

**PROCEEDINGS OF THE DAY**

Day and Date	Tuesday and 27.11.2018
Complaint No.	362/2018 Case titled as Cosmo Films Ltd.Vs M/s Ireo Pvt. Ltd.
Complainant	Cosmo Films Ltd.
Represented through	Ms. Jyoti Dixit, Company Secretary in person with Shri Sanjeev Sahay Advocate for the complainant.
Respondent	M/s Ireo Pvt. Ltd.
Respondent Represented through	Shri M.K.Dang, Advocate for the respondent.
Last date of hearing	5.11.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

**Proceedings**

Written arguments filed by the respondent.

Arguments heard.

Brief facts of the case are that complainant had booked a unit No.B-16-41, 15<sup>th</sup> Floor, Tower-B, "Ireo Gurgaon Hills" Village Gwal Pahari, Tehsil Sohna, District Gurugram and an Apartment Buyer Agreement inter-se the parties was executed on 17.07.2012. As per clause 14.3 of the agreement, possession of the unit was to be handed over to the complainant within a period of 42 months + 6 months grace period + consent to establish which comes out to be 17.07.2017. As per para 54 of BBA which reads as under:-

***"Subject to Force Majeure and further subject to the Applicant having complied with all its obligations under the terms and conditions of this Agreement, and the Applicant not being in default under any part of this Agreement including***

***but not limited to the timely payment of the total Sale Consideration, stamp duty and other charges/fees/taxes/levies and also subject to the Applicant 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 Applicant within a period of 42 months from the date of approval of the building plans and/or fulfilment of the pre-conditions imposed thereunder(“Commitment Period”). The Applicant further agrees and understands that the Company shall additionally be entitled to a period of six months (180 days)(“Grace Period”), after the expiry of said Commitment Period to allow for unforeseen delays beyond the reasonable control of the Company. Subject to the condition contained herein, if the Company fails to offer possession of the said Apartment to the Applicant by the end of the Grace Period, it shall be liable to pay to the Applicant compensation calculated at the rate of Rs.10/-(Rupees Ten Only) per sq ft of Super Area(“Delay Compensation”) for every month of delay thereafter until the actual date fixed by the Company for offering possession of the said Apartment to the Applicant. The Applicant shall be entitled to payment/adjustment against such ‘Delay Compensation’ only at the time of ‘Notice of Possession’ or at the time of final instalment, whichever is earlier.***

The date for handing over the possession should have been counted from the date they received consent to establish and other approvals which is cardinal importance to the builder and if we count the date of offer of possession i.e. 42+6 months+consent to establish then the date of possession comes out to be 17.07.2017 whereas counsel for the respondent is impinging upon 42+12+6 which is quite unfair and one sided for the purpose of computing the time line for delivery of possession of unit. Only 42+6+consent to establish should have been counted for all intents and purposes. Accordingly, due date of delivery of possession comes out to be 17.07.2017. However, it has been alleged that no delivery of possession has been given as on date. As such complainant is entitled for delayed possession charges @ 10.75% per annum as per the provisions of Section 18 (1) of the Real Estate (Regulation & Development) Act, 2016, till the actual handing

over the offer of possession failing which the complainant is entitled to withdraw from the project.

The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of issuance of this order and thereafter monthly payment of interest till handing over the possession shall be paid before 10<sup>th</sup> of subsequent month. Amount, if any, due from the complainant may be adjusted mutually.

Other contentions raised by the complainant have not been substantiated by virtue of any substantial evidence, as such they are *non est* for the purposes of taking any decision at the moment.

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

Samir Kumar  
(Member)  
27.11.2018

Subhash Chander Kush  
(Member)  
27.11.2018

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

**Complaint no. : 362 of 2018**  
**First date of hearing: 26.07.2018**  
**Date of decision : 27.11.2018**

Cosmo Films Ltd.,  
Address: 1008, DLF Tower-A,  
District Centre, Jasola,  
New Delhi-110025.

**Complainant**

**Versus**

M/s Ireo Pvt. Ltd.  
Regd. Office: A-11, 1<sup>st</sup> floor,  
Niti Bagh, New Delhi-110049.

**Respondent**

**CORAM:**

Shri Samir Kumar  
Shri Subhash Chander Kush

**Member**  
**Member**

**APPEARANCE:**

Shri Sanjeev Sahay  
Ms. Jyoti Dixit

Advocates for the complainant  
Company secretary of the  
complainant

Shri M.K. Dang  
Shri Vinod Kumar

Advocate for the respondent  
Authorised representative on  
behalf of the respondent  
company.

**ORDER**

1. A complaint dated 31.05.2018 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 Cosmo Films Ltd., against the promoter M/s Ireo Pvt. Ltd., on account of



violation of the clause 14.3 of the apartment buyer's agreement executed on 17.10.2012 in respect of apartment described below in the project 'Ireo Gurgaon Hills' 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 case are as under: -

1.	Name and location of the project	"Ireo Gurgaon Hills", Village Gwal Pahari, Tehsil Sohna, District Gurugram.
2.	Project area	11.07 acres
3.	DTCP License no.	36 of 2011 dated 26.04.2011
4.	Nature of unit	Group housing colony
5.	RERA registered/ not registered.	<b>Not registered</b>
6.	Applied for part occupation certificate on	<b>24.09.2018</b>
7.	Apartment/unit no.	B16-41, 15 <sup>th</sup> floor, tower 'B'
8.	Apartment measuring	6388.05 sq. ft.
9.	Date of execution of apartment buyer's agreement	17.10.2012
10.	Payment plan	Construction linked payment plan
11.	Basic sale price as per the said agreement	Rs.6,26,02,890/-
12.	Total cost as per payment plan annexed to the agreement	Rs.6,78,35,086/-
13.	Total amount paid by the complainant till date	Rs.5,99,99,157/-
14.	Percentage of consideration amount	Approx. 88.4 percent
15.	Date of approval of building plans	17.05.2012 annexed as annexure R1



16.	Consent to establish granted on	21.08.2013
17.	Date of delivery of possession as per clause 14.3 of apartment buyer's agreement (42 months + 180 days grace period from the date of approval of the building plans and/or fulfilment of the preconditions imposed thereunder)	21.08.2017
18.	Delay in handing over possession till date	1 year 3 months 6 days
19.	Penalty clause as per apartment buyer's agreement dated 17.10.2012	Clause 14.4 of the agreement i.e. Rs.10/- per sq. ft. of the super area for every month of delay until actual date fixed by the company for handing over of 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 have been provided by the complainant 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 21.08.2017. Neither the respondent has delivered the possession of the said unit as on date to the purchaser nor they have paid any compensation @ Rs.10/- per sq. ft. of the super area for every month of delay until actual date fixed by the company for handing over of possession of the said apartment to the allottee as per clause



14.4 of apartment buyer's agreement dated 17.10.2012. 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 appearance. The respondent through his counsel appeared on 26.07.2018. The case came up for hearing on 26.07.2018, 06.09.2018, 16.10.2018, 05.11.2018 and 27.11.2018. 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 complainant is a company incorporated under the Companies Act, 1956 having its registered office at 1008, DLF Tower-A, District Centre, Jasola, New Delhi-110025. The complainant is an "allottee" within the meaning of Section 2(d) of the Real Estate (Regulation and Development) Act, 2016. The present complaint is being filed by Ms. Jyoti Dixit, who is the Company Secretary of the complainant company and has been duly authorized to file the present complaint. The complainant submitted that the respondent is company incorporated under the Companies Act, 1956 and is a promoter within the meaning of section 2(zk) of the Act *ibid*.



6. The complainant submitted that the complainant made an application for booking a 4 BHK apartment having super area of 6388 sq. ft. bearing no. B 16-41 on 15<sup>th</sup> floor, tower B at Sector 2, Gwal Pahari in the said project. The complainant gave three cheques dated 17.07.2018 of Rs.15 lakhs each totaling to Rs.45,00,000/ towards booking amount and the same was acknowledged by the respondent vide letter dated 07.08.2012. The basic sale price of the said apartment was Rs 9800/per sq. ft of super area and the total cost of the said apartment was Rs 6,77,83,599/-.
7. The complainant submitted that on 07.06.2012, the respondent issued an offer of allotment letter in favour of the complainant. The complainant further submitted that on 17.10.2012 an apartment buyer's agreement was executed between respondent and complainant where under the respondent agreed to sell, transfer and convey the said unit and the complainant agreed to buy the said apartment.
8. The complainant submitted that during 2012-2017, in terms of the agreement various payments were made by the complainant from time to time and these payments were acknowledged by the respondent.





9. The complainant submitted that since the construction was not being carried on and delivery of possession was not given within the stipulated time of 60 months (with grace period) from the date of approval of building plan in May 2012, the complainant terminated the buyer's agreement by its letter dated 10.01.2018 and requested the respondent to refund the entire amount paid by the complainant along with compensation and interest.
10. The complainant submitted that as there was no response to the letter of complainant, the complainant was constrained to send a legal notice dated 13.02.2018 to the respondent seeking refund of the entire amount paid along with interest and compensation. The complainant submitted that by reply to legal notice dated 19.02.2018, the respondent took false and frivolous grounds to deny its liability and stated that the period of 60 months were to be computed from 26.12.2013 and not May 2012. It is submitted that defense of respondent is a moonshine and doctored defense only to somehow wriggle out of its liabilities. The complainant stated that a rejoinder to the above reply was sent on behalf of the complainant annexing an email of the respondent admitting that the approval for the building plan was granted in May 2012.



11. The complainant submitted that no construction activity has been carried out in the proposed building for last many months. The respondent has failed to stand by its commitment and has failed to deliver the possession of the said apartment within 60 months time frame after approval of building plan or even thereafter. The respondent is somehow trying to justify the delay by giving their own meaning to the relevant clause of buyer's agreement, which is patently incorrect. The respondent has not responded to the request of complainant for refund of money. Almost 6 years have passed since the complainant booked the flat with the respondent. Despite paying a total amount of Rs.5,99,99,157/- and waiting for almost 6 years, the flat in question is nowhere near completion. Hence the complainant is seeking refund of the entire amount paid along with interest and compensation for delay.

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

- i. Whether the complainant is entitled to refund of the entire amount of Rs.5,99,99,157 paid by it to the respondent along with interest at the rate of 18% from the respondent on the ground of failure by respondent to deliver possession of the said apartment without any reasonable justification?



- ii. Whether the complainant is entitled to compensation of Rs.25,00,000 to be paid by the respondent on account failure to deliver possession of the said apartment?
- iii. Whether the complainant is entitled to damages of Rs.10,00,000/ to be paid by respondent for deficiency of services and unfair trade practice?

**13. Relief sought:**

The complainant is seeking the following reliefs:

- i. Allow the present complaint in favour of the complainant and against the respondent.
- ii. Direct the respondent to refund the entire amount of Rs.5,99,99,157/- paid to the respondent with interest of 18% from the date of receipt to the date of realisation.

**Respondent's reply**

14. The respondent submitted that this hon'ble authority does not have the jurisdiction to decide on the imaginary compensation and interest as claimed by the complainant. It is submitted that in accordance with section 71 of the Real Estate (Regulation and Development) Act,2016 read with rules 21(4) and 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017, the authority shall appoint an adjudicating officer for holding an inquiry in the prescribed



manner after giving any person concerned a reasonable opportunity of being heard. It is submitted that even otherwise it is the adjudicating officer as defined in section 2(a) of Act who has the power and the authority to decide the claims of the complainant.

15. The respondent submitted that the complainant made an application for booking a 4 BHK apartment in Hill Project IREO Gurgaon on 17.07.12. Pursuant to this, an offer-of-allotment letter was issued by the respondent to the complainant on 07.08.2012. Thereafter, the complainant entered into a detailed apartment buyer's agreement on 17.10.2012, stipulating all the terms and conditions of the payment and the forfeiture.
16. The respondent submitted that as per clause 54 of schedule I of the booking application and clause 14.3 of the agreement, the complainant was to receive possession of the apartment within a period of 42 months from the date of approval of the building plan and/or fulfilment of preconditions imposed thereunder. The parties had also agreed under the clause that a grace period of 6 months would be provided to the respondent for any unforeseen delay and a period of 12 months at the end of grace period in the event of delay by the respondent in offering possession of the apartment. The



building plan was approved on 17.05.2012 with several pre-conditions. All such pre-requisites were fulfilled with the receipt of the consent to establish dated 21.08.2013. Therefore, as per clause 14.3 of the agreement, the proposed time for handing over possession of the apartment was to be computed from 21.08.2013, which would expire on 21.08.2018. [Note: vide amended reply dated 16.10.2018 filed by the respondent, the respondent submitted that all the pre-requisites were fulfilled with the receipt of fire safety scheme approval on 26.12.2013 and that in accordance with the terms of the allotment, the proposed time for handing over the possession is to be computed from 26.12.2013 which will expire on 26.12.2018. The respondent submitted that according to the booking application form and the apartment buyer agreement, the time period for offering the possession of the unit to the complainant has not yet elapsed and the complaint has been filed pre-maturely by him. Even otherwise, according to clause 23 of the apartment buyer's agreement the complainant has a limited right to cancel the allotment i.e. only in the case of clear and unambiguous failure of the respondent company]



17. The respondent submitted that the complainant failed to take the above-mentioned clause of the agreement and related

facts into consideration. This is contrary to the agreed terms of the agreement. In support of its contention, the complainant states that the respondent did not inform the complainant regarding the fulfillment of preconditions under the building plan when it raised the demand under the construction linked payment plan and accepted payment thereunder. However, it is submitted that the complainant ought to have been aware of such preconditions.

18. The respondent submitted that the complainant has never raised an issue with respect to the terms of the agreement and specifically the commitment period. In fact, before entering into the agreement, the complainant had every opportunity to raise the issue of the pre-conditions under the building plan, which was approved on 17.05.2012. The complainant cannot, at this belated stage, raise the issue about pre-conditions under the building plan approval to harass the respondent, claim unwarranted reliefs and benefit from its own wrong. It is further stated that the complainant has been making payments without raising any concerns with respect to the approvals.

19. The respondent submitted that as per the provisions of the Act *ibid*, the promoter is liable to compensate the allottee only in the event that the promoter fails to complete or is



unable to give possession of an apartment in accordance with the terms of the agreement for sale. It is thus stated that the present complaint is premature and without cause.

20. The respondent submitted that without prejudice to the aforesaid contention that there is no delay in the project in question, it is submitted that in any event the agreement, as well as the booking application, fully envisages delay and provides for consequences thereof in the form of compensation to the allottee. Under clause 14.4 of the agreement and under clause 54 of schedule I of the booking application, it is agreed between the parties that subject to clause 14.4 of the agreement and clause 54 of the booking application, if the company (respondent) fails to offer possession, then the company shall pay compensation at the rate of Rs.10 per square feet per month.

21. The respondent submitted that even in the event that there is any delay in the present case, such delay is contemplated in the inter-se agreement, and consequences thereof agreed to between the parties. Therefore, the said agreement between the parties does not in any manner fail or is breached on account of alleged delay, if any, and an allottee cannot be permitted to claim relief for the delay beyond what has been expressly agreed to by him in the booking application as well



as under the binding agreement. As such, the present complaint claiming reliefs beyond what is provided under the agreement is ex-facie not maintainable.

22. The respondent submitted that this hon'ble authority does not possess requisite jurisdiction to adjudicate on this matter by virtue of the arbitration clause, contained in clause 36 of the agreement between the parties. As per sections 5 and 8 of the amended Arbitration and Conciliation 1996, which came into force on 3.1.2016, it is provided as follows:

***“5. Extent of judicial intervention.*** *Notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall intervene except where so provided in this part.*

***8. Power to refer parties to adjudicate where there is an arbitration agreement.*** *(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.”*



In view of the aforesaid unambiguous and admitted position of fact and law, this authority ought to refer the parties to arbitration in terms of the aforesaid arbitration clause.



23. **Determination of issues:**

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

24. With respect to the **first issue** raised by the complainant, the authority came across that as per clause 14.3 of apartment buyer's agreement, the possession of the flat was to be handed over within 42 months (plus grace period of 6 months) from the date of approval of the building plans and/or fulfilment of the preconditions imposed thereunder. In the present case, the building plan was approved by the concerned authority vide memo no. ZP-722/JD(BS)/2012/8582 dated 17.05.2012. The authority is of the considered opinion that the date for handing over the possession should have been counted from the date the respondent received consent to establish and other approvals which is of cardinal importance to the builder and if we count the date of offer of possession i.e. 42 months + 6 months + consent to establish whereas counsel for the respondent is impinging upon 42 months + 12 months + 6 months which is quite unfair and one sided for the purpose of computing the time line for delivery of possession of unit. Only 42 months + 6 months + consent to establish should have been counted for



all intents and purposes. Therefore, the due date of handing over possession will be computed from 21.08.2013 i.e. date of grant of consent to establish. The clause regarding the possession of the said unit is reproduced below:

*“14. Possession and holding charges*

*14.3 ...the company proposes to offer the possession of the said apartment to the allottee within a period of 42 months from the date of approval of building plans and/or fulfilment of the preconditions imposed thereunder (commitment period)....The allottee further agrees and understands that the company shall additionally be entitled to a period of 180 days (Grace Period), after the expiry of the said commitment period to allow for unforeseen delays beyond the reasonable control of the company.”*

25. Accordingly, the due date of possession was 21.08.2017 and the possession has been delayed by one year three months and six days till the date of decision. The delay compensation payable by the respondent @ Rs.10/- per sq. ft. of the super area for every month of delay until the actual date fixed by the company for handing over of possession of the said apartment to the allottee as per clause 14.4 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.”*

26. 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 other allottees who wish to continue with the project. Further, it will also hamper the completion of the project as the respondent has already applied for OC. As the possession of the flat was to be delivered by 21.08.2017 the promoter has failed to fulfil his obligation under section 11(4)(a), hence the promoter is liable under section 18(1) proviso of the Act *ibid* read with rule 15 of the Rules *ibid*, to pay to the complainant interest, at the prescribed rate i.e. 10.75%, for every month of delay till the handing over of possession.

27. With respect to the **second and third issue**, the complainant made a statement during proceeding dated 26.07.2018 that



he is not appearing before the authority for compensation but for fulfilment of obligations by the promoter as per provisions of the said Act and reserve his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required. Therefore, the second and third issue raised by the complainant regarding compensation becomes superfluous.

### **Findings and directions of the authority**

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

29. The respondent submitted that this hon'ble authority does not possess requisite jurisdiction to adjudicate on this matter by virtue of the arbitration clause, contained in clause 36 of the agreement between the parties. The authority is of considered opinion that amendment of Sec. 8 of the Arbitration and Conciliation Act does not have the effect of nullifying the ratio of catena of judgments of the Hon'ble



Supreme Court, particularly in *National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506*, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.

Further, in *Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015*, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a consumer.

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

#### **Directions of the authority**

31. 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 is directed to pay the interest so accrued on the amount paid by the complainant i.e. Rs.5,99,99,157/- at the prescribed rate i.e. 10.75% for every month of delay from the due date of possession i.e. 21.08.2017 till the actual date of handing over of the possession.
- (ii) The interest so accrued from the due date of handing over of possession till the date of order amounting to Rs.81,68,412/- be payable within 90 days from the date of decision.
- (iii) Thereafter, the monthly payment of interest i.e. Rs.5,37,492.44/- till handing over of the possession, so accrues shall be paid by 10th of every succeeding month.



32. The project is registrable but has not been registered by the promoter. The authority has decided to take suo-moto cognizance against the promoter for not getting the project registered and for that separate proceeding will be initiated

against the respondent under section 59 of the Act by the registration branch.

33. The order is pronounced.

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

**(Samir Kumar)**

Member

**(Subhash Chander Kush)**

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 27.11.2018

Judgement Uploaded on 05.01.2019

HARERA  
GURUGRAM

