



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

Complaint no. : 1146 of 2021
First date of hearing: 25.03.2021
Date of decision : 10.11.2022

Manju Bhargava & Ramendra Kumar Bhargava
Both RR/o: C-4 A-144, Carlton Estate, DLF, City
Phase V

Complainants

Versus

M/s Vatika Limited
Office: Vatika Triangle, 4th floor, Sushant Lok, ph-1,
block A, Mehrauli-Gurugram Road, Gurugram-
122002.

Respondent

CORAM:

Shri Vijay Kumar Goyal
Shri Ashok Sangwan
Shri Sanjeev Kumar Arora

Member
Member
Member

APPEARANCE:

Sh. Surender Chaudhary (Advocate)
S/Sh. C.K. Sharma & Dhruv Dutt Sharma (Advocates)

Complainant
Respondent

ORDER

1. The present complaint dated 02.03.2021 has been filed by the complainant/allottees 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 allottees 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 complainants, 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 Express City" at sector 88A & 88B, Gurgaon, Haryana.
2.	Nature of the project	Residential plotted colony
3.	Project area	100.785 acres
4.	DTCP license no.	94 of 2013 dated 31.10.2013 valid upto 30.10.2019
5.	Name of licensee	M/s Malvina Developers Pvt. Ltd. & 20 others
6.	RERA Registered/ not registered	Registered vide no. 271 of 2017 dated 09.10.2017 Valid upto 08.10.2022.
7.	Unit no.	HSG-028-Sector 88B, Plot no. 29, ST.H-30, Top Level (page 29 of complaint)
8.	Unit area admeasuring	1700 sq.ft. (Page no. 29 of complaint)
9.	Date of booking	23.05.2016
10.	Date of builder buyer agreement	09.06.2016 (page 26 of complaint)
11.	Due date of possession	09.12.2020 [Due date of possession calculated from the date of BBA + 6 months grace period in view of covid 19]
12.	Possession clause	13. Schedule for possession of the said residential floor <i>The Developer based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said residential floor within a period of 48 (Forty Eight) months from the date of</i>



		<i>execution of this Agreement) unless there shall be delay or there shall be failure due to reasons mentioned in other clauses herein or due to failure of Allottee(s) to pay in time the price of the said Residential Floor along with all other charges and dues in accordance with the Schedule of payments given in Annexure II 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 of this Agreement... Emphasis supplied Taken from unexecuted BBA</i>
13.	Total sale price	Rs. 1,07,93,903/- (as per SOA dated 12.02.2021, page 65 of complaint)
14.	Amount paid by the complainant	Rs. 20,39,944/- (as per SOA dated 12.02.2021, page 65 of complaint)
15.	Completion certificate	Not obtained
16.	Offer of possession	Not offered

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint:
- I. That the complainants booked a unit on 23.05.2016 and paid a sum of Rs. 3,00,000/- as initial sale consideration of the said flat. At the time of booking, it categorically assured to hem that a buyer's agreement would be executed between the parties. On 09.06.2016, a buyer's agreement was executed between the parties. At the time of booking, it promised to them that the project would be completed within period of 4 years in all respect. However, it inserted a very unreasonable and ambiguous clause in a buyer's agreement pertaining to handing over the possession and holding charges.



- II. That at the of negotiation, the respondent had communicated the complainants that the project would be completed within a period of 3 years from the date of booking. However, the terms and condition of buyer's agreement were completely different, wherein the period of possession mentioned as 48 months which, clearly shows the malafide intention and misrepresentation of the builder. However, they could not understand the malafide intention of the respondent at the time of booking.
- III. That it can be perused from the record that the complainants have performed their obligation under a buyer's agreement and it is on record that a sum of Rs. 20,39,944.26/- has been paid by them till date out of total sale consideration of the said apartment i.e. Rs. 1,07,93,903.50/-.
- IV. That the aforesaid payments were received by the respondent on the basis of misrepresentation and non-discloser of true and correct status of the project. In fact, the building construction process was not as per the schedule given in the buyer's agreement dated 09.06.2016. It is pertinent to mentioned herein that the construction of the building is not in progress since last 4 years and the same is lying abandoned and there is no possibility for completion of the project in the near future.
- V. That as per clause no. 13 of the aforesaid buyer's agreement, the possession was to be handed over on 09.06.2016 but the respondent completely failed to perform its part of agreement despite receiving amount toward consideration of unit. In terms of agreement, the project delivery has exceeded it commitment of 4 years and there is no hope for completion of the project in near future as no constriction activities is being carried out it. In fact, the intension of the builder is that it is just



making the innocent buyer befool by sending false and frivolous communication letters regarding completion of the project and about obtaining of the occupation certification. The act and conduct of the builder can be seen from the casual approach, which is completely eyewash not only to the complainant but also to the other innocent allottees.

- VI. That the respondent served a false and frivolous demand notice vide email dated 03.02.20121 and upon receiving the said, the complainants sent several emails to it requesting to provide the progress of the project. However, it did not responded to the emails which clearly shows that its intention was malafide.
- VII. That being dissatisfied with the act and conduct of the respondent-builder, the complainants made several requests to it for refunding their money with interest. Even they visited several times the office of respondent for getting their money refund with interest. However, it failed to pay any heed upon their genuine requests and has been avoiding their request the last about one and half years. It has been making false promises again and again to refund their hard-earned money with interest.
- VIII. That the complainants became frustrated with the act and non-performance of the respondent. The said unit was purchased by them for their residence purpose to enjoy a peaceful retired life and in hope to shift in this unit in 2020 once retired from active job. However, their dream has been ruined by the builder. They waited for long time to receive the possession of their unit but it completely failed to complete the project on time and now, they have been waiting to get their money refunded along with interest.



- IX. That the respondent is liable to refund the entire amount paid by the complainants i.e., Rs. 20,39,944.26/- along with 18 % interest plus compensation. It is pertinent to mention herein that in terms of clause no. 8 of the buyer's agreement, it is entitled to charge interest at the rate of rupees 18% per annum from the date of due payment till the date of actual payment from them in case of delay in the payment of installment. So, similarly it is equally liable to pay the interest at the rate of rupees 18% per annum to them from the date of actual payment till the actual date of realization. As far as the present case is concerned there is inordinate delay of almost 1 year, so the complainants are entitled to get their money back from the builder with interest at the rate of rupees 18 % per annum and also entitled to get appropriate compensation.
- X. That the cause of action for filing the complaint arose to the complainants when the respondent failed to handover the possession of the apartment on the promised date as per the buyer's agreement i.e., 09.06.2016. The cause of action arose when it sent emails for re-allotment of unit in other projects while refusing to share the progress of the project and its completion deadlines and the cause of action arose when they visited several times in the office of respondent. However, it failed to refund the entire amount of the complainants with interest despite promised several times. The cause of action still subsists and continued since it has not refunded a single penny till date.
- C. Relief sought by the complainants:**
4. The complainants have sought following relief(s).
- a. Direct the respondent-builder to refund the amount of Rs. 20,39,944/- paid by the complainants.



- b. Direct the respondent builder to pay interest @ 18% per annum on the amount paid by the complainants from the date of actual payment till realization.
 - c. Direct the respondent builder to pay the relief of Rs. 5,00,000/- to the complainants towards harassment and mental agony suffered by them.
 - d. Direct the respondent builder to pay Rs. 50,000/- towards the legal and litigation 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 further, without prejudice to the aforementioned, even if it was to be assumed though not admitting that the filing of the complaint is not without jurisdiction, even then, the claim as raised cannot be said to be maintainable and is liable to be rejected for the reasons as ensuing.
 - b. That the reliefs sought by the complainants appear to be on misconceived and erroneous basis. Hence, they are estopped from raising the pleas, as raised in respect thereof, besides the said pleas being illegal, misconceived and erroneous.
 - c. That apparently, the complaint filed by the complainants is abuse and misuse of process of law and the reliefs claimed as sought for, are liable to be dismissed. No relief much less any interim relief, as sought for, is liable to be granted to them.
 - d. That the complainants have miserably and willfully failed to make payments in time or in accordance with the terms of a builder buyer's agreement. It is submitted that they have frustrated the terms and



conditions of a builder buyer's agreement, which were the essence of the arrangement between the parties. Therefore, they now cannot invoke a particular clause, and the complaint is not maintainable and should be rejected at the threshold.

- e. That it was categorically agreed between the parties that subject to the complainants having complied with all the terms and conditions of 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 residential floor. It was 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 it may also suspend the project for such period as it may consider expedient. A reference may be made to clause 16 of a builder buyer's agreement.
- f. 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: -

- b) *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 Haryana Urban Development Authority (HUDA) which took around 3 years in completing the land acquisition process.*
- c) *The Haryana Government in alliance with the Town and Country Planning Department in exercise of power vested under Section 45 (1) of Gurugram Metropolitan Development Authority Act, 2017 (GMDA Act) vide its*



Notification dated 11.04.2018 makes transfer scheme for transferring the properties falling within the ambit of NH 352 W acquired by the HUDA to GMDA for development and construction of NH 352 W.

- d) The GMDA vide its letter dated 08.09.2020 had handed over of possession of said properties for construction and development of NH 352 W to the NHAI. This is showing that still the construction of NH 352 W is under process resulting in unwanted delay in completion of project.*
 - e) Further, initially, when HUDA had acquired the sector road and started its construction, an area by 4 to 5 metres 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.*
 - f) Re-routing of High-Tension lines passing through the lands resulting in inevitable change in the layout plans.*
- h. That due to the outbreak of Covid-19, the entire world went into lockdown and all the construction activities were halted and no labour was available. In fact, all the developers are still facing hardship because of acute shortage of labour. Even, the HRERA Gurugram has vide order dated 26.05.2020 declared the Covid 19 as a calamity under the force majeure clause and there cannot be said to be any delay in delivering the possession by it.
- i. That due to the various reasons beyond the control of the respondent and not limited to delay on the part of the allottees, NGT, notifications, Covid-19 pandemic, etc., the project has been majorly impacted. However, respondent endeavours to handover the unit shortly.
- 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 are further invested



towards the completion of the project. It is submitted that a builder is supposed to construct in time when the prospective buyers make payments in terms of the agreement. It is further submitted 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 to note that the problems and hurdles faced by the builder have to be considered while adjudicating the complaints of the prospective buyers. It is also relevant to note that the slow pace of work affects the interest of a developer, as it has to bear the increased cost of construction and pay to its workers, contractors, material suppliers, etc. It is pertinent to mention here that the irregular and insufficient payment by the prospective buyers such as the complainants, freezes the hands of developer/builder in proceeding towards timely completion of the project.

8. Copies of all the relevant documents have been files 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

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

E.1 Territorial jurisdiction

10. 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

11. 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.

12. 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.

F. Findings on the objections raised by the respondent

F.I Objection w.r.t. force majeure

13. It is contended on behalf of respondent/builder that due to various circumstances beyond its control, it could not speed up the construction of the project, resulting in its delay such as various orders passed by NGT hon'ble Supreme Court, introduction of new highway being NH-352W,

transferring the land acquired for it by HUDA to GMDA, then handing over to NHAI and re-routing of high-tension lines passing through the land of the project. But all the pleas advanced in this regard are devoid of merit. The passing of various orders to control pollution in the NCR-region during the month of November is an annual feature and the respondent should have taken the same into consideration before fixing the due date. Similarly, the various orders passed by other authorities cannot be taken as an excuse for delay.

14. It is observed that the respondent was liable to complete the construction of the project and the possession of the said unit was to be handed over by 09.12.2020 and is claiming benefit of lockdown amid covid -19. In view of notification no. 9/3-2020 dated 26.05.2020, the authority has allowed six months relaxation due to covid-19 and thus with same relaxation, even if due date for this project is considered as 09.06.2020 + 6 months, possession was to be handed over by 09.12.2020, but the respondent has failed to handover possession even within this extended period. Moreover, the occupation certificate /part OC is not yet obtained by the respondent from the competent authority.

G. Findings on the relief sought by the complainant.

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

15. A project by the name detailed above was being developed by the respondent/builder. The complainants booked a unit in it admeasuring 1700 sq. ft. against the total sale consideration of Rs. 1,07,93,903/- and

paid a sum of Rs. 20,39,944/- in all against the allotted unit. A buyer's agreement was executed between the parties w.r.t. the allotted unit on 09.06.2016. The said unit had to be completed within 48 months from the date of execution of buyer's agreement. Near the promised possession date and at various points, the complainants reminded the respondent to hand over the possession but it was all in vain.

16. Keeping in view the fact that the allottee/complainants wish to withdraw from the project and are 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. The due date of possession as per date of booking as mentioned in the table above is 09.12.2020 and there is delay of 2 months 21 days on the date of filing of the complaint.
17. The occupation certificate/part occupation 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 allottees cannot be expected to wait endlessly for taking possession of the allotted unit 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....."*
18. 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. 2021-2022(1)RCR(C),357*** 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

19. 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 allottees, as they wish 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.
20. This is without prejudice to any other remedy available to the allottee including compensation for which they 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.

21. The authority hereby directs the promoter to return to the complainants the amount received by them i.e., Rs. 20,39,944/-with interest at the rate of 10.25% (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 refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

G.II Compensation and litigation cost.

22. The complainants are also seeking relief w.r.t. compensation. 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 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 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. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of compensation.

F. Directions of the authority


23. 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 return to the complainants the amount received by him i.e., Rs. 20,39,944/-with interest at the rate of 10.25% (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 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.
 - iii. The respondent is also directed to pay a cost of Rs. 5000/- to the complainants imposed vide order dated 24.08.2022 on account of failure on the part of the respondent in filing reply within the stipulated time.
24. Complaint stands disposed of.
25. File be consigned to registry.


(Sanjeev Kumar Arora)

Member


(Ashok Sangwan)

Member


(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram

10.11.2020