

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

Complaint no. :	2013 of 2019
Date of filing complaint:	06.05.2019
First date of hearing:	04.10.2019
Date of decision :	28.10.2022

Sudhir Garg R/o: BC-88, Shalimar Bagh, Delhi.	Complainant
Versus	
M/s Vatika Limited Vatika India Next, 1 st floor, A block, Town Square, Sector 82 A Gurgaon	Respondent

CORAM:	
Shri Vijay Kumar Goyal	Member
Shri. Sanjeev Kumar Arora	Member
APPEARANCE:	
Sh. Sushil Yadav (Advocate)	Complainant
Sh. Mukul Sanwariya (Advocate)	Respondent

ORDER

1. The present complaint 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 29 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 allottees as per the agreement for sale executed inter se.

A. Unit and project related details

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

S.No.	Heads	Information
1.	Project name and location	"Vatika India Next" at sector 81,82A,83,84 and 85, Gurgaon, Haryana
2.	Project area	393.358 acres
3.	Nature of the project	Residential plotted colony
4.	DTCP License	113 of 2008 dated 01.06.2008 valid upto 31.05.2018 71 of 2010 dated 15.09.2010 valid upto 14.09.2018 62 of 2011 dated 02.07.2011 valid upto 0.07.2024 76 of 2011 dated 07.09.2011 valid upto 06.09.2017
5.	RERA Registered/ not registered	Not registered
6.	Unit no.	17, first floor, E-5.1
7.	Unit measuring (super area)	1785 sq.ft.
8.	Date of execution of builder buyer agreement	29.04.2014 (annexure P2 of complaint)
9.	Possession clause	15. Schedule for possession of the said residential plot <i>The Developer based on its present plans and estimates and subject to all just exceptions, force majeure and delays due to reasons beyond the control of the Company contemplates to complete development of the said Residential Plot within a period of</i>

12

		<i>4(four) years 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 herein.</i>
10.	Due date of possession	29.04.2018 [Due date of possession calculated from the date of BBA]
11.	Total basic sale price	Rs. 1,29,50,020/-
	Total sale consideration	Rs. 1,30,64,260/- as per SOA dated 18.01.2019 (page 90 of complaint)
12.	Amount paid by the complainant	Rs. 47,42,018/- as per SOA dated 18.01.2019 (page 90 of complaint)
13.	Occupation Certificate	Not obtained
14.	Offer of possession	Not offered
15.	Notice for termination	18.01.2019 (annexure P19, page 89 of complaint)
16.	Termination cum recovery letter	04.02.2019 (annexure P-20, page 92 of complaint)
17.	Email by complainant w.r.t to the cancellation of the premium floor booking at VIN	16.08.2016 (annexure p-2, page 62 of complaint)
		22.01.2017 (annexure P10, page 77 of complaint)
18.	Confirmation of cancellation of the unit by the respondent vide an email	25.01.2017

B. Facts of the complaint:

3. The complainant booked a floor and was allotted unit no. 17, first floor, E-5.1, in Vatika India Next vide allotment letter dated 04.04.2014. The basic sale price of the subject unit was Rs.1,29,50,020/- of which, he already paid a sum of Rs.47,42,018/- diligently by 31.03.2015 as 35% of initial amount. The same was acknowledged by respondent. In pursuance of the said allotment letter a floor buyer's agreement dated 29.04.2014 was executed

broadly setting out the terms, provisions and conditions for *inter-alia* the construction, allotment and possession of the subject unit.

4. The complainant vide email dated 16.08.2016, a week after meeting the executive, wherein he expressly stated about the cancellation of the unit and was subsequently acknowledged by respondent. After many deliberations and follow ups, the respondent vide an email dated 25.01.2017 accepted to cancel the unit stating that the cancellation calculation would be sent soon. Too much of shock and anguish, it did not for a period of further two months share the cancellation calculation sheet despite several reminders and telephonic conversations. Ultimately the same was shared on 20.03.2017 by it confirming refund of only Rs. 22,55,367/- against deposit of Rs. 47,42,018/- by mischievously deducting Rs.13,06,426/- towards earnest money & Rs. 1,95,963/- towards service tax as admin charge @15% Rs. 3,85,124/- as brokerage & Rs. 5,99,137/- as interest.
5. That vide email dated 29.04.2017, the complainant requested for rectification of calculations and the refund of money. Further to it, the executive of the respondent, Shri. Varun Mehra called and asked him to provide inputs on pre-payment on the loan taken from ICICI, so as to make first payment to ICICI Bank & thereafter balance money to the complainant. The same was sent by him on 20th April 2017. The respondent confirmed that the payment would be made to soon. However, despite repeated requests and meeting with senior executives in the office of it and till date, no refund has been provided to him. He was an allottee at time of intimation of cancellation of the subject flat and the respondent in

12

the most notorious, mischievous and unprofessional ways started harassing him with the unjustified request of payment of the total remaining amount of the subject flat despite acknowledgment and acceptance of the cancellation of the subject flat.

6. That vide multiple correspondence both oral and written including letter dated 02.07.2018, it was again specifically reiterated that cancellation of the subject flat was accepted by the respondent, and in furtherance of that cancellation calculation sheet was also forwarded to the complainant by it. Thus, making demands and pursuance for allotment was in-fructuous and pointless.
7. To the utter shock and dismay, the complainant received a frivolous and vacuous letter dated 04.02.2019 for a demand/claim of an amount over and above the already paid amount despite the acceptance of cancellation and providing cancellation calculation by the respondent which is not only illegal but unjust, arbitrary and unwarranted.
8. That the buyers' agreement is totally one-sided having clauses favouring only the respondent & the complainant has no option but to sign on dotted lines. It may kindly be noted that the interest chargeable in case of delay on his part is 18% whereas in case of default on the part of seller, it was payable only @9%. Similarly, all cancellation clauses were put favouring the respondent with no express clause on rights of the complainant.
9. That despite agreeing in January 2017 for cancellation of the unit, the complainant had been continuously harassed by the respondent to the extent that Rs. 18.62 lakh have been demanded

A

from him against cancellation of the flat in a mischievous and unlawful manner as the respondent thinks that he was too big and could easily pressurise anyone through unlawful means and would get away without paying any amount to the complainant. Thus, the respondent in a planned manner defrauded the complainant with his hard-earned huge amount and wrongful gained himself and caused wrongful loss to complainant.

C. Relief sought by the complainant:

10. The complainant has sought following relief(s):
 - i. Direct the respondent to refund the amount of Rs. 47,42,018/- along with prescribed interest annum on compounded rate from the date of booking of the cancellation unit in question i.e., 16.08.2016.

D. Reply by respondent:

11. The respondent submitted that the complainant has not come with clean hands. He has suppressed vital facts and, on this ground, alone, the complaint is liable to be dismissed. It is important to note that the complainant vide email dated 14.09.2014 had requested the respondent that due to financial urgency, he would not be able to continue with the said unit. hence, he requested the company to provide alternate options. Thereafter on 24.09.2014, the complainant requested the respondent that he was no longer interested in the cancellation and wishes to continue with the unit. The conduct of the complainant from the very beginning signifies that he has made the said booking for the investment purposes.

1A

12. That without prejudice to the aforementioned, it is submitted that the complainant, in any event, cannot get his claims adjudicated under the provisions of 2016 Act and Rules framed there under inter-alia, keeping in view the fact that the project in respect whereof the complaint has been made, does not fall under the jurisdiction of this adjudicating officer.
13. It is submitted that the complainant is seeking refund with interest irrespective the possession has already been offered to him before the due date. It is the complainant who never took any initiative to take the possession. The respondent has issued various demand letters, reminders but he never adhered to the same. As a result, the respondent was constrained to issue notice for termination dated 18.01.2019. But he never paid any heed to the same. Having no other alternate, the respondent has issued termination-cum-recovery notice dated 04.02.2019, whereby it had duly terminated the said unit and there were outstanding dues of Rs. 18,62,368/- to be paid by the complainant. As a matter of fact, the said unit is no longer available as the respondent had already handed over the possession of the said unit to some other person.
14. It is humbly submitted that the complainant had booked the residential unit in the project of the respondent "Premium Floors, Vatika India Next" in the year 2014 where he was allotted unit no. 17, E-5.1 having area of 1785 sq.ft. The buyers agreement was executed between the parties on 29.04.2014. It is submitted that the total consideration was fixed for Rs. 1,30,64,260/-. But

because of non-payment of dues, the unit of the complainant was terminated.

15. It is humbly submitted that the complainant failed to fulfil his obligations towards the payment. The complainant has made the payment of only Rs. 47,42,018/- till March 2015 out of total sale consideration of Rs. 1,30,64,260/-. It is pertinent to mention here that as per the buyers' agreement, the possession was to be handed over by 2018 but the complainant stopped making payments after March 2015, meaning thereby that from the time of booking he had sole intention to harass the respondent rather than owing a residential unit. Despite repetitive reminders, the complainant did not make any payment within the respective time and caused breach of payment clause of the agreement. Hence the complaint should be dismissed as the complainant himself is liable for breach of agreement and causing loss to the respondent.
16. It is pertinent to mention here that the respondent was offered the possession within prescribed time period and several reminders have also been sent. But the complainant refused the same for the reasons best known to him. It is pertinent to mention that the complainant visited the project site and also inquired from Ms. Meenu Radhika Mathura about the status of the unit. The unit had been completed and the possession would be handed over very soon to the complainant. But still the complainant wished to cancel the booking of the allotted unit. It is important to mention that as the respondent had made huge investment on the project and had made every effort to complete the project on time so as to handover the possession to the complainant/allottees, as such, the

A

request of cancellation by the complainant, knowing beforehand that the possession is about to be given to him, was unethical and sheer harassment to the respondent causing wrongful loss to it. As a matter of fact, the respondent vide email dated 14.12.2016 had duly communicated the complainant that cancellation request cannot be entertained. Hence, the complaint should be dismissed.

17. It is submitted that the respondent was ready to deliver the possession of the said unit to the complainant before the due date i.e., as per date fixed in the agreement. Thus, at the stage of completion of the project, cancellation of the said unit by the complainant would have cause great loss to the respondent as on the one hand, it had made huge investments out of his own pocket and on the other hand, the payment due against the complainant had not been received by the respondent which cause financial loss to it. However, the complainant was never willing to pay the outstanding amount for the allotted unit and take possession although the unit was ready for handover with all amenities and facilities which shows that he was only interested in making easy money. Hence, the complainant is not entitled to claim compensation of whatsoever nature and as such the complaint should be rejected with exemplary cost.

18. It is important to mention here that the complainant had been always carrying malafide intentions since the booking of the unit as on the one hand, the respondent in getting the loan sanctioned from the bank and on the other hand made request for the cancellation of the unit. It is also important to mention here that despite several opportunities given, the complainant neglected all

intimations/ correspondence of the respondent and failed to pay the due balance payments and hence termination letter was issued.

19. It is submitted that, the respondent requested the complainant many times to clear the payments due against him within the specified time but he always failed to obey the same. Hence, the complainant violated the provisions of section 19(6) of Act, 2016. Thus, the complainant is liable to pay interest at the prescribed rate for the delay in payment towards any amount of charges as per section 19(7) of the Act, 2016.
20. It is pertinent to mention here that over the years, the respondent has garnered vast reputation and goodwill as a real estate company. It is submitted that the respondent has a diversified portfolio in real estate development on many fields. The respondent has passionate commitment to translate the philosophy of improving the quality of life in and around the catchment area of the development.
21. 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:

22. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. 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

23. 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

Section 11(4)(a) of the Act, 2016 provides that the promoter 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.

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

12

compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Entitlement of the complainant for refund:

F.1 Direct the respondent to refund the entire paid-up amount to the respondent.

24. The complainant has submitted that he booked a unit and was allotted above said unit vide allotment letter dated 04.04.2014. Thereafter a buyer's agreement was executed between the parties on 29.04.2014 for a basic sale price of Rs. 1,29,50,020/- and he paid Rs. 47,42,018/-. He further submitted that vide email dated 16.08.2016, he expressly stated about the cancellation of the unit. After two months, the respondent shared the cancellation calculation sheet and confirmed refund of only Rs. 22,55,367/- against deposit of Rs. 47,42,018/- by mischievously deducting Rs. 13,06,426/- towards earnest money & Rs. 1,95,963/- towards service tax as admin charge @15% Rs. 3,85,124/- as brokerage & Rs. 5,99,137/- as interest. Thereafter on 29.04.2017, the complainant requested for rectification of calculation and the refund of money. Despite cancelling the unit, the respondent sent reminders for making outstanding dues. On 18.01.2019, the respondent issued notice for termination and thereafter on 04.02.2019, again issued termination cum recovery letter. It is pertinent to mention here that the complainant already intends to withdraw from the project before the due date and before the notice for termination issued by the respondent.

25. Keeping in view of the above said facts and submissions made by the parties, the authority observes that the respondent terminated the allotted unit on 04.02.2019 though the complainant has

already surrendered the same vide email dated 16.08.2016 and the same having been accepted by it vide its email dated 25.01.2017. So, in such a situation, there was no occasion for the respondent to terminate the allotment of the unit of the complainant. There was only dispute w.r.t deductions to be made after acceptance of cancellation of the allotted unit. The respondent offered the complainant a refund of Rs. 22,55,367/- against deposit of Rs. 47,42,018/- made by him after deducting certain amounts towards earnest money, service tax, administrative charges and brokerage as Rs. 13,06,426, Rs.1,95,963/, Rs. 3,85,124/- & Rs. 5,99,137/- respectively. But that amount was not acceptable to the complainant leading to filing of the complaint seeking refund of the paid-up amount after deductions as per the law of the land. In cases of ***Maula Bux vs Union of India (1970) 1 SCR, 928*** & ***Sirdar KB Ram Chandra Raj Urs vs Sarah C. Urs (2015)4 SCC, 136***, the same issue arose as in the present case and wherein it was held by the hon'ble Apex Court of the land 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 the 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. The same view was followed by NCDRC, New Delhi in cases of Ramesh ***Malhotra vs EMAAR MGF Land Limited*** in case ***CC/438/2019*** decided on 29.06.2020 and ***Mr. Saurav Sanyal vs M/s Ireo Pvt. Ltd.*** decided on 12.04.2022 and reaffirmed in consumer case no. 2766 of 2017 titled as ***Jayant Singal and Anr. Vs. M/s M3M India Ltd.*** decided



on 26.07.2022. The authority also framed a regulation in this regard in the year 2018 known as Haryana Real Estate Regulatory (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, providing as under:

"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 amount of the real estate i.e. apartment/plot/building as the case may be in all case 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."

26. In view of aforesaid facts and the legal position detailed above, the respondent is directed to refund the total paid up amount of Rs. 47,42,018/- after deducting 10% of the earnest money i.e., Rs. 13,06,426/- as per calculation sheet supplied by it vide email dated 20.03.2017 and can also deduct 0.5% brokerage charges if actual paid to the real estate agent along with prescribed rate of interest i.e., 10.25% per annum. The complainant allottee is entitled for above interest at prescribed rate over above amount from the date of confirmation of the cancellation i.e., 25.01.2017 till date of its actual payment.

H. Directions of the Authority:

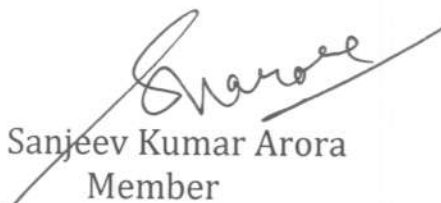
27. Hence, the Authority hereby passes this order and issues the following directions under section 37 of the Act to ensure

compliance of obligations cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- i. The respondents/promoter is directed to refund the total paid up amount of Rs. 47,42,018/- after deducting 10% of the earnest money i.e., Rs. 13,06,426/- as per calculation sheet supplied by it vide email dated 20.03.2017 and can also deduct 0.5% brokerage charges if actual paid to the real estate agent along with prescribed rate of interest i.e., 10.25% per annum on the balance amount.
- ii. The complainant allottee is entitled for above interest at prescribed rate over above balance amount from the date of confirmation of the cancellation i.e., 25.01.2017 till date of its actual payment.
- iii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

28. Complaint stands disposed of.

29. File be consigned to the registry.


Sanjeev Kumar Arora
Member


Vijay Kumar Goyal
Member

Haryana Real Estate Regulatory Authority, Gurugram

28.10.2022