

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

Complaint no. : 4371 of 2021
First date of hearing: 25.11.2021
Date of decision : 11.07.2022

Shakti Kumar Pandey
R/O: - C-426, Mahaveer Dazzle Hoodi, Whitefield,
Bangalore - 560048

Complainant

Versus

1. Shree Vardhman Infraheight Pvt. Ltd.,
3rd floor, Indraprakash Building, 21-Barakhamba
Road, New Delhi - 110001
2. PNB Housing Finance Limited
9th floor, Antriksh Bhawan, 22 KG Marg

Respondents

CORAM:

Dr. K.K. Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Ms. Abhijeet Gupta

Advocate for the complainant

Mr. Gaurav Rawat and Ms. Krishna
Sehrawat

Advocate for the respondents

ORDER

1. The present complaint dated 02.11.2021 has been filed by the complainant/allottee 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 complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.N.	Particulars	Details
1.	Name of the project	"Shree Vardhman Flora", Sector - 90, Gurugram, Haryana
2.	Project area	10.881 acres
3.	DTCP License no.	23 of 2008 dated 11.02.2008
4.	Name of Licensee	Moti Ram and anr.
5.	RERA registered/ not registered	Registered vide no. 88 of 2017 dated 23.08.2017
6.	Unit no.	1401 on 14 th floor, tower C1 [As per page no. 31 of the complaint]
7.	Super area	1300 sq. ft. [As per page no. 31 of the complaint]
8.	Date of allotment	17.01.2012 [As per page no. 31 of the complaint]

9.	Date of flat buyer agreement	24.01.2012 [As per annexure-D on page no. 74 of the complaint]
10.	Endorsement dated	18.04.2013 [As per NOC on page no. 73 of the complaint - From original allottee i.e., Vinod Dahiya to present complainant (Shakti Kumar Pandey)]
11.	Possession clause	Clause 14(a) The construction of the flat is likely to be completed <i>within 36 months of commencement of construction of the particular tower/ block in which the subject flat is located with a grace period of 6 months</i> , on receipt of sanction of the building plans/ revised plans and all other approvals subject to force majeure including any restrains/ restrictions from any authorities, non-availability of building materials or dispute with construction agency/ workforce and circumstances beyond the control of company and subject to timely payments by the buyer(s) in the said complex.
12.	Due date of Possession	20.09.2015 + 6 months as grace period = 20.03.2016 (The counsel for the respondent clarified that date

		of commencement of construction is 20.09.2012 as already decided by the authority in other similar matters/project)
13.	Sanction of loan	13.03.2013 [As per page no. 13 of reply by respondent No. 2]
14.	Date of tri-partite agreement	24.05.2013 [As per annexure R3 on page no. 16 of reply by respondent No. 2]
15.	Total sale consideration	Rs.35,94,000/- [As per NOC on page no. 73 of the complaint]
16.	Amount paid	40,56,554/- [As per page 42 of reply by respondent-builder]
17.	Amount of loan	Rs. 38,49,796/- [As per page no. 48 of reply by respondent No. 2]
18.	Occupation certificate	02.02.2022 [As per page 47 of the reply]
19.	Offer of possession	Cannot be made certain (As per page 51 of the reply)

B. Facts of the complaint

1. That the original buyer while searching for an apartment/accommodation was lured by the advertisements/brochures/sale representatives of the company to



- buy a house in the project namely "**Shree Vardhman Flora**" in Village Hayatpur, Sector-90, District Gurugram, Haryana.
2. That the representatives of the respondent company, sometimes in January 2011, met the original allottee, Mr. Vinod Dahiya, S/o Mr. Rattan Singh, R/o Gurugram, Haryana and who spoke very high on the reputation of the company qua delivery of the project on time and also handed over a brochure which projected a very interesting landscaping of the said project and went on to incite the original allottee to part with their hard earned money by way of making payments. The respondent-builder claimed that it has taken all due approvals, sanctions and government permissions towards development and the construction of project.
 3. That the original allottee was allotted a unit in the said project on 17.01.2012 bearing residential apartment number C1-1401 admeasuring 1300 sq. ft. in "Shree Vardhman Flora", Sector-90, Gurugram, Haryana having total consideration of Rs. 35,94,000/-.
 4. That the complainant purchased the unit bearing number **C1-1401 admeasuring 1300 sq. ft.** from the original allottee in 2013 for a total consideration of Rs. 51,00,000/- with a view that the respondent-builder would abide by the commitments and would offer possession within the stipulated time but to no avail.
 5. That an agreement dated 20.05.2013 was executed between the original allottee, the complainant and the respondent-builder for change of right of the said unit in the project. The original allottee declared that he has no claim/interest in the said property and the right to purchase be given to the complainant. The respondent-builder and the complainant agreed to the same and the said agreement was duly signed by and amongst the parties.

6. That pursuant to the original flat buyer's agreement, an addendum to was duly signed and executed by and amongst the complainant and the respondent-builder,
7. That the respondent-builder also persuaded the complainant to avail a home loan specifically from respondent no. 2, i.e., PNB Housing Finance Limited in order to make timely payments for the unit in the project. On the basis of the high reputation and goodwill of the respondent no. 2, the complainant availed a housing loan of Rs. 38,49,796/- vide loan application dated 26.02.2013. The said amount was sanctioned by the respondent no. 2 vide sanction letter dated 13.03.2013. The complainant received an addendum to sanction letter dated 07.05.2013 by the respondent no. 2 against the sanctioned loan amount.
8. That to the utter dismay, the said unit was purchased by the complainant on the pretext of construction linked payment plan which provides for stage wise payment of sale consideration to the respondent-builder based on the progressive stage of construction.
9. That, the complainant was shocked and appalled when visited the project site, as the unit purchased by him was not at all according to the norms as prescribed. An amount of **Rs. 41,00,000/-** has been paid by the complainant till date for the unit booked in the project.
10. That the respondent-builder has not obtained the occupation certificate of the complainant's unit till date and hence the project is an ongoing project and therefore, the project needs to be registered with the Authority. Thus, based on the construction work at the project site, it is abundantly clear that the respondent-builder has no intention in providing the complainant the said Unit. The complainant

deposed full faith in the respondent's expertise and reputation, but he has been cheated and defrauded as he has not got any update from the respondent-builder.

11. That the complainant having shattered and scattered dreams of owning his own flat herein is constrained and left with no option but to file the present complaint to get the allotment of the unit. Further, the complainant is seeking possession of the Unit with delayed payment charges and mental harassment cost in lieu of the said unit/flat, as per the terms and conditions of the allotment letter cum agreement executed by the respondent builder and even otherwise is entitled to the same.

C. Relief Sought

12. This Authority may be pleased to direct the respondent as follows:
- To handover the actual, physical, vacant possession of the **Unit No. C1-1401** in the above said project.
 - To direct the Respondent-builder to execute the sale deed of the above said Unit in favour of the Complainant.
 - To direct the Respondent-builder to pay the delay penalty charges to the Complainant with interest as per the RERA provisions.
 - To direct the Respondent-builder to maintain and to deliver the same quality of the Unit as mentioned in the Builder Buyer Agreement.
 - To direct the Respondent-builder to deliver the Unit admeasuring 1300 sq. ft. as booked by the Complainant and further the Respondent-builder be directed not to offer the possession of the Unit with an increased area admeasuring 1350 sq. ft. to the Complainant as the Complainant is not liable to pay a single penny for the increased

area.

- To direct the Respondent-builder to pay the mental harassment cost to the Complainant to the tune of Rs. 5,00,000/-
- To direct the Respondent-builder to pay the litigation cost of Rs. 2,00,000/-

D. Reply by the respondent-builder

13. The present complaint filed under Section 31 of the Real Estate "RERA Act" is not maintainable under the said provision. The respondent has not violated any of the provisions of the Act. As per rule 28(1) (a) of RERA Rules, a complaint under section 31 of RERA Act can be filed for any alleged violation or contravention of the provisions of the RERA Act after such violation and/or contravention has been established after an enquiry made by the Authority under Section 35 of RERA Act. In the present case, no violation/contravention has been established by the Authority under Section 35 of RERA Act and as such, the complaint is liable to be dismissed.

14. The complainant has sought relief under section 18 of the RERA Act but the said section is not applicable in the facts of the present case and as such, the complaint deserves to be dismissed. It is submitted that the operation of Section 18 is not retrospective in nature and the same cannot be applied to the transactions which were entered prior to the RERA Act came into force. The complaint as such cannot be adjudicated under the provisions of RERA Act.

15. That the expression "agreement to sell" occurring in Section 18(1)(a) of the RERA Act covers within its folds only those agreements to sell that have been executed after RERA Act came into

force and the FBA executed in the present case is not covered under the said expression, the same having been executed prior to the date the Act came into force.

16. It is submitted without prejudice to above objection in case of agreement to sell executed prior to RERA coming into force, the dates for delivery of possession committed therein cannot be taken as trigger point for invocation of Section 18 of the Act. When the parties executed such agreements, section 18 was not in picture and as such the drastic consequences provided under section 18 cannot be applied in the event of breach of committed date for possession given in such agreements. On this ground also, the present complaint is not maintainable.
17. That the FBA executed in the present case did not provide any definite date or time frame for handing over of possession of the Apartment to the complainant and on this ground alone, the refund and/or compensation and/or interest cannot be sought under RERA Act. Even clause 14 (a) of the FBA merely provided a tentative/estimated period for completion of construction of the Flat and filing of application for Occupancy Certificate with the concerned Authority. After completion of construction, the respondent was to make an application for grant of Occupation Certificate (OC) and after obtaining the OC, the possession of the flat was to be handed over.
18. The relief sought by the complainant is in direct conflict with the terms and conditions of the FBA and on this ground alone, the complaint deserves to be dismissed. The complainant cannot be allowed to seek any relief which is in conflict with the said terms and conditions of the FBA. It is submitted that delivery of possession by a specified date was not essence of the FBA and the complainant was

aware that the delay in completion of construction beyond the tentative time given in the contract was possible. Even the FBA contain provisions for grant of compensation in the event of delay. As such, it is submitted without prejudice to the alleged delay on part of respondent in delivery of possession, even if assumed to have occurred, cannot entitle the complainant to ignore the agreed contractual terms and to seek interest /compensation on any other basis to rescind the contract. The delivery of possession by a specified date was not essence of the FBA and the complainant was aware that the delay in completion of construction beyond the tentative time given in the contract was possible. It is submitted that issue of grant of interest/compensation for the loss occasioned due to breach committed by one party of the contract is squarely governed by the provisions of section 73 and 74 of the Contract Act, 1872 and no compensation can be granted de-hors the said sections on any ground whatsoever. A combined reading of the said sections makes it amply clear that if the compensation is provided in the contract itself, then the party complaining the breach is entitled to recover from the defaulting party only a reasonable compensation not exceeding the compensation prescribed in the contract and that too upon proving the actual loss and injury due to such breach/default. On this ground, the compensation, if at all to be granted to the complainant, cannot exceed the compensation provided in the contract itself. The complaint is not in the prescribed format and is liable to be dismissed on this ground alone.

19. Copies of all the relevant documents have been duly filed and placed on the 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. Reply by respondent no. 2

20. Except those that are expressly admitted herein, the answering respondent denies any and all allegations and claims that are contained or raised in the complaint. The complainant is not entitled to any claim or get any relief claimed therein. The complaint is not maintainable in the eyes of law and the same is liable to be *dismissed in limine*. The complainant has not approached this forum with clean hands and has deliberately filed this claim in order to raise a premeditated, false and frivolous dispute to harass the answering respondent. The complaint is actuated by intent to obtain unjust monetary gains, to the detriment of the answering respondent without making out any valid or just cause for the same and as such, the instant complaint is liable to be dismissed on this ground alone.
21. The instant complaint is not maintainable in its present form in facts and/or in law and/or as per the provisions of the Consumer Protection Act, 2019. The complainant has no cause of action for filing the instant case against the answering respondent. The instant case and prayer is barred by law of limitation, acquiescence, estoppel and waiver.
22. The instant case is harassing and speculative in nature and as such is an abuse of the process of law. The complainant is levelling the allegations without any legal standing and is attempting to shatter the image of the Respondent without any concrete substance.
23. It is most humbly submitted and stated that the complainant in an arbitrary manner is manipulating the facts of the case in order to evade their obligations under the loan agreement and the tri partite

agreement. The complainant has failed to realise that the role of the answering respondent is solely confined to providing financial assistance in furtherance of the loan agreement to purchase the respective unit/apartment and it has fulfilled all its obligations under the loan agreement and the tripartite agreement.

24. This Ld. Forum has no jurisdiction to entertain the present complaint against the Answering Respondent as Section 31 of the Act mandates filing of Complaint for any violation or contravention of the provisions of the Act or rules and regulations made thereunder only against any Promoter, Allottee or Real Estate Agent and it does not fall under any of those categories and consequently is incapable of committing any violation or contravention of the provisions of the Act as the provisions contain duties and obligations only of the three entities mentioned above viz., Promoters, Allottees and Real Estate Agents.

25. There shall be defeat of justice and equity if the prayer of the complainant is granted. The complaint is seeking the relief beyond the jurisdiction of Id. forum. The same is liable to be dismissed with heavy cost. In the light of **ORDER VII RULE 11** of the Civil Procedure Code, 1911. Therefore, in the light of the aforementioned, it becomes absolutely lucid that the present complaint is liable to be dismissed since the same is not able to establish any cause of action. Further, the relief sought in the contours of the complaint is beyond the jurisdiction.

F. Jurisdiction of the authority

The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

F.I Territorial jurisdiction

26. As per notification no. 1/92/2017-1TCP dated 14.12.2017 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.

F.II Subject matter jurisdiction

The Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee 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 promoter, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

27. 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 complainant at a later stage.

G. Findings on the objections raised by the respondent

G.I Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act

28. Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation or rights of the parties inter-se in accordance with the apartment buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the act or the said rules has been executed inter se parties. The authority is of the view that the act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the act. Therefore, the provisions of the act, rules and agreement have to be read and interpreted harmoniously. However, if the act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the act and the rules after the date of coming into force of the act and the rules. Numerous provisions of the act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)** decided on 06.12.2017 and which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter....."

122. *We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

29. Further, in appeal no. 173 of 2019 titled as **Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya**, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed as under -

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

30. The agreements are sacrosanct save and except for the provisions which have been abrogated by the act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and

are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

- 31. Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the prescribed rate. The proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%:

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

32. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

33. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 11.07.2022 is 7.50%. Accordingly, the prescribed rate of

interest will be marginal cost of lending rate +2% i.e., 9.50%.

34. The definition of term 'interest' as defined under section 2(za) of the act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

35. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.50% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.

36. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the act by not handing over possession by the due date as per the agreement. By virtue of clause 14(a) of the agreement executed between the parties on 24.01.2012, the possession of the subject apartment was to be delivered within stipulated time i.e., by 20.03.2016. As far as grace period is concerned, the same is allowed for the reasons quoted above. The Occupation

certificate of the project has been received on 02.02.2022. The respondent has delayed in offering the possession and the same is not offered till date. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the act on the part of the respondent is established. As such, the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 20.03.2016 till date of grant of OC plus two months at prescribed rate i.e., 9.50 % p.a. as per proviso to section 18(1) of the act read with rule 15 of the rules.

H. Directions of the authority

37. Hence, the authority hereby passes this order and issues the following directions under section 37 of the act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):
- i. The complainant is entitled to delayed possession charges as per the proviso of section 18(1) of the Real Estate (Regulation and Development) act, 2016 at the prescribed rate of interest i.e., 9.50%p.a. for every month of delay on the amount paid by him to the respondent-builder from the due date of possession i.e., 20.03.2016 till date of OC i.e., 02.02.2022 plus two months which comes to 02.04.2022.
 - ii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order of this order as per rule 16(2) of the rules.
 - ii. The promoter shall not charge anything which is not part of the BBA.
 - iii. The rate of interest chargeable from the allottee by the promoter, in case



of default shall be charged at the prescribed rate i.e., 9.50% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

- iv. The respondent-builder has already received occupation certificate. Therefore, he is directed to offer the possession of the allotted unit within 30 days from the date of this order. Also, the complainant w.r.t. obligation conferred upon him under section 19(10) of Act of 2016, shall take the physical possession of the subject unit, within a period of two months of the occupancy certificate.

38. Complaint stands disposed of.

39. File be consigned to registry.

V.K. Goyal
(Vijay Kumar Goyal)
Member

Dr. K.K. Khandelwal
(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 11.07.2022

HARERA
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