12. The complainants submitted that they have been diligently paying the instalments as per the demand of the respondent

believing that the money was being used to construct the apartment. Much to the shock and disappointment of the complainants their money was only being retained by the respondent as they have till date failed to construct the apartment and provide any details on the date of possession.

That the respondent is liable to refund an amount of Rs.1,27,12,349.56/- to the complainants along with the prescribed rate of interest.

13. The complainants submitted that the respondent has failed to convey any reason for delay thereby giving strong reasons to the complainants to believe that the respondent has been duping them and retaining their money thus in above circumstances, it is absolutely just and necessary that this hon'ble authority be pleased to declare that the respondent was bound to deliver the possession of the apartment by January, 2017. It is submitted that the complainants cannot be expected to endlessly wait for the possession. This principle has been settled by the hon'ble apex court in the case of the *Fortune Infrastructure and Ors V/s Trevor D'lima and Ors.*

14. The complainants submitted that it is absolutely just and necessary that this hon'ble authority be pleased to direct the respondent to refund the amount of Rs.1,27,12,349.56/- To the complainants along with prescribed rate of interest.

Issues raised by the complainant

15. The issues raised by the complainants are as follows: -

- i. Whether there has been failure on the part of the respondent in delivering the apartment to the complainants within the stipulated time period?
- ii. Whether the complainants are entitled to refund their money along with compensation?

Relief sought

16. The relief sought by the complainant is as follows: -

- i. Direct the respondent to refund the amount paid by the complainants till date i.e. Rs. 1,27,12,349.56/- along with prescribed rate of interest from the date of payment till actual realisation of the amount.

Reply by the respondent

17. The respondent submitted 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 complainants 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 enforced retrospectively. That there is no cause of action to file the present complaint.
18. The respondent submitted that the complainants have no locus standi to file the present complaint.
19. The respondent submitted that according to the booking application form and the apartment buyer's agreement, the time period for offering the possession of the unit to the complainants has not yet elapsed and the complaint has been filed pre-maturely by them.
20. The respondent submitted 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.

21. The respondent submitted that this hon'ble authority does not have the jurisdiction to decide on the imaginary interest as claimed by the complainants. It is submitted that in accordance with section 71 of the Real Estate (Regulation and Development) Act, 2016 read with rules 21(4) and 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017, the authority shall appoint an adjudicating officer for holding an inquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard. It is submitted that even otherwise it is the adjudicating officer as defined in Section 2(a) of the said Act who has the power and the authority to decide the claims of the complainants.
22. 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 i.e. clause 35 of the buyer's agreement.
23. The respondent submitted that the complainants have not approached this hon'ble authority with clean hands and have intentionally suppressed and concealed the material facts in

the present complaint. The present complaint has been filed by them 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:

A. That the respondent is a reputed real estate company having immense goodwill, comprised of law abiding and peace loving persons and has always believed in satisfaction of its customers. The respondent has developed and delivered several prestigious projects such as 'Grand Arch', 'Victory Valley', 'Skyon' and 'Uptown' and in most of these projects large number of families have already shifted after having taken possession and resident welfare associations have been formed which are taking care of the day to day needs of the allottees of the respective projects.

B. That the complainants, after checking the veracity of the project namely, 'Corridor; Sector 67A, Gurugram had applied for allotment of an apartment vide their booking application form. A copy of the booking application form is annexed herewith as annexure R-1. The complainants

agreed to be bound by the terms and conditions of the booking application form agreed upon by them.

- C. That based on the said application, the respondent vide its allotment offer letter dated 07.08.2013 allotted to the complainants apartment no. CD-B5-07-703 having tentative super area of 1321.15 sq. ft. for a total sale consideration of Rs. 1,30,45,970.79. Vide letter dated 21.03.2014, the respondent sent 3 copies of the apartment buyer's agreement to the complainants. It is submitted that the complainants signed and executed the apartment buyer's agreement only on 22.04.2014 after reminders dated 28.05.2014 and 17.07.2014 were issued by the respondent. It is pertinent to mention herein that when the complainants 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 enforced retrospectively.

- D. That the respondent kept on raising payment demands from the complainants in accordance with the mutually

agreed terms and conditions of the allotment as well as of the payment plan and the complainants made the payment of the part-amount of the total sale consideration. It is pertinent to mention herein that the complainants had committed defaults in making timely payment of the second and sixth instalment amount and the respondent had to issue reminders dated 14.05.2013 and 06.07.2016 respectively to the complainants towards the same. Furthermore, the cheque issued by the complainants for the payment of the fourth instalment demand for Rs. 14,92,214/- was returned back on account of difference in the drawer's signature and the same was intimated to the complainants vide letter dated 20.07.2015. The complainants till date have made the payment of the part-amount of Rs. 1,27,12,349.56 out of the total sale consideration of Rs. 1,92,16,377.44. The complainants are 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.

- E. That the possession of the unit is supposed to be offered to the complainants 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 43 of the schedule – I of the booking application form states that '*...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 be additionally be entitled to a period of 180 days (grace period)...*'. It is pertinent to mention here that the complainants vide clause 13.5 of the apartment buyer's agreement and clause 44 of the schedule – i of the booking application form had further agreed to the 'extended delay period' of 12 months from the end of grace period.

F. That 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 (iv) of clause 17 of the memo of approval of building plan dated 23.07.2013 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. It is submitted that the environment clearance for construction of the said project was granted on 12.12.2013. Furthermore, in clause 39 of part-a of the environment clearance dated 12.12.2013 it was stated that fire safety plan duly was to be duly approved by the fire department before the start of any construction work at site. It is submitted that the fire scheme approval was granted on 27.11.2014 and the time period for calculating the date for offering the possession, according to the agreed terms of the buyer's agreement, would have

commenced only on 27.11.2014. Therefore, 60 months from 27.11.2014 (including the 180 days grace period and extended delay period) shall expire only on 27.11.2019. There cannot be any delay till 27.11.2019. The time period for offering the possession of the unit has not yet elapsed and the complainants have pre-maturely filed the present baseless and false complaint. The complainants are trying to re-write the agreed terms and conditions of the agreement. It is submitted that even as per the terms and conditions of the agreement, no defaults or illegalities have been committed by respondent with respect to offering the possession of the unit to the complainants and the complainants have made false averments in order to unnecessarily harass and pressurize the respondent to submit to their unreasonable demands.

- G. The respondent submitted that the respondent company has already completed the construction of the tower in which the unit allotted to the complainants is located and the photographs of the same are attached with the file.

H. That it is submitted that the complainants are real estate investors who had booked the unit in question with a view to earn quick profit in a short period. However, it appears that their calculations have gone wrong on account of severe slump in the real estate market and the complainants now want to somehow get out of the concluded contract made by them on highly flimsy and baseless grounds. Such malafide tactics of the complainants cannot be allowed to succeed.

Determination of issues:

24. With respect to the **first issue** raised by the complainant, as per clause 13.3 of buyer's agreement, the possession of the unit was to be handed over within 42 months plus 180 days grace period from the from date of approval of buildings plans and fulfilment of preconditions thereunder. The date of approval of firefighting scheme was 27.11.2014 . Therefore, the due date of possession comes out to be 27.11.2018. Thus, the promotor is failed to fulfil its obligation as per section 11(4)(a) of the Act *ibid*.

25. With respect to **second issue** raised by the complainants, it is pertinent to note that the project is registered and also from the perusal of the record it is seen that the project is almost near completion hence in the interest of justice, it is not advisable at this stage to allow the complainants to withdraw from the project and thus, they are not entitled to refund . However, the complainants are entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum from due date of possession till offer of possession.

Findings of the Authority

26. Jurisdiction of the authority-

Subject matter jurisdiction

The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as held in ***Simmi Sikka v/s M/s EMAAR MGF Land Ltd.*** leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town & 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.

27. The authority is of the considered opinion that it has been held in a 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.
28. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015***, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a

consumer. This view has been upheld by the Supreme Court in **civil appeal no.23512-23513 of 2017** 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

29. Keeping in view the facts and circumstances of the complaint and submissions made by the parties during arguments, the authority has observed that as per clause 13.3 of the agreement dated 27.8.2014 for unit no.CD-B5-07-703, tower B5, in the said project possession was to be handed over to the complainants within a period of 42 months from the date of approval of building plans or from the date of approval of fire clearance i.e. 27.11.2014 + 180 days grace period which comes out to be 27.11.2018. However, the respondent has not delivered the unit in time

Decision and Direction of Authority

30. After taking into consideration all the material facts produced by the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and

Development) Act, 2016 hereby issues the following directions in the interest of justice: -

- i. The respondent is directed to pay delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f. 27.11.2018 as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 till offer of possession.
- ii. Complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period. The promoter shall not charge anything from the complainant which is not part of the BBA.
- iii. The interest on the due payments from the complainants shall be charged at the prescribed rate of interest i.e. 10.75% by the respondent which is the same as is being granted to the complainants in case of delayed possession.
- iv. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till offer of

possession shall be paid on or before 10th of every subsequent month.

31. The order is pronounced.

32. File be consigned to the registry.

(Dr. K.K. Khandelwal)
Chairman

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated : 04.04.2019

Judgement uploaded on 26.04.2019

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