

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

Complaint no. : 1012 of 2018
First date of hearing : 07.02.2019
Date of decision : 07.02.2019

Daljit Singh Dalal,
Address: H. no 29, Sector 30, near Shivam
Hospital, HUDA, Gurugram-122001.

Complainant

Versus

M/s VSR Infratech Pvt. Ltd.
(through its director Mr. Rakesh Jain)
Address: Ground floor, Plot no.14,
Sector 44, Institutional Area,
Gurugram-122003.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Sudesh Kumar Yadav Advocate for the complainant
Shri Daljit Singh Dalal Complainant in person
Shri Amarjeet Kumar Advocate for the respondent

ORDER

1. A complaint dated 29.07.2018 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 Daljit Singh Dalal, against the promoter M/s VSR Infratech Pvt. Ltd., on account of violation of the clause 32 of space buyer's



agreement executed on 26.05.2012 in respect of service apartment described below for not handing over possession by the due date and not refunding the amount after cancellation vide letter dated 06.11.2017 in violation of clause 17 and 18 of the agreement which is an obligation of the promoter under section 11 of the Act *ibid*.

2. Since, the space buyer's agreement has been executed on 26.05.2012 i.e. prior to the commencement of the Act *ibid*, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of contractual obligation on part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.
3. The particulars of the complaint are as under:

1.	Name and location of the project	"114 Avenue", Sector 114, Gurugram.
2.	Nature of the project	Commercial colony
3.	Project area	2.968 acres
4.	Registered/ not registered	Not registered
5.	DTCP license no.	72 of 2011 dated 20.07.2011
6.	Allotment letter	16.11.2011
7.	Date of execution of space buyer's agreement	26.05.2012



8.	Service apartment/unit no. as per the said agreement	6B-29, 6 th floor
9.	Unit measuring	806.87 sq. ft.
10.	Payment plan	Instalment payment plan [annexure V of the agreement]
11.	Consideration amount as per the said agreement	Rs.52,20,449/- (excluding taxes)
12.	Total amount paid by the complainant as admitted by the respondent	Rs.33,72,970/-
13.	Due date of delivery of possession as per clause 32 of the said space buyer's agreement [i.e. within 36 months of signing of this agreement (26.05.2012) or within 36 months from the date of start of construction of the said building (19.02.2012), whichever is later.]	26.05.2015 Note: The said agreement being executed later, the due date is computed from the signing of the said agreement.
14.	Delay in handing over possession till the date of cancellation of the said unit?	2 years 5 months 11 days
15.	Cancellation of allotment letter sent to the complainant by the respondent	06.11.2017 Annexure P/15 of complaint



4. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainant and the respondent. A space buyer's agreement dated 26.05.2012 is available on record for the aforesaid unit/service apartment according to which the possession of the said unit was to be delivered by 26.05.2015.

The respondent has cancelled the said allotted unit vide letter dated 06.11.2017. The respondent has not refunded the balance amount after cancellation in violation of clause 17 and 18 of the agreement. Therefore, the promoter has not fulfilled their committed liability.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The respondent through its counsel appeared on 07.02.2019. The case came up for hearing on 07.02.2019. The reply filed on behalf of the respondent has been perused. The complainant has filed a rejoinder dated 22.01.2019 wherein he has reasserted the facts of the complaint and has denied all the contentions raised by the respondent in its reply.

Facts of the complaint

6. Briefly stated, the facts of the complaint are that in the month of June 2011, the respondent started with big promise of assured return of 12% p.a. in their advertisement and confirmed that the service apartment shall be world class and operation and management shall be by "Royal Orchid Hotels Ltd." - a five-star hotel management company as per clause 23 of the space buyer's agreement dated 26.05.2012. Later on, without even caring to inform the allottee, the respondent



advertised in leading newspapers that the world class service apartments at 114 Avenue and 68 Avenue to be managed by Australian leading hotel management company- 'Leisure Inn', an international chain of "Stay Well". Only when the complainant repeatedly asked for refund of the money due to inordinate delay, it was informed more than six years later that there is no operator thereby the assured return stands withdrawn. Therefore, false and lucrative advertisements and lavish brochures were given, thereby violating section 12 of the Act *ibid*.

7. The complainant submitted that by the time space buyer's agreement was signed on 26.05.2012, the complainant had already paid Rs.9,93,176/- on false promise/representation by the respondent as 20% earnest money. As per clause 20 of the said agreement, in case the allotment is cancelled by the allottee the respondent shall forfeit the total deposit at that time. Clause 67 of the said agreement revokes and supersedes all previous discussions/correspondence whether oral written or implied. Thus, the respondent from the very beginning had intention to deceive the complainant fraudulently, intentionally and malafidely which was proved by subsequent actions of the respondent also.



8. The complainant submitted that from the annexures it is clear that there were only the demands of instalments by the respondent and the complainant's queries were answered by reminders for payment without actual construction stage of the project to which the demand was linked. Till 14.02.2014, the complainant had paid Rs.33,72,970/- i.e. 60% of basic cost+ 100% EDC+ 100% tax. Thereafter, he stopped making payment because there was no construction activity at the project site. Whereas a year later, vide advertisement in Sunday Times of India, New Delhi dated 15.02.2015, the respondent offered to buy service apartments by paying 40% now and balance on possession + 12% assured return per annum.
9. The complainant submitted that the construction started on 19.02.2012 and as per clause 32, the company should have given possession of the said unit within 36 months i.e. before 19.02.2015. There is nothing at store even as of now a sorry state of affair more so the booked service apartment stands shelved.
10. The complainant submitted that the respondent is clearly abusing the process of law. The complainant exhausted all the options of amicable settlement of issue and even for that sake agreed to accept the deduction from the total deposit by the



unilateral action of the respondent but the respondent only wanted the original documents without even showing the refund cheque in advance. There was no option left but to file a police complaint. After filing two police complaint, the respondent verbally agreed to refund the deposited amount without interest before December 2018 but neither confirmed the same in writing nor even showed some intention to comply with the same. Even the legal notice served by the complainant remains unacknowledged.

11. Issues raised by the complainant are as follow:

- i. Whether the respondent has breached the space buyer's agreement by not delivering the possession of the said unit and there is no reasonable justification for delay?
- ii. Whether the complainant is entitled for refund of entire amount along with interest as per the provisions of the Act *ibid*?

Relief sought by the complainant:

12. The complainant is seeking refund of entire amount paid i.e. Rs.33,72,970/- along with interest from the date of each individual payment, on account of failure to provide the possession of the property in timely manner.



Respondent's reply:

13. The respondent submitted that the present complaint is not maintainable or tenable in the eyes of law as the complainant has approached this hon'ble authority with unclean hands and has not disclosed the true and material facts relevant to this case of the complainant. The respondent company is new company with a mission and vision to become the number one company and endeavor to give its customers quality construction and possession in time.
14. The respondent submitted that the complainant is no more an "allottee" as defined under the section 2(d) of the Act *ibid*. The complainant's unit was cancelled by the respondent on account of non-payment and thus ceases to be an allottee as defined under the Act *ibid*.
15. The respondent submitted that the complainant has entered into an agreement with the respondent wherein the complainant was under the obligation to fulfill the terms and conditions of the contract, which he had failed to do and thus the unit was cancelled. The complainant by way of the present complaint cannot reinstate the default already made by the complainant. The complainant in the present complaint is alleging the delay in delivery of the project, however the same cannot be relied upon by the complainant since the



complainant has failed to fulfill its obligation under the contract and thus cannot enforce upon the reciprocal promise of timely delivery of the project.

16. The respondent submitted that the complainant's reliance on section 18 of the Act *ibid* is misconstrued and cannot be relied upon by the complainant. The present complaint thus should be dismissed on this ground itself. It is further submitted that the cancellation of the unit was done on account of failure of the complainant to pay the dues. Timely payment of the demand was essence of the contract which the complainant had failed to adhere. Even section 19(6) and (7) of the Act *ibid*, cast upon the duty on the allottee to pay the demand on time, which the complainant has failed to abide and thus no relief can be granted by this hon'ble authority under section 18 read with section 34(f) of the Act *ibid*.

17. The respondent submitted that the present complaint pertains to compensation and interest for a grievance under section 12, 14, 18 and 19 of the said Act and are required to be filed before the adjudicating officer under rule 29 of the rules *ibid* read with section 31 and section 71 of the said Act and not before this hon'ble authority under rule 28 *ibid*.



18. The respondent submitted that the said Act is a complete code in itself and as per provisions of the Act, the legislature had categorically framed two separate bodies i.e. the authority under section 20 for regulatory functions under the said Act and the adjudicating officer under section 71 of the said Act for adjudicatory function. Thus there is a clear distinction under the said Act including the regulatory an adjudicatory function as provided under the Act *ibid*. Even the apex court in the matter of ***Brahm Dutt v. Union of India (AIR 2005 SC 730)*** has observed as under:

“if there are advisory and regulatory functions as well as adjudicatory functions to be performed, it may be appropriate to create two separate bodies for the same.”

Thus, based on this principle the hon’ble authority by accepting/admitting the present complaint is exercising the adjudicatory function which is against the principle of law.

19. The respondent submitted that the complainant has willfully agreed to the terms and conditions of the agreement and are now at a belated stage attempting to wriggle out of their obligations by filing the instant complaint before this hon’ble authority. The relief qua compensation can further be not awarded by this hon’ble authority as the authority does not have the jurisdiction to award any relief of compensation in accordance with the rules framed thereunder.



20. The respondent submitted that in the present complaint, as per clause 32 of space buyer's agreement dated 26.05.2012, the company was to handover the possession of the unit within 36 months from the date of signing of this agreement or within 36 months from the date of start of construction of the said building, whichever is later unless there was delay due to force majeure conditions or due to other reasons mentioned in clause 32. Therefore, the respondent was supposed to handover possession within a period of 36 months from the date of signing of agreement. Despite exercising diligence and continuous pursuance of project to be completed, the project could not be completed due to following reasons:

- i. Due to non-completion of Dwarka Expressway which is a part of master plan 2031. The Dwarka Expressway was plagued by land acquisition issues, causing a delay in completion of basic structure.
- ii. The company faced the problem of sub soil water which persisted for a period of 6 months and hampered excavation and construction work. The problem still persists.
- iii. On 19.02.2013, the Office of Executive Engineer, HUDA Division No. II, Gurugram vide memo no.3008-3181 has



issued instruction to all developers to lift tertiary treated effluent for construction purpose from sewage treatment plant Behrampur. Due to this instruction, the company faced the problem of water supply for a period of 6 months.

- iv. The company is facing labour problem for last 3 years continuously which has slowed down the overall progress of the project.
- v. The contractor of the project stopped working due to his own problems and the progress of project was completely at halt due to stoppage of work at site.
- vi. The typical design of 5th floor slab casting took a period of more than 6 months to design the shutting plans by structural engineer which hampered the overall progress of work.

21. The respondent submitted that the parties are bound by the terms and conditions mentioned in the said agreement. The said agreement was duly signed by the complainant after properly understanding each and every clause contained in the agreement. The complainant was neither forced nor influenced by respondent to sign the said agreement. It was



the complainant who after understanding the clauses signed the said agreement in their complete senses.

22. The respondent submitted that it is justified to forfeit the earnest money along with delayed interest as per the agreement. Thus, the complaint is misconceived and not maintainable. The cancellation letter was issued after numerous reminders and demands as per the terms of the space buyer's agreement.

23. The respondent submitted that without prejudice to the above, the statement of objects and reasons of the said Act clearly states that the RERA is enacted for effective consumer protection. RERA is not enacted to protect the interest of investors. As the said Act has not defined the term consumer, therefore the definition of 'consumer' as provided under the Consumer Protection Act, 1986 has to be referred for adjudication of the present complaint. The complainant is an investor and not a consumer.



24. The respondent submitted that the complainant applied for allotment of service apartment having super area of 1125 sq. ft. @ Rs.6,000/- per sq. ft. via application form dated 14.06.2011. However, on the request of the complainant, the company has allotted unit no. 6B-29 admeasuring 806.70 sq.

ft. of super area instead of 1125 sq. ft. The space buyer's agreement was executed between the complainant and the respondent on 26.05.2012. The price of the property as per the said agreement is Rs.52,20,449/- plus taxes, duties and levies and the complainant has paid Rs.33,72,970/- till date.

25. The respondent submitted that the present complaint pertains to the alleged delay in delivery of possession, cancellation of the serviced apartment and the complainant is seeking the refund of the entire amount deposited. The complaint has been filed in total disregards to the terms of space buyer's agreement executed between the parties. In circumstances of default/breach the terms of agreement, the respondent company has rightly cancelled the allotment vide letter dated 06.11.2017 as per clause 17, 18 and 19 of the said agreement.
26. The respondent submitted that the advertisement issued was general in nature and subject to terms and conditions. The advertisement was issued for two projects of the respondent and was not solely for the project in which the complainant invested. The proposed service apartments in both the projects were to be initially managed by Leisure Inn. However, due to unforeseen circumstances the same was changed and the company thereafter, entered into a term sheet with Royal Orchid Hotels Ltd. as agreed by the complainant in the space



buyer's agreement. As per clause 24 of the said agreement, the allottee agrees and undertakes that the service apartments being sold to him will be leased out back to the company or operator or any other agency/third party that may be appointed by the company for such period and on such terms and conditions including initial lock in period as may be finalized by the company. Further, clause 25 of the agreement states that the allottee further confirms and agrees to execute a separate detailed agreement with the company/third party/operator nominated/appointed by the company at the time of final call notice of full and final dues. The project was delayed due to reasons beyond the control of the respondent company.

27. The respondent submitted that the hon'ble authority has no jurisdiction to decide the issue of abuse of dominant position and hon'ble Competition Commission is the sole authority to decide the issue in accordance with law. The space buyer's agreement was executed between the parties on 26.05.2012 and the amount paid till then was Rs.9,93,176/-. Clause 18 of the said agreement states that timely payment of the instalment and other charges as stated in the schedule of payment is essence of the agreement. The complainant defaulted in making payments despite sending various demand notices, reminders etc. The respondent company



issued cancellation letter dated 06.11.2017 to the complainant, cancelling the allotment and forfeiting the earnest money paid.

28. The respondent submitted that the allegations made herein by the complainant cannot be summarily tried and the complainant needs to prove the same by way of evidence, for which the civil court is appropriate forum. All the demands were raised by the respondent company as per the terms and conditions of the said agreement and construction linked payment plan opted by the allottee. The complainant failed to make payments despite repeated reminders. The complainant has backed out from his set of obligations, leaving the respondent company with no other option but to cancel the allotment.

Determination of issues

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

29. With respect to the **first issue**, as per clause 32 of space buyer's agreement dated 26.05.2012, the possession of the flat was to be handed over within 36 months from the date of signing of this agreement or within 36 months from the date



of start of construction of the said building whichever is later. The said agreement was executed on 26.05.2012 and the construction was started on 19.02.2012. Thus, the due date shall be computed from 26.05.2012. The clause regarding the possession of the said unit is reproduced below:

“32. That the company shall give possession of the said unit within 36 months of signing this agreement or within 36 months from date of start of construction of the said building, whichever is later...”

30. Accordingly, the due date of possession is 26.05.2015 and the said allotment was cancelled by the respondent vide letter dated 06.11.2017. The possession has been delayed. The respondent has issued the cancellation letter after due date of possession i.e. 26.05.2015 and the cancellation letter was even issued on 06.11.2017 which is after 2 years 5 months and 11 days from due date of possession. Also, the respondent has not refunded the amount after cancellation which is in violation of clause 17 and 18 of the agreement. Therefore, the respondent has breached the said agreement by not delivering the possession of the said unit and not refunding the amount after cancellation of the said allotment.

31. With respect to the **second issue**, the complainant is seeking refund of the entire money paid towards the said unit along with interest for delay in handing over possession. An offer



was made by the respondent to the complainant that they are unable to provide service apartment and in lieu of that a fully furnished some other apartment/unit was offered in lieu of the booked one but the complainant declined/refused. On 06.11.2017, the respondent issued him cancellation letter. In pursuance of the said cancellation letter, the complainant went to the office of respondent wherein he was asked to submit original papers but no amount was ever paid to the buyer in lieu of cancellation, as such, the offer remained in balance and it could not be pragmatized. Since, the respondent has miserably failed/defaulted in fulfilling his obligations as per the said agreement, the complainant is well within his right to seek refund along with prescribed rate of interest.

Findings of the authority

32. **Jurisdiction of the authority-**The 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. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire



Gurugram District. In the present case, the project in question is situated within the planning area of Gurugram district, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

33. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter. 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.
34. As per clause 32 of the space buyer's agreement dated 26.05.2012 for said unit/service apartment no. 6B-29, 6th floor in the project '114 Avenue', Sector 114, Gurugram possession within a period of 36 months from the date of execution of the said agreement which comes out to be 26.05.2015. The complainant has so far made an amount of Rs.33,72,970/- to the respondent for the booked unit against a total sale consideration of Rs.52,20,449/-. It was construction linked plan.
35. An offer was made by the respondent to the complainant that they are unable to provide service apartment and in lieu of that a fully furnished some other apartment/unit was offered in lieu of the booked one but the complainant declined/refused.



On 06.11.2017, the respondent issued him cancellation letter, the operative part which reads as under:

"Your cheque, against refund is ready with us. Please come to collect the same with all original documents which are issued to you by the company."

36. In pursuance of cancellation letter, complainant went to office of respondent wherein he was asked to submit original papers but no amount was ever paid to the buyer in lieu of cancellation, as such, the offer remained in balance and it could not be pragmatized. The buyer was left with no option but to lodge a complaint with the police.
37. Now the complainant vide this complaint has prayed for refund of amount paid by him along with interest @ 10.75%. Since, the respondent has miserably failed/defaulted in fulfilling his obligations as per the said agreement, the complainant is well within his right to seek refund along with prescribed rate of interest @10.75% per annum.

Directions of the authority

38. 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 direct the respondent to refund the entire amount paid by the



complainant along with prescribed rate of interest @10.75% per annum within 90 days from the date of decision.

39. As the project is registerable and has not been registered by the promoter, the authority has decided to take suo-moto cognizance for not getting the project registered and for that separate proceeding will be initiated against the respondent under section 59 of the Act *ibid*. A copy of this order be endorsed to registration branch for further action in the matter.
40. The order is pronounced.
41. Case file be consigned to the registry.

(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

(Subhash Chander Kush)

Member

Dated: 07.02.2019

Judgement uploaded on 18.03.2019

