

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

Complaint no. : 6376 of 2019
First date of hearing: 06.02.2020
Date of decision : 08.08.2022

Anil Kumar Deswal S/o Tara Chand
R/o: House no. 731, Sector 5, Gurgaon, Haryana

Complainant

Versus

M/s Vatika Limited
Office: 4th 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:

Ms. Taniya proxy counsel for Harshit
Batra (Advocate)
Sh. Dhruv Dutt (Advocate)

Complainant

Respondent

ORDER

1. The present complaint dated 09.12.2019 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	"Vatika Seven Element" at sector 89A, Gurgaon, Haryana.
2.	Nature of the project	Group housing
3.	Project area	14.30 acres
4.	DTCP license no.	41 of 2013 dated 06.06.2013 valid upto 05.06.2017
5.	Name of licensee	M/s Strong Infrabuild Pvt. Ltd. & others
6.	RERA Registered/ not registered	Registered vide no. 281 of 2017 dated 09.10.2017 area admeasuring 91345.535 sqm. Valid upto 31.03.2021
7.	Unit no.	1402, 14 th floor, building no. A3, (Page no. 24 of complaint)
8.	Unit area admeasuring	1620 sq. ft. (Page no. 24 of complaint)
9.	Date of booking	05.04.2013 (page 14 of complaint)
10.	Date of allotment	N/A
11.	Date of builder buyer agreement	Not executed
12.	Date of letter w.r.t execution of BBA	11.05.2015

13.	Possession clause	<p>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 raised by the developer from time to time or any failure on the part of the Allottee(s) to abide by any of the terms or conditions off this agreement.</i> Emphasis supplied</p>
14.	Due date of possession	11.05.2019 (Due date is calculated from the date of letter issued by the respondent to execute the BBA)
15.	Total sale consideration	Rs. 1,22,75,355/- [as per SOA dated 02.06.2021 on page 116 of reply]
16.	Amount paid by the complainant	Rs. 19,10,944/- [as per SOA dated 02.06.2021 on page 116 of reply]
17.	Occupation certificate	Not obtained
18.	Offer of possession	Not offered
19.	Termination notice	04.12.2019 (annexure R9)

B. Facts of the complaint

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

- I. The complainant booked a unit no. HSG-023/1402/tower A3/Sector-89A having admeasured super area 1620 sq. ft. in the project "Seven Elements"



believing the claims made by the respondent for basic sale consideration of Rs. 1,12,49,685/-. The respondent assured the complainant to handover the said unit within 48 months from the date of booking and also assured that the buyers' agreement in respect of the booked unit would be executed within 5 months from booking of the unit. Even after passing of 2 years of the said booking, the respondent failed to execute buyers' agreement. The complainant raised his concern several times by visiting the office of the respondent and through telephonic conversation.

II. But instead of redressing the grievances, the respondent consistently raised demands and reminders and threatened the complainant to make payment towards the sale consideration of the unit. The complainant received a letter dated 11.05.2015, for execution of buyers' agreement. The respondent also sent two copies of buyers' agreement along with the letter dated 11.05.2015. It is pertinent to mention here that at the time of booking of unit, the respondent assured the complainant that the unit would be handed over within 48 months and the buyers' agreement would be executed within 5 months. However, the respondent sent the buyers' agreement after 2 years of booking of the unit and as per clause 13 of such buyer agreement, the unit of the respondent was to be handed over within 48 months from execution of such agreement.

III. The respondent time and again made false promised and assurances to the complainant. He felt cheated by its acts and requested the respondent to cancel his allotment and refund the amount paid by him. However, the respondent kept mum of all the requests and concerns and raised demands and reminders with malicious intention to cheat and due the complainant. Therefore, the complainant intends to withdraw from the project owing to unlawful and illegal acts of the respondent and hence, it

is liable for return of the amount deposited by him along with an interest as prescribed under the Act along with other compensation under the Act.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s).
 - a. Direct the respondent to refund the amount of Rs. 19,10,944/- paid along with interest at the prescribed rate from the date of receipt of each instalment of payment till the date of refund.
 - b. Direct the respondent to pay litigation charges to the tune of Rs. 2,00,000/-.
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. The complaint suffers from misjoinder of parties, causes of action and non-joinder of necessary parties. The project "Seven Elements" is being developed by M/s Vatika Seven Elements Pvt. Ltd. which is not impleaded as a party. By way of addendum agreement to the builder buyer agreement, which had been sent to complainant for its execution, the opposite party had withdrawn as developer and the company named "M/s Vatika Seven Elements Pvt. Ltd." became the developer. The said addendum agreement was a tripartite agreement between the alleged opposite party, new developer and the complainant, thus, the complainant was very well aware that the opposite party was left with no connection and transferred all the projects obligations whatsoever with the said project named "Seven Elements".



- b. The prayer made in the complaint is not tenable and amounts to misjoinder of separate causes of action as the complainant is seeking to have the funds be refunded from the opposite party, which is not even a party in the case, Hence, no such direction can be passed against another entity. The second prayer is for handover of possession of flat in seven elements project which is being developed by M/s Vatika Seven Elements project which is being developed by M/s Vatika Seven Elements Pvt. Ltd. Hence, no direction can be passed against the opposite party in the matter as it has nothing to do with the project which are not being developed by the opposite party.
- c. The project "Seven Elements" has been registered with the authority vide registration no. 281 of 2017 dated 09.10.2017. Further, it is stated that there is a huge outstanding amount to be paid by the allottees which has resulted in alleged delay in handing over of possession to them. But despite this, the respondent is trying its best to complete the project. It is submitted that after halt in work due to various reasons and not limited to delay on the part of the allottees but also as under:
- i. Unexpected introduction of a new National Highway being NH 352 W (herein "NH 352 W") proposed to run through the project of the respondent. Under this, new development NH 352 W was initially supposed to be developed as sector roads by HUDA which took around 3 years in completing the land acquisition process.
 - ii. The Haryana Government in alliance with the Town and Country Planning Department in exercise of powers vested under section 45(1) of Gurugram Metropolitan Development Authority Act, 2017 (GMDA Act) vide its notification dated 1.05.2018 makes the transfer scheme for transferring the properties falling within the



- ambit of NH 352W acquired by the HUDA to GMDA for development and construction of NH 352 W.
- iii. The GMDA vide its letter dated 08.09.2020 had handed over the possession of said properties for construction and development of NH 352 W to the National Highway Authority of India (NHAI). This is showing that still the construction of NH 352 W is under process resulting in unwanted delay in completion of project.
 - iv. Further, initially when HUDA had acquired the sector road and started its construction and an area by 4 to 5 Mtrs. was uplifted. Before start of the acquisition and construction process, the respondent had already laid down the services according to the earlier sector road levels. However, due to upliftment caused by the HUDA in NH 352 W, the company has been constrained to raise and uplift the same within the project, which not only result in deferment of construction of project but also attract costing to the respondent.
 - v. Re-routing of high-tension lines passing through the lands resulting in inevitable change in the layout plans.
 - vi. Various orders passed by Supreme Court NGT/EPCA regarding ban on construction activities.
 - vii. Due to outbreak of Covid 19, real estate sectors have been majorly impacted which has hampered the construction of the project.
 - viii. NGT notifications, covid-19 pandemic, et., recently the work had re-started and is going on in full swing.
- d. The complainant has failed to make payments on time and as such the, complaint is liable to be rejected. It is submitted that the complainant defaulted in making payments towards the agreed sale consideration



of the unit from the very beginning and the last payment was made by the complainant on 09.04.2015. It is submitted that out of the sale consideration of Rs. 1,22,75,355/- of the unit, the amount actually paid by the complainant was Rs. 19,10,944/- i.e., only 15% of the total consideration of the unit booked by him. It is further submitted that there is a huge outstanding amount of Rs. 1,12,63,431/- payable by the complainant as on 02.06.2021 as per the construction linked plan opted by him. The complainant after defaulting in making payments now wants to shift the burden of deficiency on the part of the respondent whereas it has suffered a lot financially due to such defaulters like the present complainant. It is submitted that upon failure of the complainant to make payment of outstanding installment, the respondent was constrained to issue demand/reminder letters to him to make the outstanding payment, but the respondent's request fell on deaf ears of the complainant and he did not pay the outstanding dues pending against the said unit.

- e. That even despite non-payment of installments by the complainant, the developer has constructed to complete the tower in project in which his unit falls. The super structure of tower A-3 is completed including all the works and final finishing of said tower and unit are soon to be completed.
- f. 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 submitted that 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 perspective 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 complaint 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.

g. It is further submitted that since there is no concluded contract executed between the parties and even to say that despite several reminders, the complainant failed to get execute the BBA, hence, the respondent cannot be made liable under the Act.

7. 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 submission made by the parties.

E. Jurisdiction of the authority

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

E.I Territorial jurisdiction

9. 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

10. 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.

11. 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.
12. 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 (Civil)*,

357 and reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022 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."

13. 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.

14. The complainant submitted that he booked a unit in the project of the respondent for a total sale consideration of Rs. 1,12,49,685/- on 05.04.2013. The complainant has made a payment of Rs. 19,10,944/-. The respondent assured the complainant to handover the said unit within 48 months from the date of the booking and also assured that the builder buyer agreement in

respect of the booked unit would be executed within 5 months from the booking of the unit. That even after passing of 2 years of the said booking, the respondent failed to execute builder buyer agreement. He raised his concern several of times by visiting the office of the respondent. But instead of redressing the grievances of the complainant, the respondent consistently raised demands and reminders and threatened him to make payment toward the sale consideration. After 2 years of the said booking on 11.05.2015, the complainant received a letter for execution of the builder buyer agreement. The respondent also sent 2 copies of builder buyer agreement with the letter dated 11.05.2015. As per clause 13 of such agreement builder buyer agreement, the unit of the respondent was to be handed over within 48 months from execution of such agreement. The complainant visited the office of the respondent and requested to the respondent either deliver his unit within 2 years from execution of agreement or to refund the amount paid by him towards the total sale consideration of the unit. The respondent submitted that the present complaint suffers from misjoinder of parties, causes of action and non-joinder of necessary parties. The project "Seven Elements" is being developed by M/s Vatika Seven Elements Pvt. Ltd. which is not impleaded as a party. The respondent further pleaded that the complainant has failed to make payments on time. The complainant has paid an amount of Rs. 19,10,944/- against the total sale consideration of Rs. 1,22,75,355/- i.e., 15% of the total consideration of the unit.

15. The respondent filed an application for production of additional documents cum written submission on 01.08.2022, and submitted that the complainant made last payment on 09.04.2015, upon failure of the complainant to execute the BBA and payment of outstanding installments, the respondent sent a termination notice date 04.12.2019, to the complainant.
16. The complainant sent reply to the application, submitted that the alleged notice for termination letter dated 04.12.2019, was just an intimation that the unit shall be terminated upon further non-payment and was not the final termination also submitted that no termination of the unit has been done, as is also evident from the fact that recently on 12.07.2021, an invoice for payment of pending dues was raised by the respondent (annexure 1). The construction was not as per the schedule of payment, the complainant was left with no option but to stop the payment which was being illegally demanded by the respondent.
17. On consideration of the above-mentioned facts and submissions made by both the parties, the authority is in the view that, the complainant booked a unit in 2013 and made payment of Rs. 19,10,944/- against the total consideration of Rs. 1,22,75,355/- which is more than 15% of the total sale consideration and which is clear violation of section 13 of the Act, 2016. The complainant submitted that the respondent assured him that the unit would delivered within 48 months from the date of booking and the BBA was executed within 5 months from the date of booking. But there is no proof placed on record w.r.t. this submission of the complainant. Moreover, as per

the clause 13 of the unexecuted BBA the possession was to delivered within 48 months from the date of agreement. There is no BBA executed between the parties and therefore, the due date is calculated from the letter dated 11.05.2015 which comes out 11.05.2019. The respondent denied that it was the necessary party in the agreement. The Vatika Seven elements Pvt. Ltd. was the necessary party. It is pertinent to mention here that there was neither any allotment letter nor any BBA placed on the record to clarify that the Vatika Limited is necessary party or not, but it is placed on the record that the all the relevant letters were issued by the Vatika Limited. So, as per record, the Vatika Limited is necessary party.

18. Keeping in view the fact that the allottee/complainant wishes to withdraw from the project and demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016.
19. The due date of possession as per agreement for sale as mentioned in the table above is 11.05.2019 and there is delay of 6 months 28 days on the date of filing of the complaint. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent-promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration

and as observed by Hon'ble Supreme Court of India in ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019,*** decided on 11.01.2021

“ ... The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project.....”

20. Further in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)*** reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020*** decided on 12.05.2022. it was observed

25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed

21. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession of the unit in accordance with the terms of agreement for

sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as he wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.

22. This is without prejudice to any other remedy available to the allottee including compensation for which he may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.
23. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 19,10,944/- with interest at the rate of 9.80% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of realization of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

F. II Direct the respondent to provide litigation charges of Rs. 2,00,000/-.

24. 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

25. 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/promoter is directed to refund the entire amount of Rs. 19,10,944/- paid by the complainant along with prescribed rate of interest @ 9.80% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development Rules, 2017) from the date of each payment till the actual date of refund of the amount.
 - ii. 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.
26. Complaint stands disposed of.
27. File be consigned to registry.

v.i - 5
(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 08.08.2022

[Signature]
(Dr. K.K. Khandelwal)
Chairman