

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

Complaint no.	:	3438 of 2020
Date of filing complaint:		22.10.2020
First date of hearing	:	22.12.2020
Date of decision	:	05.07.2022

1. Ravi Kyal
2. Manita Kyal

**Both RR/o:** Boulevard 2-92, The Address-  
Wadhwa LBS Marg, Ghatkopar west, Opposite  
R-City Mall, Mumbai-400086, Maharashtra

**Complainants**

Versus

M/s Vatika limited  
R/o: Vatika triangle, 4<sup>th</sup> floor, Sushant Lok  
phase-I, block- A, Mehrauli Gurgaon road,  
Gurugram-122002, Haryana

**Respondent**

**CORAM:**

Dr. K.K. Khandelwal  
Shri Vijay Kumar Goyal

**Chairman  
Member**

**APPEARANCE:**

Surbhi Garg Bhardwaj and Gaurav Bhardwaj Advocates for the complainants  
Sh. Venket Rao Advocate for the respondent

**ORDER**

1. The present complaint has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the

Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

**A. Unit and project related details**

2. The particulars of unit details, sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Project name and location	"Gurgaon 21", Vatika India Next, Sector 83, Gurugram.
2.	Project area	11.8 acres
3.	Nature of the project	Residential group housing complex
4.	DTCP license no. and validity status	83 of 2009 dated 07.12.2009 valid up to 06.12.2024 84 of 2008 dated 11.04.2008 valid up to 10/04/2020
5.	Name of licensee	Growmore Buildtech Pvt. Ltd. & Mark Buildtech Pvt. Ltd.
6.	Unit no.	304, floor 3, block C4 (page 52 of complaint)
7.	Measurement of unit	1776.77 sq. ft
8.	Date of execution of apartment buyer's agreement	13.01.2011 (as per stamp on page 50 of complaint)
9.	Date of Allotment letter	19.10.2010

		(at page 46, annexure P/2 of complaint)
10.	Payment plan	Construction linked payment plan (at page 80 of complaint)
11.	Total consideration	Rs.66,13,896/- (as per account statement dated 08.04.2016 at page 100 of the complaint).
12.	Total amount paid by the complainants	Rs.62,41,084/- (as per account statement dated 08.04.2016 at page 100 of the complaint).
13.	Due date of delivery of possession as per clause 10.1 of apartment buyer's agreement - 3 years from the date of execution of the agreement [Page 61 of ABA]	13.01.2014
14.	Date of Offer of possession	17.08.2016 (page 116 of complaint)
15.	Possession take letter	11.09.2016 (page 117 of complaint)
16.	Date of Occupation certificate	Not received
17.	Delay in handing over of possession till date of decision i.e. 05.07.2022	8 years 5 months 22 days

**B. Facts of the complaint**

3. The complainants have submitted that in the month of October 2020, respondent approached them regarding purchase of a residential apartment in the project "Vatika India Next" and after they booked an apartment in the said project of the respondent company by filling an application form and paying an amount of Rs 6,30,576/-. On 19.10.2010 an allotment letter was issued to the

complainants thereby allotting a unit bearing no C4-304 to them. After almost 2 months from the date of booking an apartment buyer's agreement was executed on 13.01.2011 between the complainants and the respondent for the aforementioned unit bearing no C4-304, located on 3<sup>rd</sup> floor, tower C4 and having a super area admeasuring a of 1776.77 sq. ft for a total consideration of Rs 66,13,896/.

4. The respondent had undertaken and proposed to complete construction, apply and obtain occupation certificate from the competent authority and handover possession of the apartment to the complainants by 13.01.2014. Hence, the respondent was liable to hand over possession of the apartment to them by 13 .01.2014.
5. The complainants have submitted that they paid a total sum of Rs 68,14,051/-towards the aforesaid residential flat in the project from October 2010 till date as and when demanded by the respondent, as against the total sale consideration of Rs. 66,13,896/-. According to the complainants the respondent failed to offer the possession of the apartment to them by the stipulated date or thereafter despite receiving various notices and reminders.
6. The complainants have submitted that as per clause 8 of the agreement, upon delay in payments, the allottee could be made liable to the extent of paying 18% interest per annum. On the contrary, as per clause 11.5 upon delay in handing over possession,

the respondent company would be liable to pay compensation only to the extent of Rs 5/- per sq. ft. of the super area of the apartment for the period of delay.

7. The complainants have submitted that they approached Hon'ble NCDRC in January 2016 for seeking relief of the possession along with delay possession. However, owing to some technicality, the case had to be withdrawn. Meanwhile, the respondent sent a letter of intimation of possession dated 08.04.2016 to the complainants informing them about the possession formalities which were to be commenced after seeking payment of final instalment due 'at the time of possession'.
8. The complainants have submitted that on 18.04.2016 they sent an e-mail to the respondent requesting for a copy of the occupation certificate issued by the concerned authority on the basis of which possession was to be offered in accordance with clause 10.2 of the agreement. However, vide e-mails dated 19.04.2016, the respondent replied that the matter is sub-judice in the court and all updates would be sent in accordance with the proceeding. To it vide e-mails dated 22.04.2016, the complainants sought further details and updates, but to no avail. Later, on vide e-mail dated 25.04.2016, the respondent gave a vague response to the complainants that necessary completion certificate has been obtained from the architect/engineer who supervised the

construction in accordance with law but the same cannot be shared with individual clients. To this vide e-mails dated 26.04.2016 and 11.05.2016, the complainants specifically informed the respondent that the completion certificate needs to be issued by the competent authority failing which the demand due at the time of possession would be unwarranted, but all in vain as the respondent simply refused to give a concrete reply to the same. Rather, vide e-mail dated 26.04.2016, the respondent informed that the company's stand shall remain the same.

9. It is further submitted that along with the intimation of possession letter dated 08.04.2016, the respondent had sent an indemnity cum undertaking to be signed by the complainants and only then possession could be taken by them. It was laid down in the said undertaking that post signing it, the allottees would have no right against the builder and all the liabilities of the builder would cease henceforth. To this, the complainants took a serious note and vide e-mail dated 11.05.2016, conveyed to the respondent that they cannot sign such an unfair undertaking.
10. That being aggrieved by the aforesaid lapses on part of respondent and inexplicable delay in handing over possession, the complainants filed a case before hon'ble State Consumer Disputes Redressal Commission, Panchkula in May 2016.

11. The complainants have submitted that on 18.05.2016, the respondent sent a reminder for intimation of possession wherein the due date of possession was extended upto 02.06.2016. It was also unjustifiably specified that failure to provide indemnity cum undertaking would attract simple interest per annum @15-18% on the balance sale consideration on account of delayed payment and holding charges of Rs 5/- per sq. ft. per month along with maintenance charges of Rs 1.97/- per sq. ft. per month and the allotted apartment may be cancelled along with forfeiture of earnest money and other non-refundable amounts.
12. The complainants have submitted that on 17.08.2016 while the case mentioned above before Hon'ble SCRDC was pending, the respondent sent a letter of offer of possession thereby inviting the complainants to take possession between 30.08.2016 to 14.09.2016. Accordingly, on 11.09.2016, the possession was taken by the complainants here after making final payment due against the unit in question. On 12.07.2017, the hon'ble SCDRC disposed off the case filed by the complainants thereby awarding the relief of delayed possession charges @7% interest per annum from the due date of possession till actual handing over along with compensation @ Rs 5/- per sq. ft. for the period of delay and compensation for mental harassment.

13. The complainants have submitted that upon failure by the respondent in honouring the said order, the complainants filed an execution petition which was honoured in part and then again an execution petition was filed after which the respondent paid the awarded decree amount. Upon requesting the hon'ble SCDRC to direct the respondent to execute the conveyance deed, the respondent sought two months' time for registration of conveyance deed. The same forms a part of the execution order dated 13.12.2019 passed by SCDRC.
14. The complainants have submitted that since taking over of possession on 11.09.2016 till date, the complainants have been painstakingly pursuing the respondent to register the conveyance deed for the unit in question in their favour, but all in vain. It was only vide e-mail dated 16.12.2019, the respondent said that registry shall be done by April-May 2020.
15. The complainants have submitted that the aforesaid conduct of the respondent in delaying the registration of conveyance deed further despite making commitment in the court to do the same within 2 months was quite suspicious considering the fact that the conveyance deeds of residents of other towers in the project in question were already done. Upon further inquiries from other buyers of the project in question in order to find out the exact reason behind the evasive attitude of the respondent regarding



registration of conveyance deed, the complainants were startled to know that the respondent failed to obtain the occupation certificate for tower C4, i.e., the tower where the unit in question is located and tower A.

16. The complainants have submitted that they immediately rushed to the respondent's office in order to enquire about their aforesaid misconduct and fraudulent act of and to which the representatives of the respondent company simply said that the occupation certificate for the tower in question shall be received soon. The complainants were completely taken aback by the said submission of the respondent.
17. The complainants have submitted that the possession of a unit cannot be offered without obtaining the occupation certificate from the concerned authorities as the said OC is legal mandate of the fact that the premises is safe in all regards and is fit to be occupied and reside and is in accordance with the requirements laid down and as per the sanctions approved by the said authorities. Accordingly, the aforementioned offer of possession dated 17.08.2016 is outrightly illegal and elucidate the fraudulent conduct of the respondent.
18. The complainants have submitted that the fact that possession was being offered without obtaining occupation certificate was concealed from the complainants at the time of said offer. Rather, when they orally enquired about receipt of all the necessary

sanctions for the unit in questions, the respondent very cleverly submitted that all the approvals are in place. It was only upon conducting an inquiry for the reasons behind non execution of conveyance deed that the complainants came to know about the misconduct on the part of respondent.

19. The complainants have submitted that fact of concealing the non-receipt of OC and offering possession without OC is not only a violation of the apartment buyer's agreement dated 13.01.2011 but is also a violation of section 11(4)(b) of the Act. Accordingly, the respondent company must be penalized under section 61 of the Act to the extent of 5% of the project cost on account of violation of section 11(4)(b) of the said agreement.
20. The complainants have submitted that as per section 11(4)(a) of the Act, the promoter is liable to pay delayed possession interest to the allottee of an apartment, building or project for delay or failure in handing over of such possession as per the terms of agreement of the sale.

**C. Relief sought by the complainants:**

21. The complainants have sought following relief(s):
  - (i) To direct the respondent to obtain occupation certificate for tower 'C4' and issue fresh offer of possession letter to the complainants.

- (ii) To direct the respondent to register the conveyance deed and transfer title in favour of the complainants upon receipt of occupation certificate in accordance with section 17 of RERA, 2016.
- (iii) To award delay interest at the prescribed rate for every month of delay from the date of handing over of possession, i.e., 11.09.2016 till offer of valid possession after receipt of occupation certificate.

**D. Reply by the respondent:**

22. Respondent has contested the complaint and filed a reply which may be summed up as hereunder:

- i. That at the very outset, it is stated that the instant complaint has been preferred by the complainants on frivolous and unsustainable grounds and they have not approached this authority with clean hands. The instant complaint is not maintainable in the eyes of law and is devoid of merit and is fit to be dismissed *in limine*.
- ii. That the present complaint is an abuse of the process of this hon'ble authority and is not maintainable. The complainants are trying to suppress material facts relevant in the matter. The complainants are making false, misleading, frivolous, baseless, unsubstantiated allegations against the respondent with malicious intent and sole purpose of extracting illegitimate gains from the respondent.

- iii. That the complaint filed by the complainants before the Id. authority besides being misconceived and erroneous, is untenable in the eyes of law and liable to be rejected. The complainants have misdirected themselves in filing the above captioned complaint before this authority as the reliefs being claimed by them cannot be said to even fall within the realm of jurisdiction of this authority. It is submitted that the complainants had already approached different courts/ commission/ forums to redress their issues/grievances. It is pertinent to note that the complainants had already approached National Commission Disputes Redressal Commission by way of complaint case in January 2016 and which was withdrawn due to some technical issues as stated in the complaint. It is submitted that the complainants thereafter again on May 2016 had filed a complaint case on same cause of action before the hon'ble State Consumer Dispute Redressal Commission, Panchkula and the same was finally disposed of on 17.08.2016 by passing a direction to the respondent to compensated them for delay of possession and mental harassment. Therefore, the respondent duly abided by the orders and has already made the payment by way of cheques in terms of the order passed by this hon'ble bench.

- iv. That the complainants again filed an execution petition before the hon'ble SCDRC. It is submitted that the complainants had already proceeded before the hon'ble SCDRC for adjudicate upon the same issues/cause of action and so is forbidden as per *Rule of Res Judicata* to again approach another court/commission for adjudication of same cause of action. Therefore, it is submitted that the complainants with a malicious intention had approached the authority without the jurisdiction and when an order passes without jurisdiction is a nullity. Therefore, it would be pertinent to make reference to some of the provisions of the code of civil procedure which clearly forbids the authority to proceed with the present complaint. It is a settled law principle that as per section 11 of CPC, the courts cannot proceed with the subject matter which was already decided by the court of same or concurrent jurisdiction between the same parties and the parties litigating under the same title. It is submitted that the present complaint is not maintainable before the Id. authority under section 11 of Code of Civil Procedure i.e., principle of Res judicata.
- v. That it is submitted that the complainants voluntarily with free will and consent has taken over the possession of the unit on 11.09.2016 after satisfying with all the terms and conditions of the handing over of possession letter dated 11.09.2016,



which has already been annexed by complainants with the complaint. The respondent submitted that the complainants executed the unit handover letter dated 11.09.2016 whereby they took over peaceful and vacant physical possession of the unit in question after fully satisfying themselves with regard to its measurements, location, dimension, approvals and development etc. and enjoying the same at their disposal. It was further explicitly stated by the complainants in the aforesaid letter that upon acceptance of possession, they would not be entitled to raise any claim of any nature whatsoever regarding any variation in the size, dimension, area, location or legal status, delay in possession of the unit in question. The respondent relying upon the aforesaid representation had changed its position to its detriment and proceeded to deliver possession of the unit in question. Therefore, the instant complaint is barred by estoppel. The undertaking given by the complainants in the letter dated 17.08.2016 is reproduced herein for ready reference:

*"It is certified that I/we have taken over the possession of the aforesaid unit number and the car parking space (if applicable) after fully satisfying myself/ourselves with regard to the measurements, specifications and fittings/fixtures installed therein and compliance by the developer of all other terms and conditions of the builder buyer agreement and I/we have no complaint/grievance/claim whatsoever in respect thereof. i/we certify that*

*delay, if any, in the construction of the said unit has happened due to bonafide/force-majeure reasons which I/we fully understand and condone, and I/we shall not make any claim on account thereof or any other account in future."*

- vi. It is appropriate to mention here that the complainants took the possession voluntarily with free will and post giving aforesaid representation and hence, the present complaint is not maintainable as they are enjoying the peaceful possession of the apartment since 11.09.2016. The complainants have waived off the right to claim the delay interest charges way back in 2016 and therefore, the present complaint is nothing but just an afterthought way to harass the respondent.
23. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

**E. Jurisdiction of the authority:**

**E. I Subject matter jurisdiction:** Section 11(4)(a) of the Act, 2016 provides that the promoters shall be responsible to the allottees as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

***Section 11(4)(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;*

***Section 34-Functions of the Authority:***

*34(f) of the Act provides 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.*

24. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

**F. Findings regarding relief sought by the complainants:**

**Relief sought by the complainants:**

**F.I Award delay interest at the prescribed rate for every month of delay, from the due date of handing over possession, i.e., 15.05.2012 till offer of valid possession after receipt of OC.**

25. Admittedly, the possession of the allotted unit has already been offered to the complainants on 17.08.2016 and taken over by them 11.09.2016. So, now the question for consideration arises as to whether the complainants are entitled to delay possession charges from the due date of possession i.e., 13.01.2014 till actual handing over of possession after the receipt of occupation certificate.
26. It is not disputed that the complainants have already approached National Consumer Disputes Redressal commission by way of filing complaint in January 2016 and which was later on withdraw due to some technical issues. It is also a fact that the complainants later on approached State Consumer Disputes Redressal Commissions, Panchkula for the same relief i.e., delay possession charges and the complaint was finally disposed of on 12.07.2017 by observing as under:-



*"As a sequel to above discussion when the O.P. did not deliver possession in time it is liable to pay compensation @Rs. 5/- per sq. feet after the expiry of the period of three years, agreed to delivery possession deposited amount for that period. The complainants is also entitled for Rs. 31,000/- as of mental harassment and physical harassment and Rs. 21,000/- as litigation expenses."*

27. It has also come on record that the order passed by State Consumer Disputes Redressal Commissions became final as an execution of the same was filed on 15.02.2019, and the same was disposed of on 13.12.2019 by observing that the entire decretal amount had been received by the decree holders. So, the same stood dismissed as withdrawn. This is the third round of litigation w.r.t the same relief besides a direction for occupation certificate and execution of conveyance deed of the subject unit. First of all, when the complainants have already been awarded and paid delay possession charges on the basis of orders of the competent authority, then the second complaint on the same cause of action is not maintainable and is barred by the principle of res-judicata under section 11 of Code of civil Procedure, 1908. A reference in the regard may also be made to the ratio of law laid down in case of ***Ireo Grace Realtech Pvt. Ltd. VS Abhishek Khanna (5785 of 2019) decided on 11.01.2021***, and wherein the hon'ble Apex court of the land observed that the laws of the country do not permit forum shopping and an aggrieved can only approach one of the two for dispute settlement of the same matter. It was also observed that:

*"An allottee may elect or opt for one out of the remedies provided by law for redressal of its injury or grievance. An election of remedies arises when two concurrent remedies are available, and the aggrieved party chooses to exercise one, in*

*which event he loses the right to simultaneously exercise the other for the same cause of action."*

25. So, in view of law laid down by the hon'ble Apex court of the land the complaint seeking delay possession charges before the authority is not maintainable. Though, the claimants are claiming delay possession charges till handing over of possession on the basis of occupation certificate, but they are admittedly in possession of the subject unit since 11.09.2016. So, if the promoter offered them possession illegally, then he can be proceeded under the law and penalty can be imposed for handing over possession to an allottee without receipt of occupation certificate.

**F.II Direct the respondent to register the conveyance deed and transfer title in favour of the complainants upon receipt of occupation certificate, in accordance with section 17 of RERA,2016.**

26. The complainants are asking for the registration of conveyance deed and transfer of title in accordance with section 17 of the Act of 2016. The complainants have taken possession of the unit on 11.09.2016 on offer of the possession of the unit in question and whereas the possession was offered by the respondent/promoter without obtaining the OC. The respondent/promoter clearly violated the provisions section 11(4)(b) of the Act, 2016 as detailed in this order. Therefore, the respondent/promoter is under a mandatory obligation as per the statute and as per the BBA signed with mutual of consent of both parties for registration of conveyance deed after obtaining OC.

Clause 13 is reproduced below:

**13. Conveyance of the said Apartment***Clause 13.:*

*"The Company, its Associates Companies, its Subsidiary Companies as stated earlier shall prepare and execute along with the Allottee a conveyance deed to convey the title of the Said Apartment in favour of Allottee but only after receiving full payment of the total price of the Apartment and the parking space allotted to him/her and payment of all securities including maintenance security deposits and charges for bulk supply of electrical energy, interest, penal interest etc. on delayed instalments stamp duty, registration charges, incidental expenses for registration, legal expenses for registration and all other dues as set forth in this Agreement or as demanded by the Company from time to time prior to the execution of the Conveyance Deed. If the Allottee is in default of any of the payments as set forth in this Agreement then the Allottee authorizes the Company to withhold registration of the Conveyance Deed in his/her favour till full and final settlement of all dues to the Company is made by the Allottee and agrees to bear the consequences. The Allottee undertakes to execute Conveyance Deed within the time stipulated by the Company in its written notice failing which the Allottee authorizes the Company to cancel the allotment and terminate this Agreement in terms of Clause (12) of this Agreement and to forfeit out of the amounts paid by him/her the earnest money, delayed payment of interest any interest paid, due or payable, any other amount of a non-refundable nature and to refund the balance amount without any interest in the manner prescribed in Clause (12) Supra. The Allottee shall be solely responsible and liable for compliance of the provisions of Indian Stamp Act 1899 including any actions taken or deficiencies/penalties imposed by the competent authority(ies). Any increase/decrease in the Stamp Duty charges during the period when the case for execution of the Conveyance Deed of the allotted flat is being processed by the Company Shall be borne by/refunded to the Allottee."*

27. It is to be further noted that Section 11(4)(f) provides for the obligation of respondent/promoter to execute a registered conveyance deed of the apartment alongwith the undivided proportionate share in common areas to the association of the allottees or competent authority as the case may be as provided under section 17 of the Act of 2016. As envisaged in the below

mentioned section, the respondent/promoter is in clear contravention of section 11(4)(f) of the Act of 2016 and shall get the conveyance deed done after obtaining OC.

28. As far as the relief of transfer of title is concerned, the same can be clearly said to be the statutory right of the allottee as section 17(1) of the Act provide for transfer of title is reproduced below:

***“Section 17: - Transfer of title.—***

*17(1). The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws: Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate.*

29. Hence, in compliance of the above-mentioned provision of the Act of the 2016, the respondent/promoter shall transfer the title of common areas to the association of the allottee within 3 months from the date of issuance of occupation certificate.

**G. Directions of the authority:**

30. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligation cast upon the promoters as per the

function entrusted to the authority under section 34(f) of the Act of 2016:

- i. As the possession of the subject unit has already taken over by the complainants and they have received delay possession charges on the basis of order passed by State Consumer Disputes Redressal commissions, Panchkula. So, no relief under this head can be allowed.
  - ii. A direction is given to the respondent/builder to obtain occupation certificate of the project from the competent authority by completing all the formalities within a period of 3 months
  - iii. As and when OC of the tower of the allotted unit is received by the respondent/builder, then it will be obligated for him to arrange execution of conveyance deed of the unit in favour of the complainants on their depositing necessary charges within 3 months and falling which legal consequences would follow.
31. Complaint stands disposed of.
32. File be consigned to registry.

V.1-3  
(Vijay Kumar Goyal)  
Member

  
(Dr. K.K. Khandelwal)  
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 05.07.2022