

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

Complaint no. : 4711 of 2020
First date of hearing: 04.03.2021
Date of decision : 14.07.2022

Krishan Chand Jain
S/o Shri Trilok Chand,
R/o : House No. 2 A,
Mian Wali Colony, Gurugram, HR

Complainant

Versus

M/s Vatika Limited
Office: 7th Floor, Vatika Triangle, Sushant Lok-1,
Block-A, Mehrauli-Gurgaon Road, Gurgaon-
122002.

Respondent

CORAM:

Shri K.K. Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Sh. Harsh Jain (Advocate)
Sh. C.K. Sharma (Advocate)

**Counsel for the complainant
Counsel for the Respondent**

ORDER

1. The present complaint dated 12.01.2021 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 and location of the project	"Tranquil Heights Ph.-I" at sector 82A, Gurgaon, Haryana
2.	Nature of the project	Group housing
3.	Project area	11.218 acres
4.	DTCP license no.	22 of 2011 dated 24.03.2011 valid upto 23.03.2019
5.	Name of licensee	M/s Ganesh buildtech Pvt. Ltd. & others, C/o Vatika Ltd.
6.	RERA Registered/ not registered	Registered vide no. 359 of 2017 area admeasuring 22646.293 sqm. Valid upto 30.04.2021
7.	Unit no.	Plot no 43, H-34, level 1 (page no. 29 of complaint)
8.	Unit area admeasuring	1550 sq. ft. (page no. 29 of complaint)
10.	Date of allotment	N/A
11.	Date of builder buyer agreement	09.06.2016 Page 27 of complaint
12.	Possession clause	13. SCHEDULE FOR POSSESSION OF THE SAID APARTMENT <i>The Developer based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said building/said Apartment within a period of 48 (Forty Eight) months from the date of execution of this Agreement unless there shall be delay or there shall be failure due to reasons mentioned in other Clauses 14 to 17 & 37 or due to failure of Allottee(s) to pay in time the price of the said apartment along with all other charges and dues in accordance with the schedule of payments given in Annexure -I or as per the demands</i>

		<i>raised by the developer from time to time of any failure on the part of the Allottee(s) to abide by any of the terms or conditions off this agreement. Emphasis supplied</i>
13.	Due date of possession	09.06.2020 [Due date calculated from the date of execution of BBA]
14.	Total sale consideration	Rs. 1,14,67,497/- [as per SOA dated 03.09.2021 (annexure R4, page 110)]
15.	Amount paid by the complainant	Rs. 20,08,090/- [as per SOA dated 03.09.2021 (annexure R4, page 110) 566r.-]
16.	Occupation certificate	Not obtained
17.	Offer of possession	Not offered

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint:

- I. That the complainant booked an residential floor with the builder and WAS allotted a unit bearing No. HSG-28-Sector 88B, Plot No. 43, ST. H-34, Level 1 admeasuring 1550 sq. ft. of super area situated in project namely "Xpressions by Vatika" being developed in sector 88-A, Gurugram, Haryana.
- II. That a builder buyer agreement was executed between the respondent and the complainant on 09.06.2016. That the complainant during time of booking on 14.08.2015, paid an amount of Rs. 2,00,000/- to the respondent vide cheque no. 362008.
- III. That the complainant thereafter, made several deposits as per the payment schedule and as per demands raised by the respondent. In total, the complainant has paid a total of Rs. 20,08,090.28/- including a discount received by him on property sale and paid amount as per the installments



due towards the project. That till 2017, as per the ledger of the respondent, the complainant has paid an amount of Rs. 20,09,090/-.

- IV. That, according to the builder buyer agreement dated 09.06.2016, the respondent was to hand over the possession of the unit within a period of **48 months** from the date of execution of the agreement. However, the respondent failed to provide the possession of the above mentioned property even after the expiry of period as mentioned in the terms of the agreement, specifically clause 13 of the agreement. That the respondent was to provide to the complainant with the possession of the property within 48 months or 4 years by June 2020 as calculated from the date of terms of the apartment buyer agreement dated 09.06.2016.
- V. That the complainant sought legal help and sent a legal notice dated 15.11.2018, intimating the respondent in escalation in prices and sought refund of the amount deposited with the respondent.
- VI. It is pertinent to point out that the complainant has on several occasions tried to get in touch with the office of the respondent via email and phone but his all efforts remained unfruitful as the opposite party failed to sine any sufficient response to him.
- VII. That the cause of action for filing the present complaint first arose when the complainant was issued the allotment of an apartment in the said project after making payment. The cause of action arose again when the buyer's agreement was executed between the parties; the cause of action for filing the present complaint is continuing and still subsisting.
- VIII. That the complainant contacted the respondent and despite his multiple requests, it never explained or provided clarification to the unjust amount charged by it. The respondent despite having made multiple tall representations to the complainant, chosen deliberately and

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contemptuously not to act and fulfill the promises and have given a cold shoulder to the grievances raised by the allottees.

- IX. The respondent has completely failed to honor the promises and has not provided the services as promised and agreed through the brochure, agreement and the different advertisements released from time to time.
- X. That the present complaint sets out the various deficiencies in services, unfair and/or restrictive trade practices adopted by the respondent in sale of the unit and the provisions allied to it. The modus operandi adopted by the respondent, from its point of view may be unique and innovative but from the allottee point of view, the strategies used to achieve its objective, invariably bears the irrefutable stamp of impunity and total lack of accountability and transparency, as well as breach of contract and duping of the allottee, be it either through not implementing the services/utilities as promised in the brochure or through not delivering the project in time.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s).
- I. Direct the respondent to refund the paid amount along with interest.**
 - II. Direct the respondent to compensate to the complainants for the financial loss due to loss of working hours of the complainant owing to this matter apart from mental harassment and agony caused at 10% of the booked units value and Rs. 2.5 lac towards actual and ongoing expenses.**
5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent has contested the complaint on the following grounds.



- a. That each and every averment and contention, as made/raised in the complaint, unless specifically admitted, be taken to have been categorically denied by respondent and may be read as travesty of facts.
- b. That the complaint filed by the complainant before the adjudicating officer, besides being misconceived and erroneous, is untenable in the eyes of law. The complainant has misdirected himself in filing the above captioned complaint before this adjudicating officer as the relief being claimed by him, besides being illegal, misconceived and erroneous, cannot be said to even fall within the realm of jurisdiction of this adjudicating officer.
- c. That the relief sought by the complainant appear to be on misconceived and erroneous basis. Hence, the complainant is estopped from raising the pleas, as raised in respect thereof, besides the said pleas being illegal, misconceived and erroneous.
- d. That it has been categorically agreed between the parties that subject to the complainant having complied with all the terms and conditions of the buyer's agreement and not being in default under any of the provisions of the said agreement and having complied with all provisions, formalities, documentation etc., the developer contemplates to complete construction of the said residential floor within a period of 48 months from the date of execution of the agreement unless, there shall be delay due to force majeure events and failure of allottee(s) to pay in time the price of the said apartment.
- e. In the present case, it is a matter of record that the complainant has not fulfilled his obligation and has not even paid the installments on time that had fallen due. Accordingly, no relief much less as claimed cum be granted to the complainant. Further, it had been also agreed and accepted that in case the delay is due to the reasons beyond the control



of the developer then, it shall be automatically entitled to the extension of time for delivery of possession. Further the developer may also suspend the project for such period as it may consider expedient. In the present case, there has been a delay due to various reasons which were beyond the control of the respondent and the same are enumerated below:

- i. Initially HUDA has to develop the major sector roads for the connectivity of the projects on the licensed land. But no development for the connectivity and movement across the sectors, for ingress or egress was done by HUDA for long time. Later on, due to the change in the master plan for the development of Gurugram, the Haryana Government has decided to make an alternate highway passing through between sector 87 and sector 88 and further Haryana Government had transferred the land falling in sector 87, 88 and others sectors to GMDA for constructing new highway 352 W. Thereafter in a process of developing the said highway 352 W, the land was uplifted by 4 to 5 mtrs. It is pertinent to note that Respondent has already laid down its before such upliftment. As a result, respondent is constrained to uplift the project land and realign the facilities. Thereafter GMDA handed over the possession of the land properties/land falling in NH 352 W to NHAI for construction and development of NH 352 W. All this process has caused considerable amount of delay and thus hampered the project in question which are beyond the control and ambit of developer. Due to delay in construction of the NH 352 W on account of lack of will and coordination among various Govt departments, the NH352 W has still not been constructed thereby causing access issue to the project site materials/heavy machinery cannot be transported or placed in the Project and thus has hampered the construction of the Project.

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- ii. Re-routing of High-Tension lines passing through the lands resulting in inevitable change in the lay out plans and cause unnecessary delay in development.
- iii. Delay in acquisition of sector roads by LAO/HSVP. Although license of the Project was granted in 2013 and LAC award was passed in 2016 and till date only 20% development work has been done by the Department at this front.
- iv. The hon'ble National Green Tribunal (NGT)/Environment Pollution Control Authority (EPCA) issued directives and measures to counter deterioration in Air Quality in the Delhi-NCR region, especially during winter months. Among these measures were bans imposed on construction activities for a total period of 70 days between November,2016 to December, 2019.
- v. Due to the implementation of MNREGA Schemes by the Central Government, the construction industry as a whole has been facing shortage of labour supply, due to labourers regularly travelling away from Delhi-NCR to avail benefits of the scheme. This has directly caused a detrimental impact to the Respondent, as it has been difficult to retain labourers for longer and stable periods of time and complete construction in a smooth flow.
- vi. Disruptions caused in the supply of stone and aggregate, due to orders passed by the hon'ble Supreme Court and the Hon'ble High Court of Punjab and Haryana prohibiting mining by contractors in and around Haryana.
- vii. Disruptions caused by unusually heavy rains in Gurgaon every year.
- viii. Due to the slum in real estate sector, major financial institutions are facing difficulty in providing funding to the developers. As a result, developers are facing financial crunch.
- ix. Additionally, imposition of several partial restrictions from time to time prevented the Respondent from continuing construction work and

ensuring fast construction. i.e. Construction activities could not be carried out between 6 PM to 6 AM for 174 days, The usage of Diesel Generator Sets was prohibited for 128 days, The entries of truck traffic into Delhi were restricted.

- x. Manufacturers of construction material were prevented from making use of close brick kilns, Hot Mix plants, and stone crushers.
- xi. Stringently enforced rules for dust control in construction activities and close non-compliant sites.

The imposition of several total and partial restrictions on construction activities and suppliers as well as manufacturers of necessary material required, has rendered the respondent with no option but to incur delay in completing construction of its projects. This has furthermore led to significant loss of productivity and continuity in construction as the respondent was continuously stopped from dedicatedly completing the Project. The several restrictions have also resulted in regular demobilization of labour, as the respondent would have to disband the groups of workers from time to time, which created difficulty in being able to resume construction activities with required momentum and added many additional weeks to the stipulated time of construction.

- xii. The Government of India imposed lockdown in India in March 2020 to curb the spread of the Covid-19 pandemic. This severely impacted the Respondent as the Respondent was constrained to shut down all construction activities for the sake of workers' safety, most of the labour workforce migrated back to their villages and home states leaving the respondent in state where there is still a struggle to mobilize adequate number of workers to start and complete the construction of the project due to lack of manpower. Furthermore, some suppliers of the respondent, located in Maharashtra, are still unable to process orders which inadvertently have led to more delay.

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- f. Further, it had been also agreed and accepted that in case the delay is due to the Force Majeure then, the Developer would not be held responsible for delay in delivery of possession.
- g. That the project "Vatika Express City" (Expression for Phase-1) has been registered with the authority vide registration no. 271 of 2017. That due to the various reasons and not limited to delay on the part of the allottees, NGT Notifications, covid-19 pandemic, etc. the project has been majorly impacted.
- h. That the complainant has failed to make payments in time in accordance with the terms and conditions as well as payment plan annexed with the buyer's agreement and as such the complaint is liable to be rejected. It is submitted that out of the sale consideration of Rs. 1,14,67,497/-, the amount actually paid by the complainant is Rs. 20,08,090/- i.e. around 17% of the sale consideration of the unit. It is submitted that the last payment was made by the complainant on 17.02.2016 that is much before the proposed due date of possession and therefore, the complainant after himself failing in making the payment now cannot expect timely delivery of possession. It is further submitted that the complainant is a real estate investor who has made the booking with the respondent only with an intention to make speculative gains and huge profit in a short span of time. However, it appears that his calculations and planning have gone wrong on account of severe slump in the real estate market and the complainant is now raising several untenable pleas on highly flimsy and baseless grounds. The complainant after defaulting in complying with the terms and conditions of the buyer's agreement, now wants to shift the burden on



the part of the respondent whereas the respondent has suffered a lot financially due to such defaulters like the present complainant.

- i. That the respondent provided numerous opportunities to the complainant to pay the remaining dues. However, despite the number of opportunities, the complainant failed to make the payments and thus, the respondent was therefore constrained to cancel the booking and the complainant is now left with no right, title, interest etc. in the present unit.
- j. That it is to be appreciated that a builder constructs a project phase wise for which it gets payment from the prospective buyers and the money received from the prospective buyers is further invested towards the completion of the project. It is important to note that a builder is supposed to construct in time when the prospective buyers make payments in terms of the Agreement. It is submitted that it is important to understand that one particular buyer who makes payment in time can also not be segregated, if the payment from other prospective buyer does not reach in time. It is relevant that the problems and hurdles faced by the developer or builder have to be considered while adjudicating complaints of the prospective buyers. It is relevant to note that the slow pace of work affects the interests of a developer, as it has to bear the increased cost of construction and pay to its workers, contractors, material suppliers, etc. It is most respectfully submitted that the irregular and insufficient payment by the prospective buyers such as the complainant freezes the hands of developer / builder in proceeding towards timely completion of the project. As a matter of fact, the block work of the unit is completed, plaster and flooring is also completed. The respondent is expected to hand over the same by January-February 2021.

E. Jurisdiction of the authority

7. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

8. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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.

E.II Subject-matter jurisdiction

9. 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) The promoter shall-

(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.

10. 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.

11. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors.* 2021-2022(1)RCR(C), 357 and followed in case of *Ramprastha Promoter and Developers Pvt. Ltd. Versus Union of India and others dated 13.01.2022 in CWP bearing no. 6688 of 2021* wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

12. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the relief sought by the complainant.

F.I Direct the respondent to refund the paid amount along with interest.

13. The complainant has submitted that a buyer's agreement was executed on 09.06.2016. He paid 20,08,090/- against the total sale consideration of Rs. 1,14,67,497/-. As per clause 13 of the BBA, the possession was to be handed over within 48 months from the date of execution of buyer agreement. But the possession was not delivered within the stipulated time period. In the year 2018, the complainant intimated the respondent in escalation in prices and sought refund of the amount deposited with the respondent. The respondent pleaded that there has been a delay due to various reasons which were beyond its control. The respondent further pleaded that the complainant has failed to make payments in time in accordance with the terms and conditions as well as payment plan annexed with the buyer's agreement. The last payment was made by the complainant on 17.02.2016 much before the proposed due date of possession. The respondent issued reminders on 13.06.2017, 14.07.2017 & 20.07.2017 respectively for making outstanding payment. On 11.09.2017, a notice for termination was issued to the complainant. When the complainant did not pay any heed to said letter ultimately on 21.10.2020, respondent issued a letter whereby the allotted unit was cancelled.

Now, the question before the authority is whether the cancellation is valid?

14. On consideration of the documents available on record and submissions by both the parties, the authority is of the view that the complainant has paid 20,08,090/- against the total sale consideration of Rs. 1,14,67,497/-. The respondent/builder issued send a number of reminders on 13.06.2017, 14.07.2017 & 20.07.2017 respectively for making outstanding payment but having no positive result and ultimately leading to cancellation of unit vide letter dated 21.10.2020 in view of the terms and conditions of the agreement. No doubt, the complainant did not pay the amount due

despite various reminders but the respondent while cancelling the unit was under an obligation to forfeit the amount paid by the complainant i.e., the earnest money and refund the balance amount deposited by the allottee. The complainant paid 20,08,090/- to the respondent/builder and he cancellation of the allotted unit was made on 21.10.2020 by retaining the amount beyond 10% which is not legal in view of number of pronouncements of the Hon'ble Apex court. In Supreme court matter *Maula Bux Vs. Union of India, (1970) 1 SCR 928* and *Sirdar K.B. Ram Chandra Raj Urs Vs. Sarah C. Urs, (2015) 4 SCC 136*, held that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in the nature of penalty, then provisions of Section-74 of Contract Act, 1872 are attracted and the party so forfeiting must prove actual damage. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. This Commission in *CC/438/2019, Ramesh Malhotra Vs. EMAAR MGF Land Ltd. (decided on 29.06.2020)* and *Mr. Saurav Sanyal Vs. M/s. Ireo Pvt. Ltd. (decided on 12.04.2022)* held that 10% of basic sale price is reasonable amount to be forfeited in the name of earnest money.

15. Further, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, states that-

"5. AMOUNT OF EARNEST MONEY

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."

16. Keeping in view the aforesaid legal provisions, the respondent is directed to forfeit earnest money which would not exceed the 10% of the sale price of the said unit and would return the balance amount to the complainant within a period of 90 days from the date of this order.

F II. Direct the respondent to compensate to the complainants for the financial loss due to loss of working hours of the complainant owing to this matter apart from mental harassment and agony caused at 10% of the booked units value and Rs. 2.5 lac towards actual and ongoing expenses.

17. The complainant is also seeking relief w.r.t litigation expenses. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors.* (supra), has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of litigation expenses.

F. Directions of the authority

18. 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 respondent is directed to forfeit earnest money which shall not exceed the 10% of the sale price of the said unit and shall return the

balance amount to the complainant within a period of 90 days from the date of this order.

19. Complaint stands disposed of.
20. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 14.07.2022



HARERA
GURUGRAM