

PROCEEDINGS OF THE DAY

Day and Date	Tuesday and 13.11.2018
Complaint No.	132/2018 case titled as Mr. Vijay Kant Walia and another V/s M/s Ireo Pvt. Ltd.
Complainant	Mr. Vijay Kant Walia and another
Represented through	Shri Sushil Yadav, Advocate for the complainant.
Respondent	M/s Ireo Pvt. Ltd.
Respondent Represented through	Shri Garvit Gupta, Advocate for the respondent.
Last date of hearing	9.10.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Arguments heard.

Particulars of the complaint were discussed at length and date of delivery of possession agreed upon by both the parties as per clause 13.3 of the Apartment Buyer Agreement is 27.9.2015. Notice of offer of possession, as per complaint is 29.9.2017 which was also agreed upon by both the parties. Now, the complainant is directed to take over possession of the unit and the respondents are directed to make adjustment of payable interest for every month of delay on the amount deposited by the complainant after adjusting dues, if any. Matter regarding holding charges was also discussed and keeping in view that there is a delay on the part of the respondent to hand over possession of the flat, holding charges, imposed by the respondent upon

the complainant does not seem to be reasonable and accordingly the respondent is directed to desist from charging holding charges.

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

Samir Kumar
(Member)

Subhash Chander Kush
(Member)

Dr. K.K. Khandelwal
(Chairman)
13.11.2018

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

Complaint no. : 132 of 2018
First date of hearing: 15.05.2018
Date of decision : 13.11.2018

1. Mr. Vijay Kant Walia,
 2. Mrs. Sonia Walia
Both R/o. 2, The Paddocks, Wembley, Middlesex-HA99HE, UK.
- Complainants**

Versus

M/s IREO Private Ltd.
C/o : 5th floor, Orchid Centre,
Golf Course Road, Sector 53,
Gurugram-122002, Haryana.

Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar
Shri Subhash Chander Kush

Chairman
Member
Member

APPEARANCE:

Shri Sushil Yadav
Shri Vinod Kumar
Shri M.K. Dang

Advocates for the complainants
Authorised representative on
behalf of respondent company
Advocates for the respondent

ORDER

1. A complaint dated 04.04.2018 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 complainants Mr. Vijay Kant



Walia and Mrs. Sonia Walia, against the promoter M/s IREO Private Ltd., on account of violation of the clause 13.3 of apartment buyer's agreement executed on 20.09.2013 in respect of apartment described below in the project 'Skyon' for not handing over possession by 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	"SKYON", Golf Course Extension Road, Sector 60, Gurugram
2.	Project area	18.10 acres
3.	Nature of project	Group housing colony
4.	DTCP license no.	192 of 2008 dated 22.11.2008
5.	HRERA registered/ not registered	Registered (only for 0.695 acres)
6.	HRERA registration no.	367 of 2017
7.	Apartment/unit no.	B3201, 31 st floor, B Tower
8.	Apartment measuring	2809 sq. ft.
9.	Date of execution of apartment buyer's agreement	20.09.2013
10.	Payment plan	Construction linked payment plan
11.	Total consideration as per statement of account dated 27.09.2017	Rs.4,67,74,225/-
12.	Total amount paid by the	Rs.3,97,90,321/-



	complainant till date as per statement of account dated 27.09.2017	
13.	Percentage of consideration amount	Approx. 85 percent
14.	Building plans approved on	27.09.2011
15.	Consent to establish granted on	31.01.2013
16.	Date of delivery of possession as per clause 13.3 of apartment buyer's agreement i.e. 42 months + 180 days grace period from the date of approval of the building plans and/or fulfilment of the preconditions imposed thereunder.	31.01.2017
17.	Notice of offer of possession	27.09.2017
18.	Delay in handing over possession from due date of possession i.e. 31.01.2017 till the date of offer of possession i.e. 27.09.2017	7 months 27 days
19.	Penalty clause as per apartment buyer's agreement dated 20.09.2013	Clause 13.4 of the agreement i.e. Rs.7.50/- per sq. ft. of the super area for every month of delay until the actual date fixed by the company for offering possession of the said apartment to the allottee.



3. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainants and the respondent. An apartment buyer's agreement is available on record for the aforesaid apartment according to which the possession of the same was to be

delivered by 31.01.2017. Neither the respondent has delivered the possession of the said unit as on date to the complainant nor they have paid any compensation @ Rs.7.50/- per sq. ft. of the super area for every month of delay until the actual date fixed by the company for offering possession of the said apartment to the allottee as per clause 13.4 of the apartment buyer's agreement. 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. The respondent appeared on 15.05.2018. The case came up for hearing on 15.05.2018, 07.06.2018, 17.07.2018, 24.07.2018, 06.09.2018, 07.09.2018, 09.10.2018 and 13.11.2018. The reply filed on behalf of the respondent has been perused.

Facts of the complaint

5. Briefly stated, the facts of the complaint are that the complainants live in UK and on their visit to India, they were convinced by marketing team of IREO to buy an apartment in 'Skyon' Project and the respondent gave clear assurance that IREO had all necessary approvals for the project and had sufficient resources to complete the project on time i.e. within 42 months of date of approval of building plans which was



stated as October 2011 as per clause 13.3 of the buyer's agreement. Thus, occupation of the flat was to be given by April 2015. Accordingly, the complainants paid an advance of Rs.38,36,353/- on 25.06.2013.

6. The complainants submitted that the respondent was to show the buyers agreement at that stage but it made various excuses and only produced a draft in September 2013 after numerous follow ups. The agreement was totally one sided with many clauses introduced which the complainants were not informed at time of paying first cheque. Threatening forfeiture of the first instalment the complainants were coerced to sign the said agreement on 20.09.2013. At this time the complainants noticed that a grace period of 180 days was provided for delivery which would have ensured that final date of possession of fully completed flat and the project so that flat can be put to habitable use would be not later than October 2016.

7. The complainants submitted that in total they have paid an amount of Rs.3,97,90,321/- till date. The complainants submitted that there was an unapplied credit of Rs.20,72,312 in the books of IREO. Vide email dated 13.09.2017, they requested for refund of this excess amount. However, in its reply by email dated 15.09.2017, company while



acknowledging this excess payment has refused to return the same saying that this will be adjusted against final instalment. Thus, the respondent has illegally taken money required for stamp duty to be paid to government and held it for personal gains.

8. The complainants submitted that having failed to deliver the property on time, they had sought refund of the money with the latest communication on 20.09.2017. This cancellation letter was sent over a month before company rushed the occupation notice to the complainants. With no response from the company a follow up was made by email dated 12.10.2017. A complaint to this effect was sent to HRERA on 14.09.2017 against which the complainants got a response on 15.09.2017 asking to file the complaint in proper form.
9. The complainants submitted that instead of refunding the money as per agreement, the respondent vide an email dated 29.09.2017 informed that the apartment is ready for handover and the complainants can take possession but there was no offer of inspection to verify that the flat was fully complete or not.
10. The complainants submitted that the said possession notice was also a sham since and when the representatives of the



complainants visited the site, they were informed that inspection can be done only after full payment. Thus, coercion was used to get the payment as company knew very well that neither the flat or the project was complete. Seeking intervention of police, the complainant's representative managed to get access to the complex and it was found that the project work was at least one year from completion, flat was in a bad shape and the only reason why this letter was sent was to avoid the refund of money with interest which the respondent is required to make in view of inordinate delay in completion of the project.

11. The complainants submitted that the email offering the possession was sent on 29.09.2017 which is exactly coinciding the period of 1 year after completion of grace period entitles the complainants for refund provided under clause 13.5 of the buyer's agreement. This is a sham being perpetrated as project is not inhabitable and the extra one year even after grace period makes a mockery of the agreement and assurance of delivery on time.

12. **Issues raised by the complainants are as follow:**

- i. Whether there has been a failure in delivery of completed apartment as per clause 13.3 of the buyer's agreement?



- ii. Whether the complainants are entitled to full refund and interest?
- iii. Whether the complainants have exercised their right to cancel and seek refund in just circumstances and in the appropriate time frame?
- iv. Whether respondent can compel the complainants to make full payment without offering flat for inspection? In view of inspection through police intervention should be done to see whether project was fully completed on date it has offered occupation?
- v. Whether it is a fit case of fraud in issuing possession letter fraudulently without completing the project. Records of DTCP can be sought to verify the same?

Relief sought:

13. The complainants are seeking compliance of promoter's obligation under section 18 to refund the amount paid along with the interest at the prescribed rate.

Respondent's reply

14. The respondent did not admit the fact that the complainants live in the UK and denied the fact that the complainants were convinced by the marketing team to buy an apartment in the said project. It is denied that there was alleged clear assurance



that IREO has got all approvals for the project or that it had sufficient resources to complete the project on time i.e. 42 months of date of approval of building plans or that the same is stated as October 2011 as per clause 13.3 of the buyer's agreement. It is denied that the occupation was to be given by April 2015. The respondent submitted that the complainants had themselves approached the respondent company and had booked the unit in question.

15. The respondent admitted the fact that the complainants paid an advance of Rs.38,36,353/- towards the booking of the unit. However, the same was paid by the complainants on 15.06.2013 and not on 25.06.2013 as wrongly stated by the complainants. Also, the respondent submitted that the complainants have defaulted in making regular payments in accordance with the payment plan as mutually agreed between the parties and are now, after being offered the possession of unit, are intentionally not paying the remaining due instalment and are not completing the documentation formalities in order to unnecessarily harass the respondent company.

16. The respondent denied the fact that the respondent was to show the buyers agreement at that stage or that the respondent made various excuses or only produced a draft in



September 2013 or that there were numerous follow-ups. It is wrong and denied that the agreement was totally one sided or that many clauses were introduced which the complainants were allegedly not informed at time of the payment of first check. It is denied that there was alleged threatening forfeiture of the first instalment or that the complainants were alleged coerced into signing this agreement on 20.09.2013. It is not denied that a grace period of 180 days was provided in the agreement. However, it is denied that it would have ensured that final date of possession of fully completed flat and the project so that the flat can be put to habitable use would not be later than October 2016.

17. The respondent submitted that at the time of booking of the unit, only the booking application form was supposed to be shared with the complainants. It is submitted that the terms and conditions contained in the buyer's agreement were mutually agreed between the parties and the complainants had on their own will and only after understanding the terms and conditions stipulated therein had executed the buyer's agreement. It is submitted that according to clause 13.3 of the buyer's agreement, the respondent was to offer the possession to the complainants within a period of 42 months + 180 days grace period from the date of approval of the building plans



and/or fulfilment of the preconditions imposed thereunder. In the present case, the building approval which was granted on 27.09.2011 had several pre-conditions which were required to be satisfied. It is submitted that the last of the statutory approvals which forms a part of the pre-conditions was the fire approval NOC which was obtained on 25.09.2013 and that the time period for offering the possession, according to the agreed terms of the buyer's agreement, would have expired only on 24.09.2017. The respondent had completed the project well in time and possession was offered to the complainants vide letter dated 27.09.2017 and the said letter was also sent by the respondent vide email dated 29.09.2017.

18. The respondent admitted the fact that the complainants have paid total sum of Rs.3,97,90,321/- towards the purchase of the apartment. The respondent denied that IREO had cheated the complainants or that there is an unapplied credit of Rs.20,72,312/-. Also, the respondent denied that the respondent has illegally taken money required for stamp duty to be paid to the government and has held it for personal gains. It is submitted that the excess amount is to be adjusted against the final demand of the instalment but the complainants are not coming forward to pay the final amount.



19. The respondent company admitted that the complainants had sent an email to the respondent on 20.09.2017 and a follow-up email dated 12.10.2017 and that a cancellation letter was wrongly sent by the complainants. However, the contents of the emails and the letter are baseless, false and frivolous to the knowledge of the complainants. It is denied that the respondent had failed to deliver the property on time. The respondent had offered the timely possession of the unit in accordance with the terms and conditions of the buyer's agreement. It is pertinent to mention here that according to clause 22.1 and 22.2 of the buyer's agreement, the complainants have a very limited right to cancel the agreement i.e. only in the clear and unambiguous default of the respondent company. Apart from this limited right, the complainants do not have any other right to cancel the agreement.

20. The respondent has not admitted that a complaint to this effect was sent to HRERA on 14.09.2017 or that the complainants received a response on 15.09.2017 asking to send the complaint in proper form. The complaint is baseless and false to the knowledge of the complainants.

21. The respondent admitted the fact that the respondent sent an email to the complainants on 29.09.2017 stating that the



complainants can take the possession of the unit. However, the same was subject to the complainants making the payment of the remaining due amount as well as fulfilling the documentation formalities.

22. The respondent denied that the possession notice was also a sham or that the complainants' representatives requested to visit the project or that at site they were allegedly informed that inspection can be done only after full payment. However, the respondent submitted that the respondent had rightly issued the notice of possession dated 29.09.2017 to the complainants on the completion of the unit and only finishing works were left which was to be completed only after the receipt of the remaining payment and completion of documentary formalities. The respondent submitted that there is no delay in the offering of the possession of the unit by the respondent and hence the question of the imaginary right of the complainants to cancel the allotment does not arise.

Determination of issues

After considering the facts submitted by the complainants, reply by the respondent and perusal of record on file, the issue wise findings of the authority are as under:



23. With respect to the **first issue** raised by the complainants, as per clause 13.3 of buyer's agreement dated 20.09.2013, the possession of the said apartment was to be handed over within a period of 42 months from the date of approval of the building plans and/or fulfilment of the preconditions imposed thereunder (with a grace period of 180 days). In the present complaint, the respondent got approval of building plan from DTCP on 27.09.2011 having several pre-conditions which were required to be satisfied. The last of these pre-conditions, consent to establish was granted on 31.01.2013. The authority is of the view that date of handing over the possession should have been counted from the date they received the consent to establish and other approvals which is of cardinal importance to the builder. Therefore, the due date of handing over possession shall be computed from 31.01.2013. The clause regarding the possession of the said unit is reproduced below:

"13. Possession and holding charges

13.3 Subject to force majeure, as defined herein and further subject to the allottee having complied with all its obligation under the terms and conditions of this agreement and not being in default of any provisions of this agreement including but not limited to the timely payment of all dues and charges, stamp duty and other charges and also subject to the allottee having complied with all formalities or documentation as prescribed by the company, the company proposes to offer the possession of the said apartment within a period of forty two (42) months from the date of approval of building



plans and/or fulfillment of the pre-conditions imposed thereunder (committed period). The allottee further agrees and understands that the company shall additionally be entitled to a period of 180 days (Grace period), after the expiry of the said commitment period to allow for unforeseen delays beyond the reasonable control of the company.”

24. Accordingly, the due date of possession was 31.01.2017 and the possession has been delayed by 7 months and 27 days till the date of decision. The delay compensation payable by the respondent @ Rs.7.50/- per sq. ft. of the super area for every month of delay until the actual date fixed by the company for offering possession of the said apartment to the allottee as per clause 13.4 of 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. It has also been observed 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.”



25. With respect to the **second issue** raised by the complainants, refund cannot be allowed keeping in view the current status of the project. The detailed findings and directions in this regard have been elaborated in subsequent paras.

26. With respect to the **third issue** raised by the complainants, clause 22 states the limited right of cancellation by the allottee. As per section 22.1 may cancel the agreement solely in the event of the clear and unambiguous failure of the warranties of the company/ confirming parties that leads to frustration of this agreement on that account. The relevant clause is reproduced as under:

“22. Limited right of cancellation by the allottee

Except to the extent specifically and expressly stated elsewhere in this agreement allowing the allottees to withdraw from this agreement, the allottee shall only have the very limited right to cancel this agreement solely in the event of the clear and unambiguous failure of the warranties of the company/confirming parties that leads to frustration of this agreement on that account. In such case, the allottee shall be entitled to a refund of the instalments actually paid by it along with interest thereon at the rate of 7.5% per annum, within a period of 90 days from the date of determination to this effect. No other claim, whatsoever, monetary or otherwise shall lie against the company and confirming parties nor shall be raised otherwise or in any manner whatsoever by the allottee.”



27. The complainants have failed to produce any documentary evidence in support of their allegation that they have exercised their right of cancellation on the agreed terms of clause 22 of

the said agreement. Moreover, it is found from the perusal of record that the respondent has offered possession to the complainants vide letter dated 27.09.2017 and email dated 29.09.2017. So, exercising the option of cancellation of unit at this belated stage after knowing the status of the completion of the project does not serve the ends of justice.

28. With respect to the **fourth issue** raised by the complainants, the respondent can raise demand only as per the schedule of payment annexed with the said agreement and the complainants have every right to inspect the said unit keeping in view the safety measures.
29. With respect to the **fifth issue** raised by the complainants, it was noted by the authority during the proceeding dated 24.07.2018 that occupation certificate has been received by the respondent and the said project is complete in all respect and fit for occupation. Hence, this issue is decided in negative.

Findings of the authority

30. 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 complainants at a later



stage. As per notification no. 1/92/2017-1TCP dated 14.12.2018 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint. The complainant is an allottee as per definition under section 2(d) of the Act and the respondent is well within the definition of promoter as per section 2(zk) of the Act. Once there is allottee-promoter relationship, the complaint is maintainable before this authority.

31. The possession of the flat was to be delivered by 31.01.2017 as per the clause referred above, thus the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Real Estate (Regulation and Development) Act, 2016. Keeping in view the present status of the project and intervening circumstances, the authority is of the view that in case refund is allowed in the present complaint, it shall adversely affect the right of allottees who wish to continue with the project. Further, it will also hamper the completion of the project as the project is almost complete.



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 to the complainant interest, at the prescribed rate, for every month of delay till the handing over of possession. Keeping in view that there is a delay on the part of the respondent to hand over possession of the flat, imposition of holding charges by the respondent upon the complainant does not seem to be reasonable and accordingly the respondent is directed to desist from charging holding charges.

32. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above. The complainants requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act.

33. 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 complainants are directed to take possession of the said unit.
 - (ii) The respondent is directed to make adjustment of payable prescribed rate of interest i.e. 10.75% for every month of delay on the amount deposited by the complainants after adjusting dues.
 - (iii) The respondent is directed to desist from charging holding charges from the complainants.
34. The order is pronounced.
35. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 13.11.2018

Judgement uploaded on 19.12.2018

