

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

Complaint no. :	1819 of 2022
Date of filing complaint:	26.04.2022
First date of hearing:	23.08.2022
Date of decision :	15.03.2023

Anjani Kumar Avasthi
Shraddha Avasthi
Both RR/o: A-4/C,53, Janakpuri New Delhi-58.

Complainants

Versus

M/s Vatika Limited
Office : Unit no. A-002, INXT City Centre. GF, block A,
Sector 83, Gurugram.

Respondent

CORAM:

Shri Ashok Sangwan

Member

APPEARANCE:

Sh. Deepak Kumar

Advocate for the complainants

Sh. Dhruv Dutt Sharma

Advocate for the respondent

ORDER

1. The present complaint 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 provisions of the Act or the rules and regulations made thereunder 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 complainants, 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	"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. & others
6.	RERA Registered/ not registered	Registered vide no. 271 of 2017 dated 09.10.2017 valid upto 08.10.2022
7.	Unit no.	35, Street no. H-35, Sec-88B (page no. 15 of complaint)
8.	Unit area admeasuring	1350 sq. yds. (page no. 15 of complaint)
9.	Date of allotment	16.02.2016 (page 15 of complaint)
10.	Date of builder buyer agreement	12.04.2016 (page 22 of complaint)
11.	Possession clause	<p>13. SCHEDULE FOR POSSESSION OF THE SAID RESIDENTIAL PLOT</p> <p><i>The Developer based on its present plans and estimates and subject to all just exceptions, force majeure and delays due to reasons beyond the control of the Company contemplates to complete development of the said Residential floor within a period of 48 (forty eight) months from the date of</i></p>

		<i>execution of this Agreement unless there shall be delay or there shall be failure due to reasons mentioned in other Clauses herein.....</i> Emphasis supplied [page 24 of complaint]
12.	Due date of possession	12.10.2020 [Calculated from date of execution of BBA i.e., 12.04.2016 which comes out to be 12.04.2020 + 6 months as per HARERA notification no. 9/3-2020 dated 26.05.2020]
13.	Total sale consideration	Rs. 80,35,565/- as per SOA dated 18.08.2022 (page 94 of reply)
14.	Amount paid by the complainant	Rs. 45,99,859/- as per SOA dated 18.08.2022 (page 94 of reply)
15.	Offer of possession	Not offered
16.	Occupation certificate	26.05.2022 (page 97 of reply)

B. Facts of the complaint:

- That the complainant booked a unit on 17.09.2015 in the project namely **"Vatika Express City"** situated at Sector-88-A & B, Gurgaon, Haryana- for a basic sale consideration of Rs. 80,35,565/- and the complainant paid an amount of Rs. 2,00,000/- as the booking amount. In pursuant to the booking, the respondent issued an allotment letter dated 16.02.2016 and allotted a unit bearing no. 35, Street no. H-35 admeasuring 1350 sq.ft.. On 12.04.2016 a pre-printed, one-sided builder buyer agreement was executed between the parties, the complainant had no say and followed the dotted lines as set by the respondent-builder in the agreement.
- The complainants as per the demand raised by the respondent at regular intervals without verifying the status of construction believing upon its

representations had in total paid a sum of Rs. 45,99,859/- by lastly remitting on dated 30.04.2018. The committed period of 48 months as per clause no. 13 of buyer's agreement ended on 11.04.2020, but respondent offer the possession of unit vide "intimation of possession" letter dated 17.01.2022. Hence, a delay of 22 months had been occurred leading to filing of present complaint seeking refund on account of delay and other illegalities done by it.

5. That the respondent-builder was duty bound to disclose the name of the licensee along with the license detailed in the buyer's agreement or at the time of launch of the project, but it has failed to do. It was also assured to them that the respondent is fully competent to develop, transfer and convey the right, title and interest of the residential apartment pursuant to which they booked the unit.
6. That as per Section 2(d) of Haryana Development & Regulation of Urban Areas, Act 1975 which defines the term colonizer as an individual company or association, body of individuals, whether incorporated or not, owing land for converting it into a colony and to whom a license has been granted under the said Act. It is pertinent to mention that as per said definition, a colonizer must necessarily hold the land in the ownership to apply and get a license under section 3 thereof. In the case, undeniably, till date, the respondent is neither an owner of any part of land comprised of project, nor any license has been granted by the DTCP, Chandigarh in its favour. Therefore, it meets none of the essential conditions of the expression "colonizer" as prescribed under aforesaid section of Haryana Act, 1975.
7. That the DGTCP, Chandigarh laid down policy parameters for allowing change in beneficial interest, viz. change in developer, assignment of joint

development rights and marketing rights etc. in a license granted under Haryana Act, 1975. From the above stated position, it is apprehended that the respondent has no legal authority to deal with the said housing license and to book, allot, sell, transfer any units made thereat with any third party. Thus, the entire transaction made by the respondent is totally illegal and unlawful based on misrepresentations and false statements.

8. That the buyer's agreement has only been signed by the respondent in absence of valid relationship with licensing confirming parties, which seems that no approval for change in developer in terms of policy dated 18.02.2015 had been applied or granted to respondent by office of DTCP, Haryana. It is also specifically submitted that the respondent be put to strict proof so, as to bring on record that approval in reference to form LC-IV and LIC-IVA granted by DTCP, Haryana to the licensee companies for creating 3rd party rights in favour of the respondent.
9. That the respondent being a developer in terms of section 4(2)(1)(E) of Act 2016 was supposed to take all pending approvals on time, from the competent Authorities, but in present scenario neither any permissions for change in beneficial interest in developer seems to be applied by the licensee companies before competent Authority i.e., DTCP, Chandigarh, nor had even been any approval been granted in favour of respondent to deal with the project in any manner rather being a stranger to the project. Thus, the respondent has no legal Authority to deal with the said license and to book, allot, sell, transfer any flats made thereat with any third party and the entire transaction made by it in league with licensee companies is totally illegal and unlawful based on misrepresentation and false statements.

10. The complainants further reserve their rights and be given liberty to further raise, add or amend the facts which shall be subsequently gathered from the concerned civic authorities so, as to unearth the mischief of respondent. the respondent & licensee companies while concealing the true and material facts from the Authority had sworn false declaration in form of affidavit, which with humble submission has also to be enquired.

C. Relief sought by the complainants:

11. The complainant has sought following relief(s):
- Direct the respondent to refund the total amount of Rs. 20,41,083/- to the complainant along with the prescribed rate of interest as per the applicable rules.

D. Reply by respondent:

12. That at the outset, the respondent humbly submits that each and every averment and contention, as made/raised in the complaint, unless specifically admitted, be taken to have been categorically denied by respondent and may be read as travesty of facts.
13. 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 this authority as the relief being claimed by them besides being illegal, misconceived and erroneous, cannot be said to even fall within the realm of jurisdiction of this authority.
14. 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.

15. That it has been categorically agreed between the parties that subject to the allottee having complied with all the terms and conditions of the dwelling unit 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 unit within a period of 48 months from the date of execution of the agreement unless there would be delay due to failure of allottee to pay in time the price of the said residential unit.
16. 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:
- a. *Unexpected introduction of a new National Highway being NH 352 W (herein "NH 352 W") proposed to run through the project of the respondent. 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, 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. *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.*
- c. *Further, when HUDA had acquired the sector road and started its construction, 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 level. 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.*
- d. *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.*
- e. *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.*
- f. *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.*
- g. *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.*
- h. *Disruptions caused by unusually heavy rains in Gurgaon every year.*
- i. *Due to the slum in real estate sector, major financial institutions are facing difficulty in providing funding to the developers. As a result, developers are facing financial crunch.*
- j. *Disruptions and delays caused in the supply of cement and steel due to various large-scale agitations organized in Haryana.*

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- k. 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.
- l. 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:
 - a. Construction activities could not be carried out between 6 p.m. to 6 a.m. for 174 days.
 - b. The usage of Diesel Generator Sets was prohibited for 128 days.
 - c. The entries of truck traffic into Delhi were restricted.
 - d. Manufacturers of construction material were prevented from making use of close brick kilns, Hot Mix plants, and stone crushers.
 - e. Stringently enforced rules for dust control in construction activities and close non-compliant sites.

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.

- f. 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 the Respondent 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

17. Further, it had been also agreed and accepted that in case the delay is due to the force majeure then the developer would not be held responsible for delay in delivery of possession.



18. 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 labour were available. Infact, all the developers are still facing hardship because of acute shortage of labour and even the Authority, 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 and the complaint is premature.
19. That it is pertinent to mention here that, the answering respondent despite facing above-mentioned complications and difficulties in delivering the said project in time to the complainant, offered an alternative option/re-allotment in other similar projects of the answering respondent, which are ready for possession after complying with the due consideration by the complainant. However, the complainant refused and denied the said offer of the answering respondent for the best reasons known to them. 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 perspective buyer does not reach in time. It is relevant to note that the problems and hurdles faced by the developer or builder have to be considered while adjudicating complaints of the prospective buyers. It is also 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 pertinent to mention here 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.

20. 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:

21. 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

22. 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

21. 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)(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.

22. 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.
23. 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.**" SCC Online SC 1044 decided on 11.11.2021 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."

24. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the matter of **M/s Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)**, the authority has the jurisdiction to entertain a complaint seeking refund of the amount paid by allottee along with interest at the prescribed rate.

F. Findings on the relief sought by the complainant:

F.1 Direct the respondent to refund the paid amount of Rs. 45,99,859/- along with interest.

25. In the present complaint, the complainant booked a unit in the above said project for a total sale consideration of Rs. 80,35,565/-. On 16.02.2016, the respondent issued an allotment letter and allotted a unit no. 35, street no. H-35, along with the allotment letter. Thereafter, on 12.04.2016 a buyer's agreement was executed between the parties. The total sale consideration of the said unit is Rs. 1,00,83,500/- and the complainant has paid an amount of Rs. 20,41,083/-. As per clause 13 of the said agreement, the unit was to be handed over within 48 months from the signing of the agreement i.e., by 12.04.2016. Therefore, the due date comes out to be 12.04.20q. Further as per HARERA notification no. 9/3-2020 dated 26.05.2020 passed by the authority, where the due date for completion of the project is on or after 25.03.2020, an extension of 6 months be given. Therefore, an extension of 6 months is to be given over and above the due date of



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 allottee 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.45,99,859/- 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*.

G. 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 cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:
- i. The respondent/promoter is directed to refund the entire amount of Rs. 45,99,859/- paid by the complainant along with prescribed rate of interest @ 10.70% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation & Development) Rules, 2017 from the date of each payment till the date of refund of the deposited amount.
 - ii. 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.

HARERA
GURUGRAM

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 15.03.2023