PROCEEDINGS OF THE DAY	
Day and Date	Friday and 16.11.2018
Complaint No.	247/2018 case titled as Mr. Prabhakaran Thazhathe Kalathil Vs. M/s Ireo Victory Valley Pvt. Ltd.
Complainant	Mr. Prabhakaran Thazhathe Kalathil
Represented through	Shri Deepak Prabhakaran Thazhathe Kalathil-son of the complainant in person.
Respondent	M/s Ireo Victory Valley Pvt. Ltd.
Respondent Represented through	Shri Dinesh Kumar Yadav, Advocate proxy counsel for Shri M.K.Dang, Advocate for the respondent.
Last date of hearing	15.11.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Arguments heard.

Counsel for the complainant-Prabhakaran Thazhathe Kalathil happens to be son of complainant. They are residents of Maharashtra. As per the paper-book submitted by the complainant, a flat/unit No.VV-B-17-03,Tower-B was purchased in project "Ireo Victory Valley" on 3.3.2015 and a consideration amount of Rs.58,47,503/- was deposited with the respondent. However, the respondent/builder unilaterally cancelled the above said unit vide letter dated 19.3.2012 without any rhyme and reasons. Re-negotiations were held in the matter between the respondent/builder and buyer for the restoration of above unit. However instead of restoring, the respondent/builder offered them another unit No.VV-B-02-04 in the same

project/Tower for a consideration amount of Rs.2,08,96,499.50. A fresh BBA was signed inter se by both the parties for which an amount of Rs.39,90,302/- was demanded and the same was paid to the builder on 10.2.2015 as per demand made by the respondent. Till date a total consideration of Rs.2,08,96,499.50 has been deposited by the complainant with the builder. It has been alleged by the counsel for the complainant that the builder intends to illegally retain his earlier payment of Rs.39,90,302/- for earlier unit which is unjust on the part of respondent. He has submitted his calculation sheet which has been placed on record and a copy of the same has been handed over to the counsel for the respondent. Respondent stated at bar that the builder has received 'occupation certificate' dated **28.9.2017** of the project, a copy of which is placed on record. It has further been alleged by the complainant that he is not being allowed to visit his unit for which he has made number of requests. It is again unjust on the part of the builder. Respondent/builder is directed to allow the complainant to visit his flat on any convenient day and time for inspection alongwith the representative of respondent/company failing which penal action shall be initiated against the respondent/builder.

Respondent and complainant are directed to sort out the matter and if any ambiguity remains, liberty is granted to them to approach the authority for its final resolution.

Complaint is disposed off accordingly. Detailed order will follow. File be consigned to the registry.

Samir Kumar
(Member)

Subhash Chander Kush
(Member)

BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint No. : 247 of 2018
Date of first hearing : 06.06.2018
Date of Decision : 16.11.2018

Shri Prabhakaran Thazhathe Kalathil
R/o House no. N4/A-10, Cidco-PO
Aurangabad-431003, Maharashtra **...Complainant**

Versus

M/s Ireo Victory Valley Pvt. Ltd.
Office at: Ireo Campus, Sector-59, Gurugram-122011 **...Respondent**

CORAM:
Shri Samir Kumar **Member**
Shri Subhash Chander Kush **Member**

APPEARANCE:
Shri Prabhakaran Thazhathe Kalathil Advocate for the complainant
Shri Vinod Kumar, authorised representative of the respondent company with Shri M.K. Dang, Advocate Advocate for the respondent

ORDER

1. A complaint dated 10.05.2018 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 Shri Prabhakaran Thazhathe Kalathil, against the promoter M/s Ireo Victory Valley Pvt. Ltd. on account of violation of clause 13.3 of the apartment buyer's agreement executed on 03.03.2015 for unit no. VV-B-02-04 on second floor, tower B in the project "IREO Victory Valley" for not giving possession on the due date which is an obligation of the promoter under section 11(4)(a) of the act ibid.

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

1.	Name and location of the project	"IREO Victory Valley", Golf course extension road, Sector 67, Gurugram
2.	Nature of real estate project	Group housing colony
3.	Unit no.	VV-B-02-04
4.	Project area	25.6125 acres
5.	Registered/ not registered	**Not registered**
6.	DTCP license	244 of 2007 dated 26.10.2007, 103 of 2011 dated 07.12.2011
7.	Occupation certificate received on	28.09.2017
8.	Date of booking	13.02.2015 (as per annexure P15, pg 90 of the complaint)
9.	Date of apartment buyer's agreement	03.03.2015
10.	Total consideration	Rs. 2,02,00,755.50/- (as per annexure-IV, pg 81 of the complaint)

11.	Total amount paid by the complainant	Rs. 2,02,00,757/- (as per the complaint) Rs. 1,69,06,150/- (as per statement of account given by respondent, annexure P21, pg 101 of the complaint)
12.	Payment plan	Instalment payment plan
13.	Date of delivery of possession	Clause 13.3 – 24 months from date of execution of agreement, i.e. 03.03.2015 + 180 days grace period i.e. 03.09.2017 **Note: Notice for offer of possession made on 14.11.2017.**
14.	Delay of number of days/months/ years upto 14.11.2017	2 months 11 days
15.	Penalty clause as per apartment buyer 's agreement dated 03.03.2015	Clause13.4- Rs. 7.50/- per sq. ft. of the super area

3. 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 respondent. An apartment buyer's agreement dated 03.03.2015 is available on record for unit no. VV-B-02-04 on 2nd floor, tower no. B having super area of 3095 sq. ft. according to which the possession of the aforesaid unit was to be delivered by 03.09.2017. The

promoter has failed to deliver the possession of the said unit to the complainant. Therefore, the promoter has not fulfilled his committed liability as on date.

4. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. Accordingly, the respondent appeared on 06.06.2018. The case came up for hearing on 06.06.2018, 12.07.2018, 02.08.2018, 06.09.2018, 11.10.2018, 15.11.2018 and 16.11.2018. The reply has been filed by the respondent on 02.07.2018.

Facts of the complaint

5. On 13.02.2015, the complainant booked a unit in the project named "IREO Victory Valley" on Golf course extension road, Sector 67, Gurugram. Accordingly, the complainant was allotted a unit bearing VV-B-02-04 on 2nd floor, tower no. B having super area of 3095 sq. ft.

6. On 03.03.2015, apartment buyer's agreement was entered into between the parties wherein as per clause 13.3, the possession should have been handed over within 24 months from the date of execution of agreement + 6 months grace period, i.e. by 03.09.2017. However, on 14.11.2017, notice for

offer of possession was made. The complainant made all requisite payments as per demands raised by the respondent.

7. The complainant submitted that he had booked an apartment with the respondent in its "IREO Victory Valley" project bearing unit no. B-1703 on 07.07.2010 and an agreement was signed between the parties on 20.09.2010. However, owing to some miscommunication, the respondent cancelled the said allotment vide its advice dated 19.03.2012 even after receipt of payment from the complainant. While so terminating the agreement, the respondent continued to retain the money to the tune of Rs. 58,47,503/- paid by the complainant, without any justification, for years together.

8. The complainant submitted that after protracted discussions and follow-ups, the respondent agreed to restore the allotment or refund the money with interest. As a result, the respondent took a hand written application dated 10.02.2015 from the complainant, initially. It is submitted that the respondent also got the complainant's signature on a pre-typed format with subject of "Request for restoration", leaving various blank portions stating that they were for office use. The blank portions were not filled in at that point of time or at any time by the complainant. The complainant

realised about the wrong filling up of the said format at the hands of the respondent only when he received a copy of the same as an email attached dated 22.02.2018. it is submitted that the details so filled are incorrect in many ways, for eg. the amount shown to be returned as Rs. 24,98,791/- in the said form was never returned by the respondent to the complainant and was retained by him. The amount shown to be forfeited as Rs. 33,48,712/- was incorrect as the principal amount which was retained by the respondent was Rs. 58,47,503/-

9. The complainant submitted that thereafter, the respondent issued letter dated 13.02.2015 to the complainant stating that Rs. 39,90,302.32/- should be paid before 10.02.2015 with certain other stipulations contained therein. It is unconscionable that the respondent expected a payment to be made previous to the date of the letter, that too a figure fixed up by itself unilaterally and arbitrarily, with no value addition to the complainant. On 10.02.2015, a credit memo of Rs. 58,47,503/- was issued in favour of the complainant whereby the said money lying with the respondent pertaining to earlier unit VV-B-17-03 was transferred to the new unit VV-B-02-04. The respondent failed to add interest

on the withheld amount in the credit memo. The complainant also issued a cheque for Rs. 39,90,302/- credited in favour of the respondent.

10. The complainant further submitted that after receipt of letter dated 13.02.2015, the complainant objected to the contents therein about the inconsistencies, unreasonableness and arbitrariness of the conditions imposed upon him. The complainant argued that as the restoration of B-17-03 was not happening and the offer and allotment of B-02-04 was at lower floor, that itself was a sacrifice and the allotment be considered as a fresh booking as in the case of any other customer in the market. The respondent informed that the possession of the apartment would be delivered by end of 2016. The complainant also questioned as to why full payment was sought from him in February 2015 itself particularly when only 10% of the total cost was sought from the other customers at the time of booking. Accordingly, the respondent accepted his views and issued a fresh offer letter dated 16.02.2015 for B-02-04 along with fresh payment schedules and details, thus annulling all its previous claims and communications. An agreement was signed on 03.03.2015.

11. It is submitted that no further communication was received by the complainant after 03.03.2015 till the date of offer of possession on 14.11.2017. Despite this, the complainant made payment of Rs.50,00,000/- and Rs. 22,00,000/- on 24.04.2015 and 03.08.2015 respectively.

12. The complainant submitted that upon persistent follow ups, the respondent sent an email dated 15.11.2016, along with a statement of payment status, depicting that the called amount was Rs. 55,69,897.44/- while the amount paid by him was Rs. 1,30,47,503.39/-. The credit entries were defective as neither Rs. 39,90,302/- paid by him did not reflect in the said total amount nor the interest accrued on excess payments and his money retained for years. The statement ought to have shown that the total money paid was Rs. 1,70,37,803/- without interest from the dates of payment.

13. The complainant submitted that he received a letter for ofer of possession on 14.11.2017 stating that certain payments are due from him followed by a reminder dates 21.12.2017. the complainant got a certificate from his chartered accountant dated 22.12.2017 highlighting the total amount paid to the tune of Rs. 2,08,96,449.50/- inclusive of an amount of Rs. 6,95,694/ on account of sales tax paid later

14. It is submitted that the claim of money shown as due from the complainant is exorbitant on various counts. The respondent now demands a total of Rs. 2,52,81,388/- without interest as against the original claim of Rs. 2,08,96,499.50/- and shows total receipts of only Rs 1,69,06,150/- as against a total payment of Rs. 2,08,96,499.50/-. In this manner, the respondent is erroneously showing an outstanding of Rs.83,75,238/-.

15. It is submitted that the flat has been overpriced by adding more area to saleable area. Further, the claim for restoration charges is not maintainable in fact or law as there is no factual restoration of the previous terminated allotment of apartment no. B-17-03. The current allotment is the fresh one and not the restoration. Thus, there cannot be an unjust enrichment to the respondent for the no service rendered or no goods delivered or no bills raised to the complainant, that too the magnitude of Rs. 39, 90,302.32/-.

16. It is submitted that the respondent cannot take undue advantage of his position simply because it unauthorizedly withheld the money of the complainant (Rs. 58,47,403) for years together without interest. It is further submitted that no written information was given by the respondent about

the progress of construction and no written demand for payment was made on and after the agreement. Despite that an amount of Rs. 19,24,748/- is claimed towards interest on delayed payments. This is unconscionable and unacceptable considering the fact that by statement dated 15.11.2016, the respondent admitted that the complainant had made more payments than what was actually due at that point.

17. The complainant submitted that when he visited the site on 07.02.2018, it was found that the work is still going on at various levels including entrance, lifts, staircase, surroundings, drainage, water connections, sewerage etc.

18. As per clause 13.3 of the apartment buyer's agreement, the company proposed to hand over the possession of the said unit by 03.09.2017. The clause regarding possession of the said unit is reproduced below:

> *"13.3- ....the company proposes to offer the possession of the said apartment to the allottee within a period of 24 months from the date of execution of this agreement. The allottee further agrees and understands that the company shall additionally be entitled to a period of 180 days grace period...."*

19. **Issues raised by the complainant**

The relevant issues as culled out from the complaint are:

I. Whether the complainant is liable to pay restoration charges to the respondent to the tune of Rs. 39,90,302/-, when there is no factual restoration of the unit, and when the allotment is of a fresh unit B-02-04 and not a restored unit of B-17-03?

II. Whether the alleged restoration charges would not be unjust enrichment for the respondent?

III. Whether the respondent is not liable to treat the alleged restoration charges towards the value of the allotted unit?

IV. Whether the respondent is not liable to pay interest on the excess payment received from the complainant from time to time?

V. Whether the respondent is not liable for interest on the money retained by it after cancellation of the earlier unit B-17-03 from the date of payment, till the same is credited to the new unit, i.e. from 17.07.2010 to 13.02.2015 (date of credit memo)?

VI. Whether the respondent is justified in seeking more than 10% of the cost of the unit at the time of booking or seeking more than the value of the stage of completion of

the project from the complainant and to charge penal interest on the alleged delay in making the payments?

VII. Whether the respondent is entitled to charge delayed interest on the alleged instalments from the complainant when it failed to call for such payments from time to time?

VIII. Whether the respondent is entitled to claim charge of more value than those reflected in the buyer's agreement, and in violation of schedule of payment shown in the said agreement?

IX. Whether the respondent is not delivering lesser carpet area than what is agreed to be delivered?

X. Whether the respondent has not delayed the delivery of the unit?

XI. Whether the respondent is not entitled for cancellation of the apartment buyer's agreement and to call for the refund of all the payments given to the respondent with interest and compensation thereof?

20. **Relief sought**

I. Direct the respondent to add the interest component of

Rs. 30,43,068/- for the period 17.07.2010 to 13.02.2015 to the credit memo of Rs. 58,47,503/-, i.e. Rs. 86,54,303/- as on 31.02.2015 and add the said amount to unit no. VV-B-02-04.

II. Direct the respondent to give due credit to the payment made by the complainant of Rs. 39,90,302/- on 12.02.2015 towards the payment for fresh unit no. B-02-04 and to quash and set aside its claim of alleged restoration charges for the said unit.

III. Direct the respondent to consider only 10% of the value of the property towards advance on allotment offer letter dated 16.02.2015 and to consider the excess amount of Rs. 1,06,24,597/- as deposit attracting interest @ 12% p.a. from 16.02.2015 to 15.11.2016 for 21 months, i.e. Rs. 22,31,145/-.

IV. Direct the respondent to consider the amount in excess of Rs. 55,69,897/- as on 15.11.2016 towards the payment due and the balance amount of Rs. 1,49,10,066 (Rs. 1,32,79,963-Rs. 50,00,000 +Rs. 22,00,000 = Rs. 2,04,79,963 LESS Rs. 55,69,897/-) as deposit or early payment by the complainant attracting interest @ 12 %

p.a., being the amount not called by the respondent attracting such interest from 51.11.2016 or earlier.

V. Direct the respondent to withdraw all claims including delayed payment to the tune of Rs. 19,24,748/-.

VI. Direct the respondent to refund all the payments received from the complainant to him, on whatever names/claims/account heads along with interest 2 12% p.a. form the actual dates of payments of the respective sum till the dates of refund along with reasonable compensation.

Respondent's reply

21. The respondent denied that the previous allotment of unit B-1703 was cancelled owing to some miscommunication. Rather, it is submitted that the allotment was cancelled on account of continuous defaults committed by the complainant.

22. The respondent denied that the respondent got signature of the complainant on a pre-typed for at showing as the subject of 'Request for restoration' allegedly leaving various blank portions stating that it was for office use. It is denied that the

blank portions were not filled in at that point of time or at any time by the complainant.

23. It is further submitted that the complainant has also agreed by way of an affidavit that the allotment of unit no. B-1703 was cancelled on account of gross breach of the terms and conditions of the agreement by the complainant and accordingly an amount of Rs. 33,48,712/- was forfeited towards the earnest money and delayed payment interest and that the same be adjusted towards the allotment of the new alternative unit.

24. It is submitted that the payment of Rs. 39,90,302/- was made by the complainant towards the restoration charges for the unit and the same was admitted and accepted by the complainant vide its letter dated 13.02.2015 and by an affidavit dated 10.03.2015.

25. The respondent submitted that it is wrong and denied that after receipt of the letter dated 13.02.2015 from the respondent, the complainant objected to the contents therein about alleged inconsistencies, unreasonableness and arbitrariness of the conditions imposed on him. It is wrong and denied that the complainant argued that as the

restoration of B-1703 was not happening and that the offer and allotment of B-0204 was at the lower floor, that itself was a sacrifice or that the allotment be considered as a fresh booking or that this is the case of any other customer in the market. It is wrong and denied that the respondent informed that the possession of the apartment would be delivered by end of 2016. It is wrong and denied that the complainant then questioned as to why full payment was sought from him in February, 2015 itself when only 10% of the total cost was allegedly sought from the other customers at the time of booking. It is submitted that no such assurance was given or any representation was made by the respondent company. It is submitted that the possession was to be offered to the complainant strictly in accordance with the terms and conditions of the apartment buyer's agreement subject to the complainant fulfilling his contractual obligations. However, the complainant not only defaulted in making timely payments but has also failed to pay the remaining installment amount towards the price for the purchase of the unit.

26. The respondent submitted that it is wrong and denied that the statement ought to have shown that the total payment made was more than Rs. 1,70,37,803/- without interest from

the dates of payment. It is wrong and denied that the excess payment by then ought to have been more than Rs. 1,14,67,906/- plus Rs. 72,74,896/- towards interest i.e a total of Rs. 2,43,12,699/-.It is submitted that the complainant was made aware about the status of the construction from time to time.

27. It is further submitted that the complainant has not made the total payment of Rs. 2,02,00757/- and has instead paid a part amount of Rs. 1,69,06,150/- only as is evident from the statement of account attached with the email sent by the respondent to the complainant on 22.02.2018.

28. It is not denied that as the amount of sales tax was not mentioned in the payment plan of the agreement at annexure IV, a cheque of Rs. 6,95,694/- under cover of letter dated 29.12.2017 from the complainant was issued in favour of the respondent. However, it is wrong and denied that thus the total amount paid by the complainant to the respondent stands at Rs. 2,08,96,449.50.

29. It is submitted that the total cost of Rs. 2,02,00,755.50 was not inclusive of the stamp duty, registration charges, administrative expenses, service tax and all other charges

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which were payable as per the terms governing the buyer's agreement and the same was explicitly stated in the payment plan as well as the statement of account which was sent to the complainant vide email dated 25.08.2017. Thus the total cost inclusive of all the charges including the amount towards the delayed payment done by the complainant was Rs. 2,52,81,388.

30. The respondents further denied that the flat has been over-priced or that more area to saleable area has been added. It is wrong and denied that the actual carpet area is about 1500 sq. ft. whereas the area shown for sale is 3095 sq. ft. which is unfair. It is wrong and denied that the claim is illegal. It is submitted that the complainant was aware that the total area of the unit was 3095 sq. ft. from the very inception and the same is evident from the payment plan as attached with the allotment letter and the apartment buyer's agreement.

31. The respondent submitted that the notice of possession was given to the complainant by the respondent on 14.11.2017. The respondent being a customer oriented company adjusted the delayed compensation in accordance with the terms and conditions of the agreement in the statement of account which was sent to the complainant along with the notice of

possession. It is submitted that the construction of the unit is completed and the respondent company has already applied for the grant of occupation certificate on 09.02.2017. Only the final touches/finishing work are left and it shall be undertaken only after the receipt of the entire payment and completion of documentary formalities by the complainant and the same was specifically stated in the notice of possession. It is submitted that it is not the respondent but the complainant who has continuously defaulted in adhering by the terms and conditions of the allotment.

32. The respondent denied that he is liable for payment of interest on all such excess payments from date of receipt till it is actually due. It is submitted that the complainant had made excess payment only till the payment of the third installment amount and accordingly early payment discount of Rs. 1,75,401/- has been given by the respondent to the complaint. However, the complainant not only failed to make timely payments towards the purchase of the unit but has also not paid the due balance amount towards the purchase of the unit. The complainant has been a consistent defaulter and cannot now claim premium of his own defaults, laches, delays, misdeeds and illegalities.

33. It is submitted that the complainant had paid excess payment only till the third installment and an early payment discount has already been offered to him by the respondent as is evident from statement of account which was sent along with the notice of possession.

34. The respondent submitted that this hon'ble authority does not have the jurisdiction to decide on the imaginary refund, compensation and interest as claimed by the complainant. It is submitted that in accordance with section 71 of the RER 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 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 block 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(1)(o) of the Haryana Real Estate (Regulation and Development) Rules, 2017.

35. It is further submitted that an application for grant of occupation certificate (OC) was made on 09.02.2017 and the same was received on 28.09.2017. On the other hand, the complainant has defaulted in paying the remaining installment towards the unit in question.

Rejoinder by the complainant

36. A rejoinder was filed by the complainant wherein he denied the submissions of the respondents in the reply and re-asserted the facts stated in the complaint apart from the submission that the affidavit dated 10.03.2015 is false and fabricated as the verification contains no dates and the complainant was not present in Gurgaon in order to submit the alleged affidavit on 10.03.2015. Rather, he was present in Aurangabad, Maharashtra.

Determination of issues

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the authority decides seriatim the issues raised by the parties as under:

37. In respect of the **first, second and third issue** raised by the complainant, the payment of Rs. 39,90,302/- was made by the

complainant towards the restoration charges for the unit and the same was admitted and accepted by the complainant vide its handwritten letter dated 10.02.2015(annexure P2) and another letter dated 10.02.2015(annexure P3) wherein he undertook to abide by the terms and conditions of the respondent company including payment of restoration charges as may be demanded by the company. Further, vide letter dated 13.02.2015 from the respondent company to the complainant, a demand was raised for the said amount towards restoration charges and the same was paid by the complainant on 12.02.2015 and this is again admitted and accepted by an affidavit dated 10.03.2015. However, the authority is of the view that the aforesaid payment of Rs. 39,90,302/- was made against restoration charges, whereas, instead of restoring, the respondent/builder allotted another unit and retained the aforesaid amount against restoration charges which is unjust on the part of the respondent. In such circumstances, the complainant cannot be held liable to pay restoration charges of Rs. 39,90,302/- to the respondent.

38. In respect of **fourth issue** raised by the complainant, it is submitted in the reply that the complainant had paid excess payment only till the third installment and an early payment

discount to the tune of Rs. 1,75,401 has already been offered to him by the respondent as is evident from statement of account dated 14.11.2015 (annexure P15, pg 90 of the complaint) which was sent along with the notice of possession. Further, as per clause 7.4 of the apartment buyer's agreement dated 03.03.2015, the allottee shall be entitled to pre-payment rebate which shall be due only at the time of payment of final installment. Clause7.4 of the agreement is reproduced below:

> *"7.4 If the allottee prepays any installment or part thereof to the company before it falls due for payment, the allottee shall be entitled to pre-payment rebate on such prepaid amounts at the interest rate declared by the company for this purpose from time to time. The interest on such paid installment shall be calculated from the date of prepayment uptill the date when such amount would actually have become due. The credit due to the allottee on account of such pre-payment rebate shall however be adjusted/paid only at the time of final installment for the said apartment."*

39. In respect of **fifth issue** raised by the complainant, the cancellation of the earlier unit B-17-03 was done by the respondent company vide its advice dated 19.03.2012 and it has been more than six years since the said cancellation, thus this issue is highly barred by limitation and the remedy, if

any, could have been availed by the complainant through civil court within the limitation period.

40. In respect of **sixth issue** raised by the complainant, as far as the initial amount of Rs. 58,47,503/- paid by the complainant at the time of booking is concerned, the same was actually paid vide a credit note of the said amount issued by the respondent towards the allotment of unit no. B-02-04 only upon the request of the complainant. Thereafter, amount of Rs. 50,00,000/-, Rs. 22,00,000/- and Rs. 31,62,953/- were paid as against instalment no.1, 2 and 3 respectively prior to the date of payment by the complainant's own will, as is evident from the statement of account in annexure P21 of the complaint(pg 101). Thus, it cannot be said that the respondent sought more than 10% of the cost at the time of booking.

41. In regard to **seventh issue** raised by the complainant, payment plan of the apartment in question is instalment linked plan and demand notice was necessary to be sent by the respondent and thus, upon failure to make payments on time, the respondent is entitled to charge delayed interest as per the agreement. The relevant clause 7.1 of the agreement is reproduced below: -

> *"7. The allottee has opted for the payment plan annexed herewith as Annexure-IV. The allottee understands that it shall always remain responsible for making payments in accordance with the payment plan Annexure-IV. Only in case of a construction linked payment plan, the company shall be obliged to send demand notices for instalments on or about the completion of the respective stages of construction…."*

42. In regard to **eighth issue** raised by the complainant, it is submitted in the reply that the total cost of Rs. 2,02,00,755.50 was not inclusive of the stamp duty, registration charges, administrative expenses, service tax and all other charges which were payable as per the terms governing the buyer's agreement and the same was explicitly stated in the payment plan as well as the statement of account which was sent to the complainant vide email dated 25.08.2017. Thus the total cost inclusive of all the charges including the amount towards the delayed payment done by the complainant was Rs. 2,52,81,388.

43. In regard to **ninth issue** raised by the complainant, the complainant was aware that the total area of the unit was 3095 sq. ft. from the very inception and the same is evident from the payment plan as attached with the allotment letter and as per clause K of the buyer's agreement, the apartment in question admeasured a super area of around 3095 sq. ft.

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Chairman
Member
Member

44. Regarding **tenth issue,** as per clause 13.3 of the agreement, the due date of possession was 03.09.2017. Thus, the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Haryana Real Estate (Regulation and Development) Act, 2016, which is reproduced as under:

> *"11.4 The promoter shall—*
>
> *(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:*
> *Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed."*

45. In regard to **eleventh issue** raised by the complainant, an offer of possession was made by the promoter on 14.11.2017. further, it is submitted by the respondent that the construction of the unit is completed and the respondent company has already applied for the grant of occupation certificate on 09.02.2017 which was received on 28.09.2017.

Only the final touches/finishing work are left and it shall be undertaken only after the receipt of the entire payment and completion of documentary formalities by the complainant and the same was specifically stated in the notice of possession. It is submitted that it is not the respondent but the complainant who has continuously defaulted in adhering by the terms and conditions of the allotment. However, the respondent has been unjust in retaining the amount of Rs. 39,90,302/- against restoration charges where actually no restoration was made and a fresh unit was allotted to the complainant. As such the restoration charges are unlawful and need not be charged from the complainant.

46. The delay compensation payable by the respondent @ Rs.7.50/- per sq. ft. of the super area of the said flat as per clause 13.4) of apartment buyer's agreement is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided as also held in para 181 of ***Neelkamal Realtors Suburban Pvt Ltd Vs. UOI and ors. (W.P 2737 of 2017)***, wherein the Bombay HC bench held that:

> *"...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and*

which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements."

47. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.

"34 (f) Function of Authority –

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."

48. The complainant requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act which is reproduced below:

"37. Powers of Authority to issue directions-

The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned."

49. The complainant reserves his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.

Findings of the authority

50. **Jurisdiction of the authority**- The respondent admitted that as the project "IREO Victory Valley" is located on Golf course extension road, Sector 67, Gurugram, thus the authority has complete territorial jurisdiction to entertain the present complaint.

The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. 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.

51. Keeping in view the present status of the project and intervening circumstances, the authority is of the view that the respondent unilaterally cancelled the earlier unit B-17-03 booked by the complainant without any rhyme and reasons. Further, upon re-negotiations between the parties, the

respondent took Rs. 39,90,302/- against the restoration charges of earlier unit. Whereas, there was no restoration made, rather a fresh unit B-02-04 was allotted to the complainant and a fresh agreement was also signed in this regard. This is highly unjust on the part of respondent as allotment of a new unit cannot be termed as restoration of earlier unit. Further, the respondent stated that the occupation certificate has been received on date 28.09.2017. Moreover, it has been alleged by the complainant that he is not being allowed to visit his unit for which he has made number of requests. It is again unjust on the part of the builder and the complainant must be allowed to visit and inspect his flat.

Decision and directions of the authority

52. 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:

(i) The respondent/builder is directed to allow the complainant to visit his flat on any convenient day and time for inspection alongwith the representative of respondent/company failing which penal action shall be initiated against the respondent/builder.

(ii) The respondent and complainant are directed to sort out the matter and if any ambiguity remains, liberty is granted to them to approach the authority for its final resolution.

53. The complaint is disposed of accordingly.

54. The order is pronounced.

55. Case file be consigned to the registry. Copy of this order be endorsed to the registration branch.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Date: 16.11.2018

HARYANA REAL ESTATE REGULATORY AUTHORITY • HARYANA
Chairman
Member
Member

Judgement Uploaded on 08.01.2019