

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

Complaint no.	:	2571 of 2021
Date of decision	:	31.05.2023

Ahuja Estates though its partner Regd. Office: G-73, Aggarwal Millenium Tower II, Netaji Subash Place, District Centre, Pitampura Delhi - 110034	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 Ashok Sangwan	Member
APPEARANCE:	
Sh. Riju Mani (Advocate)	Complainant
Sh. Gaurav Rawat (Advocate)	Respondent

ORDER

1. The present complaint dated 01.07.2021 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

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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.	Allotment letter	25.12.2012 (Page 21 of complaint)



8.	Unit no.	Tower no. I-203 (Page 29 of complaint)
9.	Unit area admeasuring	1300 sq. ft. (Page 29 of complaint)
10.	Date of buyer agreement	26.09.2013 (Page 26 of complaint)
11.	Possession clause	14 (a) Possession <i>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.</i> (Emphasis Supplied)
12.	Date of commencement of construction	13.10.2014 (As per affidavit submitted by

		respondent in another case file of same project)
13.	Due date of possession	13.08.2018 13.02.2018 + 6 months of grace period = 13.08.2018 (Calculated from date of commencement of construction.)
14.	Total sale consideration	Rs.69,22,500 /- (Page 30 of complaint) Rs. 80,75,000/- (As per customer ledger at page no. 35 of reply)
15.	Amount paid by the complainants	Rs. 68,54,973/- (Page 12 of complaint)
16.	Occupation certificate	Dated 13.07.2022 (As per DTCP)
17.	Offer of possession	Dated 14.07.2022 (As per page 8 of additional documents)

B. Facts of the complaint:

3. That the complainant is a partnership firm duly registered under partnership act and also an allottee of a residential apartment in the project of respondent. It booked an apartment on 11.06.2012. Thereafter,



received an allotment letter dated 25.12.2012 and paid the amount payable at the time of allotment and the same was acknowledged in the allotment letter.

4. An apartment buyer's agreement was executed between the parties on 26.09.2013 and the complainant paid an amount of Rs. 19,07,310/- by the date of signing of agreement. As per clause 14(a) of the agreement, the possession of the apartment was to be delivered within a period of 40 months from construction of the particular tower in which the flat is located with a grace period of 6 months. That even at the time of booking the respondent informed the complainant that they have obtained all the relevant sanctions and approvals.
5. Till date it has paid an amount of Rs. 68,54,973/- against total sale consideration of Rs. 81,38,020/- As per agreement the possession to be delivered by 13.08.2018 but respondent has miserably failed to complete the project and deliver the possession. The complainant after waiting endlessly asked them for refund on 19.12.2019, but the same was not acknowledged by it. Further sent reminder mails wherein requesting for refund but no heed was paid to their requests.
6. It received an intimation letter dated 14.01.2020 where it was informed by the respondent that the status of the project is almost complete and would try to handover the possession by June 2020.
7. Upon perusal of the provisions of agreement, it can be found that the respondent has drawn a one-sided contract, provisions of which were arbitrary, unfair and beneficial to it only.

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8. The respondent has failed to abide by its promise or alternately has also failed to refund the entire money paid by the complainants. Hence, this complaint.

C. Relief sought by the complainant:

9. The complainant has sought following relief(s):
- Direct the respondent to immediately refund of the total amount paid by the complainant along with interest at a rate of 24% per annum from the date of payment till actualization.
 - Direct the respondent to pay Rs. 1,00,000/- to the complainant for mental agony and harassment.
 - Direct the respondent to pay a sum of Rs. 50,000/- to the complainant towards litigation expenses.
 - Hold that the respondent has followed unfair trade practices and accordingly compensate the complainant.

D. Reply by respondent:

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

10. 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. It has sought relief under section 18 of the Act, but the said section is not applicable in the facts of the present case and as such, the complaint deserves to be dismissed. Further, 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 Act came into force and as such section 18 of the Act cannot be made applicable to the present case. Any other interpretation of the 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 Act nugatory.

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

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13. The relief sought by the complainant is in direct conflict with the terms and conditions of the agreement 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.
14. It is submitted that delivery of possession by a specified date was not essence of the agreement, and the complainant was aware that the delay in completion of construction beyond the tentative time given in the contract was possible. Even the agreement 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.
15. It is submitted that the order of refund shall cause irreparable loss and hardship not only to the promoter of the project in question but also the majority of its allottees who are interested in taking possession. The project is already under financial stress due to various reasons such as COVID-19 pandemic and order of refund will only increase the level of stress.
16. 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:

17. 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:

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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.

18. 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(1) R.C.R. (Civil) 357*** 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 observed as under: -

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.

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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.

19. The respondent took a plea that the 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

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contemplate rewriting of contract between the flat purchaser and the promoter.....

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."*

20. 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."

21. 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

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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.I Objections regarding not completing the project due to COVID-19 Pandemic:

22. The respondent-promoter has raised a contention that the construction of the project was delayed due to reasons beyond the control of the respondent i.e., COVID-19 and further requested that any such order granting refund to allottee would hamper the project. The authority put reliance judgment of Hon'ble Delhi High Court in case titled as *M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (I) (Comm.) no. 88/ 2020 and I.As 3696-3697/2020* dated 29.05.2020 which has observed that-

"69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself."

In the present complaint also, the respondent was liable to complete the construction of the project in question and handover the possession of the said unit by 13.08.2018. The respondent is claiming benefit of lockdown

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which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason the said time period is not excluded while calculating the delay in handing over possession.

G. Entitlement of the complainant for refund:

G.I Direct the respondent to immediately refund the total amount paid (Rs. 68,54,973/-) by the complainant along with interest at a rate of 24% per annum from the date of receipt of payments.

23. The complainant was allotted a unit on 25.12.2012 in the project of respondent namely "Shree Vardhman Victoria" vide allotment letter dated 25.12.2012 for a total sale consideration of Rs. Rs. 80,75,000/- out of which it has paid an amount of Rs. 68,54,973/- which is approximately 84.8% of the total sale consideration.
24. As per complainant, the respondent has failed to abide by its promise of handing over the possession within time. After waiting endlessly, it asked them for refund on 19.12.2019, but the same was not acknowledged by them. Further reminder mails were sent wherein request for refund was sought but no heed was paid to their requests. Further the respondent also failed to refund the entire money paid by the complainants.
25. Keeping in view the fact that the allottee complainant wishes to withdraw from the project and is 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.

The due date of possession as per agreement for sale as mentioned in the table above is 13.08.2018.

26. The occupation certificate of the building/particular tower where allotted unit of the complainant is situated was received on 13.07.2022 and it offered the possession of subject unit on 14.07.2022 but by the time the complainant-allottee has already exercised its wish to withdraw from the project and has become entitled to his right under section 18(1) and 19(4) to claim the refund of amount paid along with interest at prescribed rate from the promoter as he failed to complete or unable to give possession of the unit in accordance with the terms of agreement. Accordingly, the promoter is liable to return the amount received by him from the allottee in respect of that unit with interest at the prescribed rate
27. 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 he wishes 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.

This is without prejudice to any other remedy available to the allottee including compensation for which he may file an application for adjudging compensation with the adjudicating officer under section 71 read with section 31(1) of the Act of 2016.

28. The authority hereby directs the promoter to return the amount received by him i.e., **Rs. 68,54,973/-** 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.II Direct the respondent to award compensation of Rs. 1,00,000/-

G.III Direct the respondent to pay a sum of Rs. 50,000/- to the complainant towards litigation expenses

29. 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

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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.

G.IV Hold that the respondent has followed unfair trade practices and accordingly compensate the complainant

30. The complainant has sought the above-mentioned relief but did not press upon the same issue during proceeding. So, this relief cannot be adjudicated and hence, no direction to this effect.

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 received from the complainant i.e., **Rs. 68,54,973/-** along with interest at the rate of 10.70% p.a. from the date of each payment till the actual date of realization.
- ii) The respondent/promoter is further directed not to create any third-party rights against the subject unit before full realization of paid-up amount along with interest thereon to the complainant, and even if,



any transfer is initiated with respect to subject unit, the receivable shall be first utilized for clearing dues of allottee-complainant.

- iii) 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.



Ashok Sangwan
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 31.05.2023

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