BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**6004/2019**
Date of filing complaint:		**30.11.2019**
First date of hearing	**:**	**25.03.2020**
Date of decision	**:**	**23.02.2023**

Poonam Karel **R/O**: AD2, AFI building, Bombay Hospital Lane, New Marine Lines, Mumbai	**Complainant**
Versus	
M/s Shree Vardhman Infraheights Private Limited **Regd. office:** 302, 3rd floor, Indraprakash Building, 21-Barakhamba road, New Delhi-110001	**Respondent**

CORAM:	
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Karan Chahar (Advocate)	Complainant
Sh. Gaurav Rawat (Advocate)	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 allottee 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	"Shree Vardhman Victoria", village Badshapur, Sector-70, Gurugram
2.	Project area	10.9687 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	103 of 2010 dated 30.11.2010 valid upto 29.11.2020
5.	Name of the Licensee	Santur Infrastructures Pvt. Ltd.
6.	RERA registered/ not registered and validity status	**Registered** Registered vide no. 70 of 2017 dated 18.08.2017 Valid upto 31.12.2020
7.	Unit no.	1703, Tower - C (Page 26 of reply)
8.	Unit area admeasuring	1300 sq. ft. (Page 26 of reply)

9.	Date of buyer agreement	17.07.2013 (Page 23 of reply)
10.	Possession clause	14 (a) Possession *The construction of the flat is likely to be completed* ***within a period of forty months (40) of commencement of construction of the particular tower/block in which the flat is located*** *with a grace period of 6 months or receipts of sanction of building plans/revised plans and all other approvals subject of the building plans/revised plans and all other approvals subject to force majeure including any restrains/restrictions from any authorities, non-availability of building materials or dispute with construction agency /workforce and circumstances beyond the control of company and subject to timely payments by the buyer in the said complex.* (Emphasis Supplied)
11.	Date of commencement of construction	07.05.2014 (As per page 10 of reply)
12.	Due date of possession	**07.03.2018** **07.09.2017 + 6 months of grace period = 07.03.2018** **(Calculated from date of commencement of construction which is available in the file.)**
13.	Total sale consideration	Rs. 83,67,118 /-

		(Page 77 of reply)
14.	Amount paid by the complainant	Rs. 14,97,485/- (Page 77 of reply)
15.	Occupation certificate	13.07.2022 (Page 45 of reply)
16.	Offer of possession	27.08.2022 (Page 78 of reply)
17.	Refund request by complainant	14.07.2014, 23.07.2014 and 07.09.2014 (Annexure 9 and 11)
18.	Date of cancellation	22.12.2014

B. Facts of the complaint:

3. That the complainant a law-abiding citizen of the Country who has been cheated by the malpractices adopted by the respondent as stated to be a builder and is allegedly carrying out real estate development since many years. She booked a unit in the project of the respondent.

4. After booking, the complainant through letter informed the respondent to change the address for future communications as her husband was posted to Jammu and Kashmir.

5. The respondent sent the allotment letter to the wrong address instead of the corrected address (the complainant made a request to change). Flat buyer agreement was executed between the parties. It is also to mention

that prior to signing of the agreement, the complainant had already paid an amount of Rs. 14,97,485/-. Which is around 20% of the sale consideration.

6. The husband of the complainant visited the office of the respondent to enquire and to utter shock got to know about the demand letters being sent to wrong address and now the exorbitant cost has been imposed on the complainant for delay in payments.

7. Being dissatisfied and cheated about the act of respondent, the complainant vide letters requested the respondent to refund the amount paid till date along with interest but no positive result has been achieved.

8. The complainant from the starting has informed the change of address, but neither demand letters/notice were sent on the correct address, nor the grievance was replied. Having no option left, a legal notice was sent to the respondent. The reply of notice was of no use as it was absurd.

9. The respondent has deliberately burdened the complainant with exorbitant interest of 24% in case she wishes to pay the instalments, but the fault in not paying the instalments on time was of respondent and not of complainant.

10. Hence this compliant.

C. Relief sought by the complainant:

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

    a) Direct the respondent for refund of the total amount (Rs. 14,97,485/-) paid by the complainant along with interest at a rate of 24% per annum from the date of receipt of payments.

b) Direct the respondent to pay a sum of Rs. 1,00,000/- to the complainant towards litigation costs.

D. Reply by respondent:

The respondent by way of written reply made the following submissions:

12. The complaint filed under Section 31 of the Real Estate (Regulation and Development) Act, 2016 is not maintainable under the said provision. The respondent has not violated any of the provisions of the Act. The complainant has sought relief under section 18 of the RERA Act but the said section is not applicable in the facts of the present case and as such, the complaint deserves to be dismissed. It is submitted that the operation of Section 18 is not retrospective in nature and the same cannot be applied to the transactions that were entered prior to the RERA Act came into force. The parties while entering into the said transaction could not have possibly took into account the provisions of the Act and as such cannot be burdened with the obligations created therein. In the present case also, the agreement was executed much prior to the date when the RERA Act came into force and as such section 18 of the RERA Act cannot be made applicable to the present case. Any other interpretation of the RERA Act will not only be against the settled principles of law as to retrospective operation of laws but will also lead to an anomalous situation and would render the very purpose of the RERA Act nugatory. The complaint as such cannot be adjudicated under the provisions of RERA Act.

13. That the expression "agreement to sell" occurring in Section 18(1)(a) of the RERA Act covers within its folds only those agreements to sell that have been executed after RERA Act came into force and the FBA executed

in the present case is not covered under the said expression, the same having been executed prior to the date the Act came into force.

14. That the FBA executed in the present case did not provide any definite date or time frame for handing over of possession of the apartment to the complainant and on this ground alone, the refund and/or compensation and/or interest cannot be sought under RERA Act. Even clause 14 (a) of the FBA merely provided a tentative/estimated period for completion of construction of the flat and filing of application for occupancy certificate with the concerned authority. After completion of construction, the respondent was to make an application for grant of occupation certificate (OC) and after obtaining the OC, the possession of the flat was to be handed over.

15. The relief sought by the complainant is in direct conflict with the terms and conditions of the FBA and on this ground alone, the complaint deserve to be dismissed. The complainant signed the agreement only after having read and understood the terms and conditions mentioned therein and without any duress, pressure or protest and as such the terms thereof are fully binding on him. The said agreement was executed much prior to RERA Act coming into force and the same has not been declared and cannot possibly be declared as void or not binding between the parties.

16. It is submitted that delivery of possession by a specified date was not essence of the FBA, and the complainant was aware that the delay in completion of construction beyond the tentative time given in the contract was possible. Even the FBA contained provisions for grant of compensation in the event of delay. As such, it is submitted without

prejudice that the alleged delay on part of respondent in delivery of possession, even if assumed to have occurred, cannot entitle the complainant to ignore the agreed contractual terms and to seek interest and/or compensation on any other basis.

17. It is submitted without prejudice that the alleged delay in delivery of possession, even if assumed to have occurred, cannot entitle the complainant to rescind the FBA under the contractual terms or in law. The delivery of possession by a specified date was not essence of the FBA and the complainant was aware that the delay in completion of construction beyond the tentative time given in the contract was possible.

18. It is submitted that issue of grant of interest/compensation for loss occasioned due to breach committed by one party of the contract is squarely governed by the provisions of section 73 and 74 of the Contract Act,1872 and no compensation can be granted dehors the said sections on any ground whatsoever. A combined reading of the said sections make it amply clear that if the compensation is provided in the contract itself, then the party complaining the breach is entitled to recover from the defaulting party only a reasonable compensation not exceeding the compensation prescribed in the contract and that too upon proving the actual loss and injury due to such breach/default. On this ground, the compensation, if at all to be granted to the complainant, cannot exceed the compensation provided in the contract itself.

19. 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 on the basis of those undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

20. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. 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 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.

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 regarding jurisdiction of authority w.r.t. buyer's agreement executed prior to coming into force of the Act.

21. Another contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation or rights of the parties inter-se in accordance with the apartment buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the act or the said rules has been executed inter se parties. The authority is of the view that the act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the act. Therefore, the provisions of the act, rules and agreement have to be read and interpreted harmoniously. However, if the act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the act and the rules after the date of coming into force of the act and the rules. The numerous provisions of the act save the provisions of the agreements made between the buyers and sellers. The said contention has been

upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** decided on 06.12.2017 which provides as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter.....*
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> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

22. Further, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019, the Haryana Real Estate Appellate Tribunal observed- as under

> *"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided*

in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

23. The agreements are sacrosanct save and except for the provisions which have been abrogated by the act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

F.II Objections regarding default on behalf of the complainant:

24. It was pleaded on behalf of respondent that the complainant failed to make timely payments of the subject unit. The authority observes that the complainant opted for construction linked payment plan and the same is evident from buyer's agreement. The occupation certificate of the project has been received on 13.07.2022. The complainant till date has paid an amount equivalent to 17.89 % of total consideration. It is the case of the complainant where she seeks refund on the ground of exorbitant interest which was charged by the respondent as she made delay in paying instalments. It was also contended by him that demand letters/notices were not sent to the correct or changed address. It is observed that it is the obligation on the part of the respondent to send the demand letters on

correct/changed address. When the complainant did not get any positive response w.r.t. grievance, she wished to withdraw from the project of the respondent and as per Section 18 of RERA Act, if a promoter fails to complete or is unable to give possession of an apartment/unit (residential apartment in the present case) duly completed by the date specified in the agreement, the promoter would be liable, on demand, to return the amount received by him in respect of that apartment if the allottee wishes to withdraw from the project. Therefore, the plea advanced by the respondent with regard to non-payment by the complainant is devoid of merit and hence, is rejected.

25. The present case is a situation where she has made the request of refund, withdrawing from the project before the due date of possession. So the necessary deductions have to be made.

G. Entitlement of the complainant for refund:

G.I Direct the respondent for refund of the total amount (Rs. 14,97,485/-) paid by the complainant along with interest at a rate of 24% per annum from the date of receipt of payments.

26. The complainant was allotted a unit in the project of respondent Shree Vardhman Victoria", in Sector 70, Gurugram vide buyer agreement that was executed on 17.07.2013 for a total sale consideration of Rs. 83,67,118 /- out of which she has paid Rs. 14,97,485/-. That after coming to know about the exorbitant interest on the instalments put by respondent, the complainant went in utter shock and on 14.07.2014 and 23.07.2014 etc, the complainant sent an email to the respondent for seeking refund of the amount paid. To which respondent replied but that is of no use as the same has not been acted upon.

27. As per the settled principle of the authority, the respondent can retain not more than 10% of the sale consideration from the amount paid by the complainant.

28. Even Otherwise, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 11(5) of 2018, states that-

> *"5. Amount Of Earnest Money*
> *Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view* ***that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount*** *of the real estate i.e. apartment /plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer."*

29. Keeping in view the aforesaid factual and legal provisions, the promoter should have refunded the amount after deduction of 10% of sale consideration but the same has not been refunded by it. As the complainant is seeking refund of the entire amount which has not been done so far by the promoter, the authority hereby directs the promoter to refund the amount after deduction of 10% of the sale consideration and from the date of cancellation i.e., 22.12.2014 along with the interest at the prescribed rates.

G.II Direct the respondent to award compensation of Rs. 1,00,000/-

30. The complainant is seeking relief w.r.t. compensation in the above-mentioned relief. ***Hon'ble Supreme Court of India in civil appeal 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, for claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before the Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

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 cast upon the promoter 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 amount of Rs. 14,97,485/-. after deducting 10% of the sale consideration of the unit being earnest money as per regulation Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018 along with an interest @ 10.70% p.a. on the refundable amount, from the date of cancellation till the date of realization of payment.

ii) A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

32. Complaint stands disposed of.

33. File be consigned to the registry.

V.l – 3

Vijay Kumar Goyal
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 23.02.2023