

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

Complaint no.	:	2314 of 2022
First date of hearing:		02.09.2022
Date of decision	:	31.05.2023

1. Mr. Sudhir Bhardwaj 2. Mrs. Vandana Bhardwaj Both RR/o : B-902, Sector-49, Sispal Vihar, A WHO Society, Gurugram-122018.	Complainants
Versus	
M/s Vatika Ltd. Office: Unit No. A-002, INXT City Centre, Ground Floor, Block-A, Sector-83, Vatika India Next, Gurugram, Haryana-122012	Respondent
CORAM: Shri Ashok Sangwan	Member
APPEARANCE:	
Sh. Varun Chugh	Complainants
Sh. Dhruv Dutt	Respondent

ORDER

1. The present complaint dated 24.05.2022 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 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.no.	Particulars	Details
1.	Name and location of the project	"Primorose", sector-83, Gurgaon
2.	Nature of the project	Group Housing
3.	Project area	182 acres
4.	DTCP license no.	113 of 2008 dated 01.06.2009
5.	RERA Registered/ not registered	Not registered
6.	Unit no.	26,1 st , block E admeasuring 1094.21 sq.ft. (page 29 of complaint)
	Changed unit no.	28, FF admeasuring 1263.16 sq.ft. (page 85 of complaint)
	Finally allotted unit vide addendum dated 24.08.2017	11, ST J—1.3 level 2 (page 87 of complaint)
7.	Date of builder buyer agreement	22.04.2011 (page 26 of complaint)
8.	Date of Start of construction	N/A
9.	Possession clause	<p>10.1 Schedule for possession of the said independent dwelling unit</p> <p><i>hat the Company based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said Building/ said independent dwelling unit within a period of three years from the date of execution of this Agreement unless there shall be delay or there shall be failure due to reasons mentioned in Clauses (11.1), (11.2), (11.3) and Clause (38) or due to failure of Allottee(s) to pay in time the price of the said independent dwelling unit along</i></p>

		<i>with all other charges and dues in accordance with the schedule of payments given in Annexure III or as per the demands raised by the Company 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>
10.	Due date of possession	22.04.2014
11.	Total sale consideration	Rs. 43,11,965/- as per notice for termination (page 108 of complaint)
12.	Total amount paid by the complainants.	Rs. 13,01,960/- as per notice for termination (page 108 of complaint)
13.	Occupation certificate	N/A
14.	Offer of possession	N/A
15.	Notice for termination	31.07.2021 (page 108 of complaint)

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint:
 - I. That, initially, the property in question i.e. independent low rise floor bearing unit no. FF/157, plot no.26, block-e, admeasuring 1094.21 Sq. ft., located on the 1st Floor, in the project of the respondent known as "Primerose" exclusive floors, (the "Project") situated at Vatika India Next Phase-II, Sector-83, Gurugram, Haryana, was booked by the complainants in the year 2009 and subsequently the unit was allotted to them on 09.02.2011.
 - II. That, it is pertinent to mention here that initially the unit allotted to the complainants consisted of 1094.21 Sq. ft., however, later the area of the unit was increased by 168.95 Sq. ft. owing to which reason the final size of unit got changed to 1263.16 Sq. ft.. Accordingly, the final cost of the floor increased to Rs 37,12,282/- only and since it was a construction

linked plan, hence the payment was to be made on the basis of schedule of payment, provided by the respondent.

- III. That, on 22.04.2011, the complainants entered into a builder buyer's agreement with the respondent, by virtue of which the respondent allotted unit in the project. The said buyer's agreement dated 22.04.2011, the respondent had categorically stated that the possession of the said floor would be handed over within 36 months from the date of signing the builder buyers' agreement.
- IV. That, it is pertinent to mention here that till date, the complainants had made the total payment of Rs 13,01,960/- from their own sources.
- V. That, the said buyer's agreement is totally one sided, which impose completely biased terms and conditions upon the complainants, thereby tilting the balance of power in favour of the respondent, which is further manifest from the fact that the delay in payment of instalment by the complainants would attract a heavy penalty of 15% for first 90 days and an additional penal interest of 3 % thereafter i.e. 18% per annum from the due date of payment of instalment.
- VI. That, subsequently, in the year 2012, when the complainants enquired about the progress of construction of their unit, the employee of the respondent company, in response to the said query, vide its email dated 04.09.2012 stated that *"allotment is not possible due to changes in the layout in Sector-83, alignment of sector road and fine tuning of map in that area"* hence changed the unit of the complainants.
- VII. That, in view of the reason as stated above by the respondent, the unit of the complainant got changed and fresh unit bearing no. 28, FF, St. 82 C-13, Sector-82, Gurugram, admeasuring 1263.16 Sq. Ft. was re-allotted to the complainants in lieu of their existing unit, by the respondents.



- VIII. That, to utter shock and surprise of complainants, the respondents issued another letter dated 03.08.2017 for re-allotment of another unit in place of the earlier allotted unit vide allotment letter dated 08.10.2012 stating that "*there has been a revision in the master layout of the said township due to certain fine tunings and amendments in the master layout necessitated due to architectural and other related considerations*". The complainants feeling cheated and harassed at the hands of the respondents and having left with no other option as they had already invested a substantial amount of their hard earned money were constrained to accede to the unlawful and unreasonable demand of the respondent and entered into an addendum to the said Builder Buyer agreement dated 24.08.2017 wherein the complainants were re-allotted another unit bearing no. Plot no. 11, St. J-13, Level 2, Vatika India Next, Sector-83, Gurugram, admeasuring 1305 sq. ft. in place of unit bearing no. 28, FF, St. 82 C-13, Sector-82, Gurugram, admeasuring 1263.16 sq. ft.
- IX. That, it is pertinent to mention here that after having invested in the year 2009 and after waiting for a considerable period of eight years, there was no end to the miseries of the complainants and the respondent has relentlessly exploited the hard earned money belonging to the complainants besides the other homebuyers and traumatized the complainants to such an extent that even after making the payments on time, as and when demanded by the respondent, the respondent failed to handover the possession of the property belonging to the complainants.
- X. That, the shameless attitude of the respondent is further substantiated from the fact that during all these years when the complainants were

4



striving and chasing the respondent for getting the possession of their property, via emails, telephonic conversations and personal visits to their office, the respondents never attempted to address their genuine grievance, rather kept on changing their unit one after the other and gave them false assurances of handing over the possession though never intended to give the actual possession of the unit and finally vide its email dated 24.04.2019, stated that the present unit as allotted shall be delayed for possession and will be delivered in the next 4 years and advised alternate options to invest in place of the unit already allotted to the complainants.

- XI. That, the respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession by **96 months**. The complainants were made to make advance deposit on the basis of information contained in the brochure, which is false on the face of it as is evident from the fact that no construction is done at the site.
- XII. That, the respondent has not acknowledged the requests of the complainants in regard to the status of the project. There are no signs of completion of the project. The complainants were made to make advance deposit on the basis of information contained in the brochure, which is false on the face of it as is evident from the construction done at site so far. That, the complainants, without any default, had been timely paying the instalments towards the property, as and when demanded by the respondent. The respondent had promised to complete the project by April, 2014. The buyer's agreement was executed on 22.04.2011 and the possession of the property has still not been offered which is resulting in extreme kind of mental distress, pain and agony to the complainants.



XIII. That, the respondent has committed various acts of omission and commission by making incorrect and false statement in the advertisement material as well as by committing other serious acts as mentioned in preceding paragraph. The project has been inordinately delayed. The respondent has resorted to misrepresentation. The complainants, therefore, seeks direction to the respondent to handover the physical possession of the property in question in a time bound manner besides making the payment towards delayed possession interest @ 18% p.a. for inordinately delaying the handing over of the possession of the property in question.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s).
 - I. Direct the respondent to handover the possession of the property/floor to the complainants, in a time bound manner.
 - II. Direct the respondent to pay interest @ 18% p.a. as payment, towards delay in handing over the property in question as per provisions of Act, 2016 and Rules, 2017.
 - III. Direct the respondent to pay a sum of Rs. 50,000/- to the complainants towards the cost of the litigation.
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 contested the complaint on the following grounds.
 - a. That at the outset, the respondent humbly submits that each and all averments and contentions, as made in the complaint, unless specifically admitted, be taken to have been categorically denied by the respondent and may be read as travesty of facts.



- b. That the complaint filed by the complainants before the Authority besides being misconceived and erroneous, is untenable in the eyes of law. The complainants have misdirected themselves in filing the above captioned complaint before the 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 the Authority.
- c. 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.
- d. That the reliefs sought by the complainants appear to be on misconceived and erroneous basis. Hence, the complainants are estopped from raising the pleas, as raised in respect thereof, besides the said pleas being illegal, misconceived and erroneous.
- e. 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 reliefs much less any interim relief, as sought for, is liable to be granted to the complainants.
- f. That the respondent has already cancelled the booking of the complainants vide cancellation notice dated 31.07.2021 due to various reasons but not limited to change in the layout plan, initiation of the GAIL corridor, non-removal or shifting of the defunct high tension lines and non-acquisition of sector roads by HUDA. As per clause 11.5 of the agreement, it has been agreed that in the event of failure to handover the possession, the company shall be entitled to terminate the agreement and refund the amount. The respondent also offered to refund the amount to the complainants along with 6% interest p.a.



However, it was the complainants who did not come forward to collect the money.

- g. That in the present case, there has been a delay due to various reasons which were beyond the control of the respondent and the same enumerated below:
- 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 of the Respondent 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 the Respondent 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. Re0routing of High-Tension lines passing through the lands resulting in inevitable change in the lay out plans and cause unnecessary delay in development.
 - h. That it was due to the aforesaid reasons which were beyond the control of the respondent, the unit of the complainants became non-deliverable.
7. All other averments made in the complaint were denied in total.
8. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided based on these undisputed documents.
- 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.I Territorial jurisdiction

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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 complainant at a later stage.

13. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022 (1) RCR (Civil), 357* and reiterated in case of *M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022*, wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

14. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme court in the cases mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the relief sought by the complainants.

- F. I Direct the respondent to pay interest @18% p.a. as payments, towards delay in handing over the property in question as per provisions of the Act, 2016 Rules 2017.**

h



15. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

16. Clause 10.1 of the buyer's agreement provides for time period for handing over of possession and is reproduced below:

"10.1 Schedule for possession of the said unit

The Company based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said Unit/said Unit within a period of three years from the date of execution of this agreement. However, in case the Company is not able to adhere to the said time frame, it shall be entitled to reasonable extension of time for completing the construction, unless there shall be delay or there shall be failure due to reasons mentioned in clauses (11.1),(11.2),(11.3) and clause (38) or due to failure of applicant(s) to pay in time the price of the said unit along with all other charges and dues in accordance with the schedule of payments given herein in Annexure-III or as per the demands raised by the Company from time to time or any failure on the part of the Applicant(s) to abide by any of the terms or conditions of this Agreement.

17. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the prescribed rate. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of

possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

18. The legislature in its wisdom in the subordinate legislation under the rule 15 of the rules has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
19. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 31.05.2023 is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.
20. **Rate of interest to be paid by complainants/allottees for delay in making payments:** The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;

(ii) *the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

21. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.70% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.
22. On consideration of the circumstances, the documents, submissions made by the parties and based on the findings of the authority regarding contravention as per provisions of rule 28(2), the Authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 10.1 of the agreement executed between the parties on 22.04.2011, the possession of the subject apartment was to be delivered within three years from the date of execution of agreement. Therefore, the due date of handing over possession was 22.04.2014. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/ promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. The authority is of the considered view that there is delay on the part of the respondent to offer of possession of the allotted unit to the complainants as per the terms and conditions of the agreement dated 22.04.2011 executed between the parties. Further no OC/part OC has been granted to the project. Hence, this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the builder as well as allottees.
23. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is

established. As such the complainants are entitled to delay possession charges at rate of the prescribed interest @ 10.70% p.a. w.e.f. 22.04.2011 till the actual handing over of possession or offer of possession + 2 months whichever is earlier as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

F.II Possession

24. The complainant booked a villa in the project of the respondent and in consonance of same, a buyer's agreement dated 22.04.2011 was executed inter-se parties. It is an undisputed fact that the complainant has already paid an amount of Rs. 13,01,960/- towards total consideration of Rs. 43,11,965/-. The respondent sent a letter namely "notice for termination" dated 31.07.2021, however, there is nothing on record to substantiate the fact that the said notice was proceeded by cancellation by the respondent-builder. The complainants approached the Authority seeking possession of the allotted villa as one of their reliefs, Whereas the respondent, submitted that the said unit not available due to passing of GAIL pipeline over the allotted area.
25. The Authority observes that it is high headedness on part of the respondent that despite booking of the subject unit way back in 2009, the respondent is now denying to provide the possession of the unit to the complainants.
26. In view of the submissions of the parties, the respondent is directed to provide alternative plot/units to the complainants at the same rate at which the unit was earlier purchased. The rational behind same is simple, that the allottees booked the plot in the project way back in 2009 and paid the amount then only, in a hope to get the possession.
27. Moreover, the interest (DPC) component is levied to balance the time-value component of the money. However, the same is made applicable on the

amount then paid by the allottee for the delay in handing over of the possession by the respondent and the same is balanced vide provision of section 2(z) of the Act. The complainants cannot be made suffer due to fault of the respondent and supposed to pay for the unit as per today's rate.

F.III Litigation cost

28. The complainant is also seeking relief w.r.t. litigation expenses & 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 & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of litigation expenses.

G. Directions of the authority

29. 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 provide possession of the alternative plot/unit as agreed between the parties, at the same rate at which the unit was earlier purchased within two months from the date of this order.



- ii. The respondent is directed to pay interest at the prescribed rate of 10.70% p.a., for every month of delay from the due date of possession i.e., 22.04.2014 till the actual handing over of possession or offer of possession + 2 months whichever is earlier.
 - iii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
 - iv. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.70% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
 - v. The respondent shall not charge anything from the complainants which is not the part of the agreement.
30. Complaint stands disposed of.
31. File be consigned to registry.

HARERA
GURUGRAM

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 31.05.2023

