



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

Complaint no. :	487 of 2021
Date of filing complaint:	08.02.2021
First date of hearing:	25.03.2021
Date of decision :	21.03.2023

Ritu Mukherji
Joydeep Mukherji
Both RR/o: C-94, Sector 50, Noida, UP 201301, India.

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:

Ms. Sanjana Dua
Sh. Dhruv Dutt Sharma

Advocate for the complainants
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.	HSG-028, plot no. 21, ST, H-30, Level 2 admeasuring 1700 sq. ft.
8.	Date of booking	20.01.2016 (page 28 of complaint)
9.	Invitation for offer of allotment of unit in "Xpressions by Vatika"	04.04.2016 (page 36 of complaint)
10.	New unit in the project "Xpressions by Vatika"	21, H-30 admeasuring 1700 sq.ft. (page 38 of complaint)
11.	Date of builder buyer agreement	12.07.2016 (page 42 of complaint)



12.	Due date of possession	12.07.2020
13.	Legal notice	13.10.2020 (page 88 of complaint)
14.	Possession clause	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 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 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 of this Agreement. Emphasis supplied</i>
15.	Total sale price	Rs. 1,04,90,565/- [page 45 of complaint]
	Basic sale price	Rs. 1,01,90,565/- [page 45 of complaint]
16.	Amount paid by the complainants	Rs. 21,48,812/- [page 17 of complaint] Including TDS of 21,276/- to acknowledgment of this payment to be supplied to the respondent.
17.	Occupation certificate	Not obtained
18.	Offer of possession	Not offered

B. Facts of the complaint:

3. 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 1700 sq.ft. in aforesaid project of the respondent for total sale consideration of Rs. 1,04,90,565/- which includes BSP, car parking, IFMS, club membership, PLC etc.

4. That the complainant made payment of Rs. 21,48,812/- to the respondent vide different cheques on different dates. As per buyer's agreement dated 12.07.2016, the respondent had allotted a unit bearing no. 21, H-30 admeasuring 1700 sq.ft. Sector 88B admeasuring 1700 sq.ft. As per para no 13 of the buyer agreements dated 12.07.2016, 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 12.07.2020 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 despite non-receipt of possession on 12.07.2020, the complainants met the CRM team on various occasions between January 2019 and February 2020. During all such visits/meetings, the CRM team offered to the complainants, allotment and possession of various other ready to move in flats within the project with the conditions that the complainants would have to make upfront payment of the total BSP at once. However, since the said condition of upfront payment for such ready to move in flats was not suitable to the complainants, they refused the offer of the respondent and sought cancellation of the agreement along with refund of the payments made by them to it. Reference may be made to emails dated 18.09.2020 & 06.11.2019.
8. That the complainants once again met the representatives of the respondent in February 2020 and requested for a refund of the amount of Rs. 21,48,812 which they had paid till July 2016. In response to such request of the complainants, the respondent assured the complainants that it would take some time but the respondent would process the refund and again verbally requested the complainants to write an email to that effect. However, these assurances were all in vain.
9. That despite repeated assurance, the respondent or its representative failed to respond to the emails and request of the complainants, they once again, after the lifting of the nationwide lockdown, in August 2020 had another verbal discussion with the CRM team of the respondent when the said CRM team again assured the complainants that Ms. Nidhi Bhatnagar



and Mr. Sajada Hanger would contact the complainants for providing a solution to their concerns however, till date, no call or email, whatsoever, has been received by the complainants from the aforementioned representative or the respondent. The conduct of the respondent clearly shows that the respondent is no more interested in finishing the project and has failed to even start the construction of the unit allotted to the complainants owing to which, the complainants are no longer interested in the project.

10. That the complainants have lost all faith and hope and therefore through their counsel have issued a legal notice dated 13.10.2020 whereby they invoked their rights under the aforesaid agreement and sought cancellation of the allotment of unit no. 21 with immediate effect due to the abovesaid defaults and breach of the said builder buyer agreement. In addition, the complainants demanded a full refund of Rs. 21,48,812/- as paid by them to the respondent along with interest @18% towards causing harassment and deliberately indulging yourself into fraudulent activities and deficiency of services and to bear the legal cost of the legal notice i.e. Rs. 50,000/-
11. That the complainants sending a legal notice to the respondent and requesting them to show cause as to why this complaint should not be filed, the respondent has failed to respond to the concerns and requests of the complainant, within the stipulated period of 15 days. In fact, no response whatsoever has been received till date, despite expiry of more than 100 days.

C. Relief sought by the complainant:

12. The complainant has sought following relief(s):

- i. Direct the respondent to refund of Rs. 21,48,812/- along with prescribed interest on compounded rate from the date of booking of the unit.
- ii. Litigation cost & Compensation.

D. Reply by respondent:

13. 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.
14. 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.
15. 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.
16. 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.

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

- a. Initially HUDA has to develop the major sector roads for the connectivity of the projects on the licensed land. But no development for the connectivity and movement across the sectors, for ingress or egress was done by HUDA for long time. Later on, due to the change in the master plan for the development of Gurugram, the Haryana Government has decided to make an alternate highway passing through between sector 87 and sector 88 and further Haryana Government had transferred the land falling in sector 87, 88 and others sectors to GMDA for constructing new highway 352 W. Thereafter in a process of developing the said highway 352 W, the land was uplifted by 4 to 5 mtrs. It is pertinent to note that Respondent has already laid down its facilities before such upliftment. As a result, the respondent is constrained to uplift the project land and re-align the facilities. Thereafter GMDA handed over the possession of the land properties/land falling in NH 352 W to NHAI for construction and development of NH 352 W. All this process has caused considerable amount of delay and thus hampered the project in question which are beyond the control and ambit of developer.

- b. Re-routing of High-Tension lines passing through the lands resulting in inevitable change in the lay out plans and cause unnecessary delay in development.
 - c. Various orders/directions passed/issued by NGT/Environmental Pollution (Prevention & Control) Authority/Supreme Court with respect to banning of construction activities.
 - d. Due to the slump in real estate sector, major financial institutions are facing difficulty in providing funding to the developers. As a result, developers are facing financial crunch.
 - e. Due to outbreak of Covid 19, real estate sectors had been gravely impacted. During such time, all construction activities were halted, no labors were available. At present, developers are still facing hardship because of acute shortage of labors:
18. That due to various unforeseen events as mentioned in the preceding para, the unit of the complainants would be constructed in phase 2. However, the respondent is ready and willing to provide alternate options to the complainants.
19. 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.21,27,536/- out of total sale consideration i.e., 1,13,47,721/- of the total consideration of the unit. There is an outstanding amount of Rs. 1,35,373/- including interest payable by the complainant as on 16.03.2021 as per the construction linked plan opted by the complainant. 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.

20. 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.
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.1 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 12.07.2020 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 12.07.2020 + 6 months, possession is to be handed over by 12.01.2021 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. 21,48,812/- along with pendent lite interest @ 24% per annum from the due date of payment till the date of actual payment, in favour of the complainant.**

23. The complainants submitted that they booked a unit bearing no. HSG-028-Sector 88B, plot no. 21, ST.H.30, level-2, Gurgaon for a total sale consideration of Rs. 1,04,90,565/- against which they paid an amount of Rs. 21,48,812/-. A buyer's agreement was executed on 12.07.2016 between the parties. The due date for completion of the project and offer of possession of the allotted unit was fixed as 12.07.2020. After two years the complainants did not receive any updates about the status of the project. Thereafter, they visited the websites of the respondent developer to check for further updates about the timelines for construction and learnt that the unit allotted to them was not a part of the latest master plan for the project uploaded on the said website. Then, the respondent shared details of some other project which were not suitable to the complainants. In February 2020, the complainant requested the respondent to refund the amount which was deposited by them. In response to such request, the respondent assured the complainants that it would take some time, but the respondent would process the refund and again verbally requested to write a mail to that effect. Accordingly, the complainants vide email dated 07.02.2020 requested the respondent to confirm that Vatika is willing to process the refund of the paid amount for the flat. Despite repeated assurance, the representatives of the respondent failed to respond to the emails and requests of the complainants. Being aggrieved by no responding to their requests, the complainants through their counsel issued a legal notice dated 13.10.2020 for refund the deposited amount.
24. 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.

25. The due date of possession as per agreement for sale as mentioned in the table above is 12.07.2020 and there is delay of 6 months 27 days on the date of filing of the complaint.
26. 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....."*
27. 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



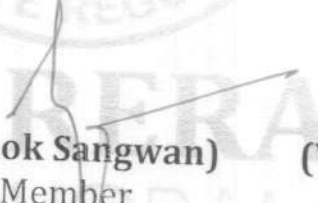
absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, 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."

28. 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.
29. The authority hereby directs the promoter to return to the complainant the amount received i.e. Rs.21,48,812/- 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:

30. 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. 21,48,812/- 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 actual 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.
31. Complaint stands disposed of.
32. 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