

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

Complaint no.	:	3997 of 2020
First date of hearing:		22.01.2021
Date of decision	:	07.10.2022

Vishal Jyani R/O: - 1403, Tower - I, Uni World Garden, Sohna Road, Gurugram	Complainant
Versus	
Shree Vardhman Infraheights Pvt. Ltd., 302, 3 rd floor, Indraprakash Building, 21- Barakhamba Road, New Delhi - 110001	Respondent

CORAM:

Shri Vijay Kumar Goyal

Member

Shri Ashok Sangwan

Member**APPEARANCE:**

Mr. Sanjeev Sharma (Advocate)

Complainant

Mr. Gaurav Rawat Proxy Counsel (Advocate)

Respondent

ORDER

1. The present complaint dated 04.11.2020 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	"Shree Vardhman Victoria", village Badshapur, Sector-70, Gurugram
2.	Project area	10.9687 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	103 of 2010 dated 30.11.2010 valid upto 29.11.2020
5.	Name of the Licensee	Santur Infrastructures Pvt. Ltd.
6.	RERA registered/ not registered and validity status	Registered Registered vide no. 70 of 2017 dated 18.08.2017 Valid up to 31.12.2020
7.	Unit no.	1102, Tower D (Page 36 of complaint)
8.	Unit area admeasuring	1950 sq. ft. (Page 36 of complaint)
9.	Allotment letter	25.12.2012

		(Page 29 of complaint)
10.	Date of buyer agreement	16.02.2015 (Page 33 of complaint) (In favour of Ved prakash jyani and Vishal jyani)
11.	Possession clause	<p>14 (a) Possession</p> <p><i>The construction of the flat is likely to be completed within a period of forty months (40) of commencement of construction of the particular tower/block in which the flat is located with a grace period of 6 months or receipts of sanction of building plans/revised plans and all other approvals subject 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 in the said complex.</i></p> <p>(Emphasis Supplied)</p>
12.	Date of commencement of construction	07.05.2014 (As per affidavit submitted by respondent in another case)
13.	Due date of possession	07.03.2018 07.09.2017 + 6 months of grace period = 07.03.2018

		(Calculated from date of commencement of construction which is available in another file of same project- <u>submitted by respondent through affidavit.</u>)
14.	Total sale consideration	Rs.1,01,08,800 /- (Page 37 of complaint) Rs. 1,16,53,800 (As per customer ledger dated 09.07.2021 at page 37 of reply)
15.	Amount paid by the complainant	Rs. 95,86,751/- (Page 11 of complaint)
16.	Occupation certificate	Not obtained
17.	Offer of possession	Not offered
18.	Delay in handing over the possession till date of filing complaint	2 years 7 months and 28 days

B. Facts of the complaint

3. That complainant is a home buyer and jointly with his father Mr Ved Prakash Jyani applied to book a unit in the project. The respondent acknowledged the application vide its letter dated 21.06.2012. The flat buyer agreement was signed on 16th Feb 2015 and the respondent confirmed that total payment received against the said flat to the tune of Rs 50,54,400/- from the complainant till the date of signing the agreement. The total base price of the flat is Rs 1,01,08,800/- @ Rs 5185 per sq. ft as agreed. As per agreement, the

flat was supposed to be completed within a period of 40 months of commencement of construction of the particular tower block with a grace period 6 months due to force majeure or towards unforeseen circumstances. Therefore, the actual date of handing over of the flat was 11/11/ 2014 and in case of the force majeure extension, the final date comes to 11/02/2015. Thus, the possession is delayed by more than 5 years.

4. That, in total complainant has paid Rs 95,86,751/- as on 22.09.2016 and thereafter as per the statement given by respondent to complainant, only 17 Lakh were pending to paid out of 1.12 crore which accounts to only 15% pending amount. As per construction linked payment plan at this stage, the respondent should have started commencement of external plaster as on 22.09.2016. But it failed to complete the project as per commitment and as on date, the position is in jeopardized. The complainant got surprised after visiting at site and shocked to see the condition the said project was not yet completed and with the present condition, it appears that there are serious flaws in the management attitude and commitment in completing the project. The complainant tried to reach out the officials of respondent but even after several round of the meeting yielded no proper conclusion and no proper commitment. The complainant even demanded the return of the invested money back but all in vain.
5. That in this present scenario, after all the efforts went in vain the complainant approached this Hon'ble H-RERA for a direction to the respondent to refund the money to him along with the interest

C. Relief Sought

6. This Authority may direct the respondent as follows:

- a. To direct the respondent to refund the amount paid by the complainant.

But an application has been moved by the complainant on 18.01.2022 for amendment of relief sought from refund of the amount paid to delayed possession charges at the prescribed rate of interest for the delay in handing over of possession. Also, in court proceedings dated 07.10.2022, respondent stated that construction has been completed, application for grant of OC has already been made to the concerned department and the same has been expected to be granted by end of November 2022 and he has no objection to the request of the complainant for amending the relief. Thus, the application was allowed.

- b. To direct respondent to award compensation of Rs. 10,00,000/-

D. Reply by the respondent

7. 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.

8. 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.
9. 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 and the same having been executed prior to the date the Act came into force.
10. 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 agreement, 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.

11. 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.
12. 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 that 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

and/or compensation on any other basis. It is submitted without prejudice that the alleged delay in delivery of possession, even if assumed to have occurred, cannot entitle the complainant to rescind the FBA under the contractual terms or in law. 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 dehors 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.

13. The complainant is an investor in real estate and the booking in question was also made as an investment. The complainant and his family members have made multiple bookings with the answering respondent and its group companies.
14. 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. 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.

E. I Territorial jurisdiction

15. 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.

E.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.

16. 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.

F. Findings on the objections raised by the respondent

F.1 Objection regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.

17. 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. The 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 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."

18. 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 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."

19. 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.

G. Findings on the reliefs sought by the complainant

G.1 Objection regarding entitlement of delayed possession charges on account of complainant being an investor.

20. The respondent has taken a stand that the complainant is the investor and not consumer, therefore, he is not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims & objects of enacting a statute. But at the same

time, the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. At this stage, it is important to stress upon the definition of term allottee under the Act, and the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

21. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainant, it is crystal clear that the complainant is an allottee(s) as the subject unit was allotted to him by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in *appeal no. 000600000010557 titled as M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

A

22. **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.

23. 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.

24. 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., 07.10.2022 is 8%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10%.

25. 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;"

26. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.

27. 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 16.02.2015, the possession of the subject apartment was to be delivered within stipulated time i.e., by 07.03.2018. As far as grace

period is concerned, the same is allowed for the reasons quoted above. 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., 07.03.2018 till date of offer of possession plus two months after obtaining OC or date of actual handing over of possession whichever is earlier at prescribed rate i.e., 10 % p.a. as per proviso to section 18(1) of the act read with rule 15 of the rules.

G.II Direct the respondent to award compensation of Rs. 10,00,000/-

28. The complainant is seeking relief w.r.t. compensation in the above-mentioned reliefs. *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.*, 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, for claiming

compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before the Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

H. Directions of the authority

29. 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., 10%p.a. for every month of delay on the amount paid by him to the respondent from the due date of possession i.e., 07.03.2018 till date of offer of possession after obtaining OC plus two months or date of actual handing over of possession, whichever is earlier as per proviso to section 18(1) of the act read with rule 15 of the rules.
- ii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order and thereafter, monthly payment of interest be paid till date of handing over of possession shall be paid on or before the 10th of each succeeding month.
- iii. The respondent is directed to offer the possession of the allotted unit

within 30 days after obtaining OC from the concerned authority. The complainant's 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.

- iv. The promoter shall not charge anything which is not part of the buyer agreement. If any payment is due from the complainant, it shall be adjusted from the amount of delayed possession charges.
- v. The complainant is directed to make payment of due installments towards consideration of allotted unit as per provision of Section 19(6) & (7) of Act of 2016. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10% 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.

30. Complaint stands disposed of.

31. File be consigned to registry.


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 07.10.2022