

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

Complaint no. : 1904 of 2021
Date of filing : 22.04.2021
Order Reserve On : 15.09.2023
Order Pronounced : 10.11.2023
On:

1. Vivek Bhati
2. Anshika Singh
R/o: H. no. 901, Tower 8, Vipul Lavanya
Apartments, Sector-81, Gurugram

Complainants

Versus

M/s Vipul Ltd.
Office: Vipul Tech Square, Golf Course Road,
Sector-43, Gurugram- 122001, Haryana.

Respondent

CORAM:
Shri Sanjeev Kumar Arora

Member

APPEARANCE:
Col. M.S Sehrawat
Sh. Vijay Pal Chauhan

**Complainant
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 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 complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details
1.	Name and location of the project	"Vipul Lavanya" in Sector 81, Gurgaon.
2.	Nature of the project	Group Housing Complex
3.	Project Area	2.282 cares
4.	RERA Registered/ not registered	Registered 15 of 2018 dated 11.09.2018 upto 31.08.2019
5.	DTCP License No.	26 of 2010 dated 18.03.2010 valid upto 17.03.2020
6.	Name of licensee	Vijay Luxmi Inds and 4 others.
7.	Unit no.	304, 3rd Floor, Tower 3 (Page no. 19 of complaint)
8.	Unit area admeasuring	1780 sq. ft. (Page no. 19 of complaint)
9.	Date of allotment Letter	31.05.2016 (page no. 14 of complaint)
10.	Flat buyer agreement	31.05.2016 (Page no. 18 of complaint)
11.	Tripartite agreement	24.06.2016 (page no. 50 of complaint)
12.	Possession clause	8. Possession 8.1 Time of handing over the possession Subject to terms of this clause and subject to the Vendee(s) having complied with all the terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement and complied with all provisions, formalities, documentation etc. as prescribed by the Vendor, the



		<i>Vendor proposes to handover the possession of the Flat within a period of 36 months from the date of signing of this Agreement. The Vendee agrees and understands that the vendor shall be entitled to a grace period of 90 days, after the expiry of 36 months for applying and obtaining occupation certificate in respect of the Group Housing Complex.</i>
13.	Due date of possession	31.05.2019 (as per possession clause) Note: Grace period is not allowed as OC was not obtained in requisite timelines.
14.	Email for refund by complainant	19.11.2019 (Page no. 59 of complaint)
15.	Total sale consideration	Rs. 80,39,343/- (as per payment schedule on page no. 38 of complaint)
16.	Amount paid by the complainant	Rs. 40,23,125/- (As per SOA on page no. 55 of complaint)
17.	Occupation Certificate	Not Obtained
18.	Offer of possession	Not offered

B. Facts of the complaint

3. The complainant has made the following submissions:
4. That the complainants booked a unit in the project of the respondent and issued an allotment in favour of the complainants, on 31 May 2016. The complainants paid an amount of Rs. 12,53,935 /- on booking.
5. That the complainants were allotted a unit no. 301 on 3rd floor in tower-3 admeasuring super area of 1780 sq. ft. for a total sale consideration of Rs 80,39,343/- (inclusive of EDC/IDC, One covered car parking ,PLC, Service Tax, Swachh Bharat Tax).

6. That a flat buyer's agreement was executed between the complainants and respondent on 31.05.2016. As per the clause 8 of buyers agreement the possession of the unit was to be handed over within 36 months from the date of signing of the agreement.
7. That the tripartite agreement between the complainants, respondent and the HDFC Housing Finance Ltd was executed on 24.06.2016 and a loan amount of Rs. 65,34,674/- was sanctioned out of which an amount of Rs. 24,20,090/- was disbursed by the financial institution.
8. The occupation certificate for the project was not received by the respondent till date hence, the complainants are seeking refund of the paid up amount.

C. Relief sought by the complainant:

9. The complainant has sought following relief(s).
 - i. **Direct the respondent to refund the entire amount paid by the complainant along with prescribed rate of interest.**

D. Reply by the Respondent:

10. That the complainants approached the respondent, making enquiries about the project and after thorough due diligence and complete information being provided to him, sought to book an apartment in the said project vide application dated 25.05.2016. That complainant has gone through terms and conditions in provided in the application form for allotment in detail.
11. That vide allotment letter dated 31.05.2016 the complainant was allotted flat no. 304 on third floor, in tower 3 at Vipul Lavanya, sector 81, (in short "Flat") Gurugram, for a total sale consideration Rs. 80,39,343/- which is inclusive of EDC & IDC, One Covered Car Parking Space, PLC, Service Tax and Swachchh Bharat Tax against which the complainant had paid only Rs. 34,44,640/- (inclusive of service tax).
12. That on 31.05.2016, flat buyer's agreement (in short "FBA") was executed between the complainant and the answering respondent. It is pivotal to state

here that before signing the FBA, the complainant has gone through each and every clause of the FBA in detail and read the same very carefully.

13. That as per clause 8.1 (a) the possession of the flat was to be delivered within 36 months from the date of FBA alongwith an additional grace period of 90 days.
14. That a tripartite agreement was executed between the complainants, answering respondent and Housing Development Finance Corporation limited on dated 24.06.2016.
15. That when the construction of the project was in full swing, it was stopped due to order dated 31.10.2016 passed by Deputy Commissioner, and Order dated 08.11.2016 passed by the Hon'ble National Green Tribunal, New Delhi. The complainant was informed by the respondent vide intimation dated 18.11.2016. When again the construction of the project was in full swing and was about to complete, it was again stopped due to order dated 09.11.2017 passed by the Haryana State Pollution Control Board. In compliance of the order dated 09.11.2017 in case titled as Vardhman KaushikVs Union of India & Ors. All the construction activities were stopped in the region of Delhi and NCR. It is relevant to note that Graded Response Action Plan targeting key sources of Pollutions has been implemented during the winters of 2017-18 and 2018-19. These short term measures during smog episodes including shutting down power plant, industrial units, ban on construction, ban on brick kiln, action on waste burning and construction mechanized cleaning of road dust. Further, the construction work stopped from time to time due to order passed by the authorities and the complainants were duly informed by the answering respondent.
16. That after completion of the construction work of the project vide letter dated 03.04.2018 the respondent applied for grant of occupation certificate with the Director, Town and Country Planning, Haryana, in respect of Tower 2 and 3 of

the Project. No legal possession of the flat cannot be offered or delivered to the complainant prior to the issuance of the occupation certificate by the competent authorities. The grant of the occupation certificate as on date is under consideration at the office of the competent authority and the company is hopeful that it will soon get the certificate of occupation from the competent authority.

17. That the circumstance enumerated in para no. 8 to 9 amounts to the Force Majeure as set out in the FBA. Hence, the respondent cannot be held liable for delay in handing over the possession of the flat.
18. That delay in delivery of possession is on account of reasons that cannot be attributed to the respondent herein. it is not out of place to mention here that FBA provides that in case the developer/respondent delays in delivery of flat for reasons not attributable to the developer/respondent, then the developer/respondent shall be entitled to extension of time for delivery of the flat.
19. It may not be out of place to submit that the statement of objects and reason so the RERA inter-alia is an attempt to balance the interests of consumers and promoters by imposing certain responsibilities on both. It is submitted that the complainants have never been at all aggrieved and do have never been at all aggrieved and do not fall under the definition of aggrieved person, but still by filing such false, frivolous and vexatious complaint, the complainants are not only harassing the respondent company to succumb to their illegal demand, but by filing such false complaint, they are misleading the Hon'ble Authority.
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 those undisputed documents and submissions oral as well as written (filed by the complainant) 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, 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

23. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11

.....
(4) 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.

24. 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.

25. 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 cases of *Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors.*" 2021-2022(1) RCR(C), 357 & *M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022 and wherein it was held 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."

26. 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.

G. Findings on the relief sought by the complainant.

- i. **Direct the respondent to refund the entire amount paid by the complainant along with prescribed rate of interest.**

27. In the present complaint, the complainants intend to withdraw from the project and are seeking return of the amount paid by them in respect of



subject unit along with interest at the prescribed rate as provided under section 18(1) of the Act. Sec. 18(1) of the Act is reproduced below for ready reference.

"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.-*

- (a) *in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
(b) *due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,*

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

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."

(Emphasis supplied)

28. As per clause 8 of the flat buyer agreement dated 31.05.2016 provides for handing over of possession and is reproduced below:

8.1 Time of handing over the possession

Subject to terms of this clause and subject to the Vendee(s) having complied with all the terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement and complied with all provisions, formalities, documentation etc. as prescribed by the Vendor, the Vendor proposes to handover the possession of the Flat within a period of 36 months from the date of signing of this Agreement. The Vendee agrees and understands that the vendor shall be entitled to a grace period of 90 days, after the expiry of 36 months for applying and obtaining occupation certificate in respect of the Group Housing Complex."

29. **Due date of handing over possession and admissibility of grace period:** As per clause 8 of the agreement to sell, the possession of the allotted unit was supposed to be offered within a stipulated timeframe of 36 months from the date of signing of the agreement. Further there



is a grace period of 90 days for applying and obtaining occupation certificate. It is a matter of fact that the respondent has not completed the project in which the allotted unit is situated and has not obtained the occupation certificate within 36 months from the date of agreement. Accordingly, in the present case the grace period of 90 days is not allowed.

30. **Admissibility of refund along with prescribed rate of interest:** The complainants are seeking refund the amount paid by them at the prescribed rate interest. However, the allottees intend to withdraw from the project and is seeking refund of the amount paid by them in respect of the subject unit with interest at prescribed rate as provided 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.

31. The legislature in its wisdom in the subordinate legislation under the provision of 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.
32. 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., 10.11.2023 is **8.75%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.75%**.



33. On consideration of the circumstances, the documents, submissions and based on the findings of the authority regarding contraventions as per provisions of rule **28(1)**, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 8 of the flat buyer's agreement executed between the parties on 31.05.2016, the possession of the subject unit was to be delivered within a period of 36 months from the date of execution of buyer's agreement which comes out to be 31.05.2019. As far as grace period is concerned, the same is not allowed for the reasons quoted above.
34. Keeping in view the fact that the allottee/complainant wishes to withdraw from the project and demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter to complete or inability to give possession of the plot 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.
35. The due date of possession as per agreement for sale as mentioned in the table above is **31.05.2019** and there is delay of **1 year 10 months and 22** days on the date of filing of the complaint. The authority has further, observes that even after a passage of more than 7 years (from the date of BBA till date) neither the construction is complete nor the offer of possession of the allotted unit has been made to the allottee by the respondent/promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the unit which is allotted to them and for which they have paid a considerable amount of money towards the sale consideration. Further, the authority observes that there is no document place on record from which it can be ascertained that whether the respondent has applied for occupation



certificate/part occupation certificate or what is the status of construction of the project. In view of the above-mentioned fact, the allottees intend to withdraw from the project and is well within the right to do the same in view of section 18(1) of the Act, 2016.

36. Moreover, the occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent/promoter. The authority is of the view that the allottees cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021***

“... The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project.....”

37. 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. (supra) reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020*** decided on 12.05.2022. it was observed

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."

38. 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 the allottee 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.
39. 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 refund of the entire amount paid by him at the prescribed rate of interest i.e., @ 10.75% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*.

H. Directions of the authority

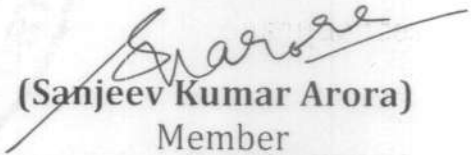
40. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):



- i. The respondent is directed to refund the entire amount of ₹ 40,23,125/- paid by the complainants along with prescribed rate of interest @ 10.75% p.a. 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 realization of the amount.
- 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.
- iii. Out of the total amount so assessed, the amount paid by the financial institution/payee be refunded first in the account of the financial institution and the balance amount along with interest if any, be refunded to the complainant-allottees.

41. Complaint stands disposed of.

42. File be consigned to registry.


(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.11.2023

HARERA
GURUGRAM