



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

Complaint no. :	3551 of 2021
Date of filing complaint:	31.08.2021
First date of hearing:	28.09.2021
Date of decision :	21.03.2023

Amit Sharma

R/o: 1232, Sector 16, Faridabad.

Complainant

Versus

M/s Vatika Limited

Office: Unit A-002, Inxt City Centre, Ground Floor,
Block A, Sector 83, Gurgaon

Respondent

CORAM:

Shri Vijay Kumar Goyal

Shri Ashok Sangwan

Shri Sanjeev Kumar Arora

Member

Member

Member

APPEARANCE:

Sh. Sushil Yadav

Sh. Dhruv Dutt Sharma

Advocate for the complainant

Advocates for the 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. N.	Particulars	Details
1.	Name and location of the project	"Xpressions By Vatika", Sector 88, distt-Gurgaon.
2.	Nature of the project	Residential floor
3.	Project area	133.022 acres
4.	DTCP license no.	94 of 2013 dated 31.10.2013 valid upto 30.10.2019 11 of 2015 dated 01.10.2015 valid upto 30.09.2020
5.	Name of licensee	Malvina Developer Pvt. Ltd. & 20 others Haben Developer Pvt. Lt. & 7 others
6.	RERA Registered/ not registered	Not registered
7.	Plot no.	15, St. H-23, Level-2 (page 14 of complaint)
8.	Unit area admeasuring	1350 sq. ft. (super area)
9.	Date of builder buyer agreement	11.08.2016 (page 12 of complaint)
10.	Due date of possession	11.08.2020
11.	Possession clause	13. SCHEDULE FOR POSSESSION OF THE SAID APARTMENT The Developer based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the



		<i>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. Emphasis supplied</i>
12.	Total sale consideration	Rs. 85,63,903/- [as per SOA dated 07.09.2021, annexure R3, page 109 of reply]
13.	Amount paid by the complainant	Rs. 34,21,409/- [as per SOA dated 07.09.2021, annexure R3, page 109 of reply]
14.	Occupation certificate	Not obtained
15.	Offer of possession	Not offered

B. Facts of the complaint:

- That the respondent gave advertisement in various leading newspaper about their forthcoming project named "xpressions"- Vatika India Next Sector 88 B Gurgaon promising various advantages, like world class amenities and timely completion of the project etc. Relying on the promise and undertakings given by the respondent the complainant booked the unit in the aforementioned project of respondent admeasuring 1350 sq.ft. in aforesaid project of the respondent for total sale consideration of Rs.



85,63,903/- which includes BSP, car parking, IFMS, club membership, PLC etc.

4. That the complainant made payment of Rs. 34,21,409/- to the respondent vide different cheques on different dates. As per buyer's agreement dated 11.08.2016, the respondent had allotted a unit bearing no. HSG-028-Pocket-H-2-Level- 2nd floor on plot no. 15, sector 88B admeasuring 1350 sq.ft. As per para no 13 of the buyer agreement dated 11.08.2016, the respondent had agreed to deliver the possession of the unit within a period of 48 months from the date of execution of buyer's agreement
5. That the complainant regularly visited the site but was surprised to see that construction work is not in progress and no one was present at the site to address the queries of the complainant. It appears that respondent has played fraud upon the complainant. Its only intention was to take payments for the unit without completing the work. The malafide and dishonest motives and intention cheated and defrauded the complainant. Despite receiving of payment of all th demands raised by the respondent for the said unit and despite repeated requests and reminders over phone calls and personal visits of the complainant, it had failed to deliver the possession of the allotted unit to the complainant within stipulated period.
6. That it could be seen that the construction of the floor in which the complainant floor was booked with a promise by the respondent to deliver the unit by 11.08.2020 but was not according to time line given by the respondent for the reasons best known to the respondent, which clearly shows its ulterior motive was to extract money from the innocent fraudulently.

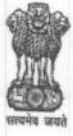
7. That due to this omission on the part of the respondent the complainant had been suffering from disruption on his living arrangement, mental torture, agony and also continues to incur severe financial losses. This could be avoided if the respondent had given possession of the unit on time. As per clause 18 of the buyer's agreement dated 11.08.2016, it was agreed by the respondent that in case of any delay, it would pay to the complainant a compensation @Rs. 7.5/- per sq.ft. per month of the super area of the unit. A clause of compensation at a such of nominal rate of @Rs. 7.5/- per sq.ft. per month for the period of delay is unjust and the respondent has exploited the complainant by not providing the possession of the unit even after a delay from the agreed possession plan. The respondent cannot escape the liability merely by mentioning a compensation clause in the agreement. It could be seen here that it has incorporated the clause in one sided buyers agreement and offered to pay a sum of @Rs. 7.5/- per sq.ft. for every month of delay. If we calculate the amount in terms of financial charges it comes to approximately @2% per annum rate of interest whereas the respondent charges 18% per annum interest on delayed payment.
8. That on the ground of parity and equity the respondent also be subjected to pay the same rate of interest on the amount paid by the complainant @18% per annum to be compounded from the promise date of possession till the flat is actually delivered to the complainant. He has requested the respondent several times on making telephonic calls and also personally visiting the office of the respondent either to deliver possession of he flat in question or to refund the amount along with interest @18% per annum on the amount deposited by the complainant but respondent has flatly refused to do so.

C. Relief sought by the complainant:

9. The complainant has sought following relief(s):
- Direct the respondent to refund of Rs. 34,21,409/- along with prescribed interest on compounded rate from the date of booking of the unit.
 - Litigation cost & Compensation.

D. Reply by respondent:

10. That at the outset, respondent humbly submits that each and every averment and contention, as made in the complaint, unless specifically admitted, be taken to have been categorically denied by it and may be read as travesty of facts.
11. That the complaint filed by the complainant before the Authority, besides being misconceived and erroneous, is untenable in the eyes of law. The complainant has misdirected themselves in filing the above captioned complaint before the Authority as the reliefs being claimed by him, besides being illegal, misconceived and erroneous, cannot be said to even fall within the realm of jurisdiction of the Authority.
12. 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.
13. That the complainant has miserably and wilfully failed to make payments in time or in accordance with the terms of the buyer's agreement. The complainant has frustrated the terms and conditions of the buyer's agreement, which was the essence of the arrangement between the parties



and therefore, the complainant now cannot invoke a particular clause. Therefore, the complaint is not maintainable and should be rejected at the threshold. The complainant has also misdirected in claiming refund on account of alleged delayed offer for possession. It has been categorically agreed between the parties that subject to the complainant has complied with all the terms and conditions of the buyer's agreement and not a being in default under any of the provisions of the said agreement and has complied with all provisions, formalities, documentation etc., the developer contemplates to complete construction of the said unit within a period of 48 months from the date of execution of the agreement unless there would be delay due to force majeure events and failure of allottee to pay in time the price of the said residential floor. Further, it has also agreed and accepted that in case the delay is due to the reasons beyond the control of the developer then the developer would be automatically entitled to the extension of time for delivery of possession. Further the developer may also suspend the project for such period as it may consider expedient.

14. Apart from the above, the progress of the construction of the project was also affected due to various other unforeseen circumstances such as:

- a. Decision of the Gas Authority of India Ltd. (GAIL) to lay down its gas pipeline from within the duly pre-approved and sanctioned project which further constrained the respondent to file a writ petition in the Hon'ble High Court of Punjab and Haryana seeking directions to stop the disruption caused by GAIL towards the project. However, upon dismissal of the writ petition on grounds of larger public interest, the construction plans of the respondent were adversely affected and it was forced to reevaluate its construction plans which caused a long delay.
- b. Delay caused by the Haryana Development Urban Authority (HUDA) in acquisition of land for laying down sector roads for connecting the project. The matter has been further embroiled in sundry litigations between HUDA and landowners.



- c. Due to the implementation of MNREGA Schemes by the Central Government, the construction industry as a whole has been facing shortage of labour supply, due to labour regularly travelling away from Delhi-NCR to avail benefits of the scheme. This has directly caused a detrimental impact to the Respondent, as it has been difficult to retain labour for longer and stable periods of time and complete construction in a smooth flow.
- d. Disruptions caused in the supply of stone and sand aggregate, due to orders passed by the Hon'ble Supreme Court and the Hon'ble High Court of Punjab and Haryana prohibiting mining by contractors in and around Haryana.
- e. Manufacturers of construction material were prevented from making use of close brick kilns, hot mix plants and stone crushers.
- f. Disruptions caused by unusually heavy rains in Gurgaon every year.
- g. Disruptions and delays caused in the supply of cement and steel due to various large-scale agitations organized in Haryana.
- h. Declaration of Gurgaon as a Notified Area for the purpose of Groundwater and restrictions imposed by the state government on its extraction for construction purposes.
- i. Delayed re-routing by DHBVN of a 66KVA high-tension electricity line passing over the project.
- j. The Hon'ble National Green Tribunal (NGT)/Environment Pollution Control Authority (EPCA) issued directives and measures to counter deterioration in Air Quality in the Delhi-NCR region, especially during winter months. Among these measures were bans imposed on construction activities for a total period of 70 days between November 2016 to December 2019.
- k. Additionally, imposition of several partial restrictions from time to time prevented the Respondent from continuing construction work and ensuring fast construction. Some of these partial restrictions are:
 - i. Construction activities could not be carried out between 6 p.m. to 6 a.m. for 174 days.
 - ii. The usage of Diesel Generator Sets was prohibited for 128 days.
 - iii. The entries of truck traffic into Delhi was restricted.
 - iv. Manufacturers of construction material were prevented from making use of close brick kilns, Hot Mix plants, and stone crushers.
 - v. Stringently enforced rules for dust control in construction activities and close non-compliant sites.

15. The imposition of several total and partial restrictions on construction activities and suppliers as well as manufacturers of necessary material required, has rendered the respondent with no option but to incur delay in completing construction of its projects. This has furthermore led to significant loss of productivity and continuity in construction as the respondent was continuously stopped from dedicatedly completing the project. The several restrictions have also resulted in regular demobilization of labour, as the respondent would have to disband the groups of workers from time to time, which created difficulty in being able to resume construction activities with required momentum and added many additional weeks to the stipulated time of construction.
16. The Government of India imposed lockdown in India in March 2020 to curb the spread of the Covid-19 pandemic. This severely impacted the respondent as it was constrained to shut down all construction activities for the sake of workers' safety, most of the labour workforce migrated back to their villages and home states, leaving the respondent in a state where there is still a struggle to mobilize adequate number of workers to start and complete the construction of the project due to lack of manpower. Furthermore, some suppliers of the respondent, located in Maharashtra, are still unable to process orders which inadvertently have led to more delay. It is not disputed that due to the outbreak of covid-19, the entire world went into lockdown and all the construction activities were halted and no labourers were available. In fact all the developers are still facing hardship because of acute shortage of labours and even the RERA Gurugram has vide order dated 26.05.2020 declared the covid 19 as a calamity under the force majeure clause and therefore there cannot be said to be any delay in delivering the possession by the respondent. the respondent "Vatika Express City" has been registered with the Authority



vide registration no. 271 of 2017. Due to the various reasons and not limited to delay on the part of the allottees, NGT notifications, covid-19 pandemic etc, the project has been majorly impacted. However, the respondent endeavors to handover the unit within the timeline committed before HRERA, Gurugram.

17. That the super structure of the tower is completed, flooring and plaster is also completed. The respondent endeavours to handover the unit by March 2022.
18. That the complainant has failed to make payments in time in accordance with the terms and conditions as well as payment plan annexed with the buyer's agreement and as such the complaint is liable to be rejected. The complainant has paid an amount of Rs.34,21,409/- out of total sale consideration i.e., 85,63,903/- i.e., 37% of the total consideration of the unit. There is an outstanding amount of Rs. 14,60,666/- including interest payable by the complainant as on 07.09.2021 as per the construction linked plan opted by the complainant. The last payment was made by the complainant in February 2017 that is much before the propose due date of possession. It is further submitted that the complainant is real estate investors to make speculative gains and huge profit in a short span of time. However, it appears that their calculations and planning have gone wrong on account of severe slump in the real estate market and the complainant are now raising several untenable pleas on highly flimsy and baseless grounds. The complainant after defaulting in complying with the terms and conditions of the buyer's agreement, now wants to shift the burden on the part of the respondent whereas it has suffered a lot financially due to such defaulters like the present complainant.



19. 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. A builder is supposed to construct in time when the prospective buyers make payments in terms of the agreement. 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. The problems and hurdles faced by the developer or builder have to be considered while adjudicating complaints of the prospective buyers. The slow pace of work effects the interests of a developer, as it has to bear the increased cost of construction and pay to its workers, contractors, material suppliers, etc. The irregular and insufficient payment by the prospective buyers such as the complainant freezes the hands of developer in proceeding towards timely completion of the project.
20. That as per section 18(1) of the Act, 2016, it is obligatory on the part of the allottee to make a demand for refund in case the allottee wishes to withdraw from the project. The complainant did not make any demand for refund from the respondent and as such the present complaint is liable to be dismissed.
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 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

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 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. I Objection w.r.t. force majeure

22. 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.
23. 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 11.08.2020 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 11.08.2020 + 6 months, possession is to be handed over by 11.02.2021 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. Entitlement of the complainant for refund:

G.1 Direct the respondent to refund of Rs. 34,21,409/- along with prescribed rate of interest.

23. The complainant booked a flat, bearing no, 15, ST H-23, and having a super area of 1350 sq. ft., in the said project. On 11.08.2016, a builder buyer agreement was executed between the parties wherein it was concurred that the said unit would be bought for a sale consideration of Rs. 85,63,903/-. Further, it was promised to the complainant's that the possession of the said flat would be provided within 48 months and same was also consolidated in the said builder buyer's agreement. The complainant paid the rest of the consideration i.e. Rs.34,21,409/- through different transactions.
24. The respondent stated in reply that the complainant being the habitual defaulter in terms of payment has failed to adhere to the payment plan and violated the terms and conditions of agreement. It is to be noted that the complainant merely paid an amount of Rs. 34,21,409/- towards the total agreed sale consideration and still a substantial amount of money is due and payable.
25. 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.

26. The due date of possession as per agreement for sale as mentioned in the table above is 11.08.2020 and there is delay of 1 year 20 days on the date of filing of the complaint.

27. 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 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....."

28. 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, RCR(c), 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.** It was observed that :

"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."

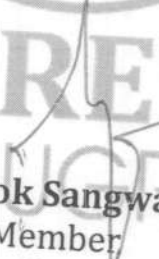
29. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016 or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). The promoter has failed to complete or unable to give possession 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.
30. The authority hereby directs the promoter to return to the complainant the amount received i.e. Rs.34,21,409/- with interest at the rate of 10.70% (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*.

H. Directions of the authority:

31. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations

31. 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:
- The respondent/promoter is directed to return the amount received i.e. Rs. 34,21,409/- to the complainant with interest at the rate of 10.70% (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 date of actual realization.
 - A period of 90 days is given to the respondents to comply with the directions given in this order and failing which legal consequences would follow.
32. Complaint stands disposed of.
33. File be consigned to the Registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

21.03.2023