

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

Complaint No. : 1094 of 2019

First date of Hearing : 24.07.2019

Date of Decision : 24.07.2019

Mr. Bharat Bhushan Kumar
R/o- Farm no. 1, Grand Westend Green,
Rajokari, New Delhi-110038

Versus

Complainant

M/s Ireo Victory Valley Pvt. Ltd. (Through
its directors/ Authorized signatory)

Office address: Ireo Campus, Archview
Drive, Ireo City, Golf City, Golf Couse
Extension Road, Gurugram 122101

M/s K.S.S Properties Pvt. Ltd. Through its
Director(s)

Office address: 305, 3rd Floor, Kanchan
House, Karampura, Commercial Complex,
New Delhi-110015

M/s High Responsible Realtors Pvt. Ltd.

Through its Director(s)

Office address: A-11, 1st Floor, Neeti Bagh,
New Delhi-110049

Respondents

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

**Member
Member**

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LEGAL ASSISTANT

APPEARANCE:

Shri Dhruv Dutt Sharma

Advocate for the complainant

Shri Garvit Gupta

Advocate for the respondents

ORDER

1. A complaint dated 26.03.2019 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 complainant Mr. Bharat Bhushan Kumar against the promoter M/s Ireo Victory Valley Pvt. Ltd. and others, on account of violation of clause 13.3 of apartment buyer's agreement executed on 31.12.2010 in respect of unit no. A4002, tower A, 39th floor admeasuring 4322 sq. ft. in the project 'Ireo Victory Valley' located at Sector 67, Gurugram for not handing over possession of the subject unit by the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.
2. Since the buyer's agreement dated 31.12.2010 was executed prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, so the penal proceedings cannot be initiated retrospectively. Therefore, the authority has decided to treat this complaint as an application for noncompliance of

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statutory obligation on the part of the respondent in terms of the provision of section 34(f) of the Act *ibid*.

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

1.	Name and location of the project	'Ireo Victory Valley' located at Sector 67, Gurugram
2.	Nature of real estate project	Group housing colony
4.	DTCP license no.	244 of 2007
5.	Registered/unregistered	Not Registered
6.	Date of booking	16.07.2010
7.	Allotment offer letter	09.08.2010
8.	Date of execution of apartment buyer's agreement	31.12.2010
9.	Unit no.	A4002, tower A, 39 th floor
10.	Unit measuring	4322 sq. ft.
11.	Payment plan	construction linked plan
12.	Occupation certificate	28.09.2017
13.	Environment clearance	25.11.2010
14.	Building plan approval	29.11.2010
15.	Total consideration amount	Rs. 3,71,40,407/-
16.	Total amount paid by the complainant	Rs. 3,68,13,940/-
17.	Due date of delivery of possession (As per clause 13.3) - 36 months + 180 days grace period from the date of approval	28.04.2017

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	of the building plan or fulfilment of the precondition imposed thereunder	Fire fighting scheme approval dated 28.10.2013
18.	Delay in handing over possession till date of decision	2 years 2 months and 26 days
19.	Penalty clause	As per clause 13.4 of apartment buyer's agreement compensation @ Rs.7.50/- per sq. ft of super area of the said unit per month for the period of such delay

4. The details provided above have been checked on the basis of the record available in the case file which have been provided by the complainant and the respondents. An apartment buyer's agreement is available on record for unit no. A4002, tower A, 39th floor admeasuring area of 4322 sq. ft. according to which the possession of the aforesaid unit was to be delivered by **28.04.2017**. However, the respondents have failed to fulfil his contractual liabilities as on date.

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5. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and for appearance. The case came up for hearing on 24.07.2019. The reply has been filed on behalf of the respondents which has been perused.

Facts of the case

6. The complainant submitted that in the year 2010, the respondents launched a new upcoming group housing colony by the name of **"Ireo Victory Valley"** (hereinafter referred to as the "project") to be developed at the Golf Course Extension Road, Sector-67, District Gurugram. The respondents had advertised the project through flyers, catalogues, magazines, brokers, newspapers etc. for persuading the public to invest in the project.
7. The complainant submitted that the respondents represented that the respondent no. 2 and 3 are the absolute owners in possession of freehold land admeasuring approximately 24.6125 acres in the revenue estate of Village Maidawas, Badshahpur, Tehsil and District Gurugram and are well and sufficiently entitled to develop, sell and deal with the residential apartments. Further, the respondent no. 2 and 3 have separately vested the respondent no. 1 with the complete authority and appropriate powers inter alia

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to undertake on its behalf marketing, sale and administration of all the constructed units comprising project and also to act on its behalf and in its name if and whenever required.

8. The respondents induced the complainant with tall claims and believing their representations to be true and correct, the complainant vide application dated 21.07.2010 applied for allotment of apartment no. A-4002 on 39th floor, A tower having a super area of 4322 sq. ft. together with 3 nos. parking spaces, which shall form an indivisible part thereof (hereinafter collectively referred to as the "apartment") and accordingly paid Rs. 25,50,000/- towards the booking amount. The total cost of the apartment was Rs. 3,71,40,407/- including external development charges (EDC), infrastructure development charges (IDC), RFMS and parking. Within 45 days of booking, another demand of Rs. 26,81,284/- was made by the respondents which was duly paid by the complainant and an allotment offer letter dated 09.08.2010 was issued by the respondent no. 1 towards the said apartment in the above said project in favor of the complainant.
9. The complainant submitted that the respondents in order to dupe the complainant in their nefarious net executed apartment buyer's



agreement (hereinafter referred to as the "agreement") dated 31.12.2010 with the complainant, just to create a false belief that the project shall be completed in time bound manner and in the garb of this agreement persistently raised demands due to which they were able to extract huge amount of money from the complainant.

10. Subsequently the respondent no. 1 raised various demands from the complainant from time to time which were regularly paid by the complainant and have also been acknowledged by various receipts issued by the respondent no. 1. As such till date, the complainant had paid a sum of Rs. 3,68,13,940/- out of the aforesaid total cost of Rs. 3,71,40,407/-. It is pertinent to mention here that despite paying such huge amount, the complainant was never apprised about the actual development status by the respondents despite repeated requests. As per clause 13.3 of the agreement, the possession of the apartment was to be offered within a period of 36 months from the date of approval of the building plans and/or fulfillment of the preconditions imposed thereunder (hereinafter referred to as the "commitment period") with a grace period of 180 days after the expiry of the said

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commitment period. Even after depositing a substantial amount of money, the complainant till date has not been offered possession of the said apartment.

11. The complainant submitted that as per clause 13.4 of the agreement, if the respondent fails to offer possession of the said apartment to the complainant by the end of the grace period, it shall be liable to pay compensation for every month of delay until the actual date fixed by the respondent for handing over of possession of the apartment to the complainant.
12. The conduct of the respondents has resulted in wrongful loss to the complainant and wrongful gain to the respondents herein, for which the respondents are even liable to be prosecuted under Indian Penal Code. The acts of the respondents are causing great hardship and mental agony to the complainant and the complainant has no other option but to approach this hon'ble authority through a complaint for the recovery of the interest on account of delay in handing over the possession. The present complaint has been filed by the complainant without prejudice to claim further damages suffered by the complainant on account of inordinate delay committed by the respondents in handing over

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the possession of the allotted apartment to the complainant, by filing their claim before the “adjudicating officer” to be appointed under the RERA Act 2016.

13. Issues to be decided

The relevant issue as per the complaint is as follow: -

1. Whether there is delay on the part of the respondents in handing over the possession of the apartment to the complainant? If yes, how much delay?
2. Whether the respondents have intentionally and willfully failed to deliver the possession of the allotted apartment within the stipulated time as mentioned in the agreement?
3. Whether the complainant is entitled to interest for every month of delay on account of delay in handing over the possession of the apartment to the complainant?
4. Whether the respondents are liable to pay the interest on the total amount received by it from the complainant from the due date of possession till handing over the possession of the apartment?

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Relief sought

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

1. A direction be given to the respondents to handover the possession of the apartment along with interest on the total payment made by the complainant from the due date of possession till handing over the possession of the apartment to the complainant.
2. A direction be given to the respondents to pay interest for every month of delay till the handing over of the possession to the complainant.
3. The cost of the proceedings to the tune of Rs. 75,000/- may also be awarded.

Respondents Reply

15. The respondents 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 complainant and the respondents 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

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retrospectively. The respondents have filed the present reply within the period of limitation as per the provisions of Real Estate (Regulation and Development) Act, 2016.

16. The respondents submitted that this hon'ble authority does not have the jurisdiction to try and decide the present false and frivolous complaint. It is pertinent to mention that the project in question is exempted from registration under the Real Estate Regulation and Development Act, 2016 and Haryana Real Estate (Regulation and Development) Rules, 2017. The tower of the project where the unit of the complainant is situated does not come under the scope and ambit of 'on-going project' as defined in section 2(o) of the Haryana Real Estate (Regulation and Development) Rules, 2017 which is read as under:

2 (o) "on going project" means a project for which a license was issued for the development under the Haryana Development and Regulation of Urban Area Act, 1975 on or before the 1st May, 2017 and where development works were yet to be completed on the said date, but does not include:

Any project for which after completion of development works, an application under Rule 16 of the Haryana Development and



Regulation of Urban Area Rules, 1976 or under sub code 4.10 of the Haryana Building Code 2017, as the case may be, is made to the Competent Authority on or before publication of these rules; and That part of any project for which part completion / completion, occupation certificate or part thereof has been granted on or before publication of these rules.”

17. It is submitted that the application for grant of occupation certificate for the block where the unit of the complainant is situated in the Project was made before the publication of Haryana Real Estate (Regulation and Development) Rules, 2017 vide its application dated 09.02.2017 in accordance with sub code 4.10 of the Haryana Building Code, 2017. Thus, according to the provisions of the said Act and Rules, the tower where the unit of the complainant is located is not required to be registered under the said Act and Rules. The said application dated 09.02.2017 for grant of occupation certificate is attached herewith an **Annexure R1**. The project is not covered within the ambit of the provisions of Real Estate Regulation and Development Act, 2016. It has been held by various authorities that if the building where the unit is located is not part of the project that is registered, the matter shall

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be dismissed for want of jurisdiction. Since the tower where the unit of the complainant is located is not registered with the HARERA, therefore this hon'ble authority does not have any jurisdiction to decide any dispute related to it.

18. 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, which is reproduced for the ready reference of this hon'ble authority-

"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

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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".

19. The respondents submitted that respondent no.1 vide its allotment offer letter dated 09.08.2010 allotted to the complainant apartment no. A4002, tower no. A, having tentative super area of 4322 sq. ft for a total sale consideration of Rs. 3,71,40,406.64. However, it is submitted that the total sale consideration amount was exclusive of the registration charges, stamp duty charges, service tax and other charges which are to be paid by the complainant at the applicable stage. Accordingly, an apartment buyer's agreement was executed between the parties to the complaint on 31.12.2010. It is pertinent to mention herein that

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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.

20. That respondent no.1 in accordance with the agreed terms of the allotment raised the installment demand dated 09.08.2010 for the net payable amount of Rs. 26,81,284/-. The complainant was aware that timely payment is the essence of the allotment. However, the complainant defaulted in making payments towards the due amount and the due amount was credited towards the total sale consideration amount only after reminders dated 30.09.2010 and 12.11.2010 was issued by respondent no.1 to the complainant. Furthermore, on account of non-receipt of the installment amount on time despite reminders, respondent no.1 had as per the terms of the allotment also issued a cancellation advice dated 30.11.2010 to the complainant. However, on account of the installment amount being credited by the complainant towards the total sale consideration and on the request of the complainant, the allotment of the unit was restored by respondent no.1.

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21. The respondents submitted that the possession of the unit is 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 35 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 36 months from the date of approval of the Building Plans and/or fulfillment 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)...'*. Furthermore, the complainant has further agreed for an extended delay period of 12 months from the date of expiry of the grace period as per clause 13.5 of the apartment buyer's agreement.

22. 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

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that it has been specified in sub- clause (v) of clause 17 of the approval of building plan dated 29.11.2010 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 25.11.2010. Furthermore, in clause (v) of part-B of the environment clearance dated 25.11.2010 it was stated that approval from fire department was necessary prior to the construction of the project.

23. It is submitted that the last of the statutory approvals which forms a part of the pre-conditions was the fire scheme approval which was obtained on 28.10.2013 and that the time period for offering the possession, according to the agreed terms of the buyer's agreement, expired only on 28.04.2018. The respondents have already completed the construction of the tower in which the unit allotted to the complainant is located and the photographs of the same are attached herewith as **annexure R-13 (Colly)**. It is pertinent to mention herein that the respondents have already received the occupation certificate

dated 28.09.2017. There is a slight delay in offering the possession of the unit to the complainant on account of the completion of the finishing work going on in the unit allotted to the complainant and the complainant is aware about the same. The respondents shall offer the possession of the unit to the complainant shortly and the complainant would be liable to pay the remaining due amount. The complainant is not entitled to any relief in the facts and circumstances of the case. Absolutely without prejudice to the rights of the respondent, it is alternatively submitted that the complainant would be entitled to delayed compensation as per the terms of the allotment.

24. It is submitted 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 is now raising several untenable pleas on highly flimsy and baseless grounds. Such malafide tactics of the complainant cannot be allowed to succeed.

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Determination of issues

After considering the facts and submissions made by both the parties and perusal of records the issue wise determination given by the authority are as follows-

25. With respect to **all issues** raised by the complainant, authority came across clause 13.3 of the apartment buyer's agreement, the possession should have been handed over within a period of 36 months + 180 days grace period from the date of approval of the building plan or fulfilment of the precondition imposed thereunder. Therefore, the due date of handing over the possession shall be computed from fire scheme approvals i.e. 28.10.2013. Accordingly, the due date of possession was 28.04.2017 and hence, the period of delay in delivery of possession is computed as 2 years 2 months and 26 days till the date of decision.
26. As the promoter has failed to fulfil his obligation under section 11(4)(a), the promoter is liable under section 18(1) proviso to pay interest to the complainants, at the prescribed rate, for every month of delay till the handing over of possession. Therefore, as per proviso to section 18(1) read with rule 15 of the Rules ibid, the

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complainants are entitled to prescribed rate of interest i.e. State Bank of India highest marginal cost of lending rate plus two percent, per annum. The authority issues directions to the respondent u/s 37 of the Real Estate (Regulation and Development) Act, 2016 to pay interest at the prescribed rate of 10.60% per annum on the amount deposited by the complainant with the promoter from the due date of possession i.e. **28.04.2017** till the date of offer of possession.

Findings of the authority:-

27. The authority has complete jurisdiction to decide the complaint in regard to 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 complainant at a later stage.
28. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District. In the present case, the project in question is situated within the planning area of Gurugram District, therefore

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this authority has complete territorial jurisdiction to deal with the present complaint.

29. Since the project is not registered, notice under section 59 of the Real Estate (Regulation and Development) Act, 2016, for violation of section 3(1) of the Act be issued to the respondent. Registration branch is directed to do the needful.
30. During the course of arguments counsel for the respondent has himself admitted that no possession letter has been offered by the respondent to the complainant in spite of the fact that occupation certificate has been issued by the competent authority on 28.9.2017. Counsel for respondent has stated at Bar that possession could not be offered to the complainant till date as finishing work in flat No. A4002, in tower-A allotted to the complainant is still going on and is likely to be completely within next three months. On the basis of submission made by the counsel of the respondent, it is quite clear that the occupation certificate dated 28.09.2017 has been issued by the competent authority without verifying the ground realities of the project whether the building in which flat of the complainant is located has been completed in all respects in accordance with the

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provisions/sanction of building plans as per Haryana Building Code 2017. As such, DTCP, Haryana is directed to clarify and explain the circumstances under which occupation certificate dated 28.09.2017 has been issued by their office without verifying the grounds realities as finishing work is still going on in the flat/unit no. A4002 and the offer of possession has not been issued by the respondent so far whereas as per provisions of section 14, offer of possession is to be given by the respondent to the allottee within a period of two months from the date of receipt of occupation certificate.

31. It is really strange that how occupation certificate has been obtained (in a misrepresented form) in view of the facts stated above as neither the possession has been offered nor the work at site in the flat is completed. It is really a quandary. The respondent is liable for penal action for obtaining the occupation certificate in a fraudulent manner, as such, the occupation certificate w.r.t flat of the complainant is not applicable at the moment. Accordingly, the promoter/respondent is directed to issue the offer of possession letter at the earliest by completing all the work within 20 days failing which penal action under section 63 of the Real

Estate (Regulation and Development) Act 2016 shall be initiated against the respondent/promoter. It is further observed that the flat/unit has been sold for a total consideration of Rs. 3,71,40,407/- against which an innocent complainant/buyer has already paid Rs. 3,68,13,940/- which is a huge amount. The promoter is obligated to fulfill his commitments as per terms and conditions of BBA dated 31.12.2010 executed inter-se the parties. As per clause 13.3 of the BBA, the possession of the booked unit was to be handed over the complainant within a period of 36 months from the date of approval of building plans and /or approval of preconditions+180 days grace period which comes out to be 28.04.2017. (Fire fighting approval date is 28.10.2013) complainant is also entitled for delayed possession charges @ 10.60% per annum w.e.f 28.04.2017 on account of delay in offering possession till the offer of possession. It is directed that the same may be adjusted at the time of final settlement.

Decision and directions of the authority:-

32. After taking into consideration all the material facts as adduced and produced by both 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 to the respondent in the interest of justice and fair play:

- i. The respondent shall be liable to pay interest for every month of delay at prescribed rate i.e. 10.60% p.a. from due date of possession i.e. **28.04.2017** till the handing over of the possession to the allottee.
- ii. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order. Subsequent interest to be paid by 10th of every succeeding month.
- iii. Complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iv. The promoter shall not charge anything from the complainant which is not part of the BBA.
- v. Interest on the due payments from the complainant shall be charged at the prescribed rate of interest i.e. 10.60% by the promoter which is the same as is being granted to the complainant in case of delayed possession.

33. Since the project is not registered, notice under section 59 of the Real Estate (Regulation and Development) Act, 2016, for violation

of section 3(1) of the Act be issued to the respondent. Registration branch is directed to do the needful.

34. The complaint is disposed of accordingly.

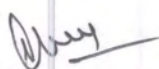
35. The order is pronounced.

36. Copy of this order be consigned to registry.


(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram


(Subhash Chander Kush)

Member

Dated:24.07.2019



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