

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

Complaint no. : 6344 of 2022
Date of filing: 22.09.2022
Order pronounced on: 21.12.2023

Ashutosh Singhal
R/o: Sector 70, Badhsapur, Gurugram, Haryana

Complainant

Versus

Shree Vardhman Infraheights Pvt. Ltd.
Regd. Office: 302, 3rd floor, Indraprakash building, 21,
Barakhamba road, New Delhi-110001

Respondent

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Shri Vivek Jhangu (Advocate)
Shri Shallabh Singla &
Shri Gaurav Rawat (Advocates)

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 to the allottee as per the agreement for sale executed inter-se them.

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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, delay period, if any, have been detailed in the following tabular form:

S.No.	Particulars	Details
1.	Name of the project	"Shree Vardhman Victoria", Sector- 70, Gurugram
2.	Nature of project	Group Housing Colony
3.	RERA registered/not registered	Registered Vide 70 of 2017 dated 18.08.2017 valid upto 31.12.2020
4.	DTPC License no.	103 of 2010 dated 30.11.2010
	Validity status	29.11.2020
	Licensed area	10.9687 acres
5.	Commencement of construction	07.05.2014 (as per the email dated 16.04.20104 page 53 of complaint)
6.	Unit no.	904, tower-C (page 31 of reply)
7.	Unit measuring	1350 sq. ft. (super area) (As per FBA page no. 31 of reply)
8.	Date of execution of Floor buyer's agreement executed between the complainant	10.05.2013 (Page no. 28 of reply)
9.	Possession clause	14(a) Possession

		<p><i>The Construction of the Flat is likely to be completed within a period of forty (40) months of commencement of construction of the particular tower/ block in which the Flat is located with a grace period of six(6) months, on receipt of sanction 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(s) in the Said Complex. (Emphasis supplied)</i></p>
10	Due date of possession	07.03.2018 (calculated from the commencement of construction of tower including grace period of 6 months being unqualified and unconditional.)
11	Basic sale price	Rs. 71,55,000/- (as per FBA page no. 32 of reply)
12.	Total sale consideration	Rs.92,25,868/- (as per SOA annexed with offer of possession page 22 of reply)
13.	Total amount paid by the complainant	Rs. 82,14,020/- (as alleged by complainant page no.10 of complaint)
14.	Occupation certificate	13.07.2022 (page no.15 of reply)
15.	Offer of possession	05.08.2022 (page no. 22 of reply)

B. Facts of the complaint

3. The complainant has made the following submissions: -

- I. That in 2012, the respondent through its marketing executives and advertisement done through various medium and means approached the consumer at large including complainant with an offer to invest and buy a flat in the proposed project of respondent, which was going to launch by the name of "Shree Vardhman Victoria" on sector-70, Gurugram. The respondent represented to the complainant that he has very ethical business house in the field of construction of residential and commercial project and if the complainant invests in the project of respondent, then they would deliver the possession of proposed flat on the assured delivery date with the best quality. The respondent assured and represented to the complainant that they had already taken the necessary approvals and sanctions from the concerned authorities and departments to develop and will complete the proposed project on time. Further, assured that it would issue the allotment letter and execute the buyer's agreement in favor of complainant on booking.
- II. That the complainant purchased a unit already booked by Mr. Madan Lal Hasija by making advance payment. Thereafter, the payment receipts dated 12.06.2012, 29.06.2012 and 29.10.2012 issued by the respondent in favor of previous allottee were endorsed in the name of complainant on 07.11.2012. Subsequently, the complainant was allotted a unit no. 904, tower-C admeasuring super area of 1350 sq. ft. for a sale consideration of Rs.71,55,000/-.

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- III. That after the allotment of the said unit the respondent kept on delaying the execution of buyer's agreement and on various request of the complainant and after inordinate delay the respondent executed the builder buyer agreement on 10.05.2013.
- IV. That from the date of booking the respondent raised various demands for the payment of instalments towards the sale consideration of the said unit and the complainant paid all demands raised by the respondent.
- V. That the complainant paid Rs.82,14,020/- against the sale consideration as demanded by the respondent. As per the clause-14(a) of the buyers agreement dated 10.05.2013, the respondent agreed to complete the construction of the said unit and deliver the possession within a period of 40 months from the date of the commencement of the construction of particular tower and vide email dated 18.04.2014 the respondent sent a construction linked payment plan and raised the demand of its arrears where the respondent specifically mentioned 07.05.2014 as the date of commencement of construction and accordingly the due date of possession was 40 months from the date of commencement of construction with a grace period of 6 months. However, the respondent failed to fulfil its obligations and has not delivered possession of said flat as per the terms of the buyer's agreement.
- VI. Thereafter, the respondent upon an unexplained and unreasonable delay of approximately 55 months, upon multiple requests of the complainant offered the possession of the said unit to the complainant vide letter dated 05.08.2022.

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VII. That the cause of action accrued in favor of the complainant and against the respondent on the date of booking of the subject unit dated 07.11.2012 and on the execution of buyer's agreement dated 10.05.2013. It further arose when the respondent failed/neglected to deliver the said flat on the agreed date. The cause of action is continuing and is still subsisting on a day-to-day basis as the respondent has not paid the interest for causing delay in the delivery of possession of said unit as agreed. The respondent's failure to deliver the home on the agreed terms and conditions as per the buyer's agreement has caused the complainant severe financial hardship, as all his personal financial plans were based on the date of possession as agreed by the respondent.

C. Relief sought by the complainant

4. The complainant has sought following relief:

- (i) Direct the respondent to pay interest at the prescribed rate on account of delay in offering possession.

D. Reply by the respondent

5. The respondent contested the complaint on the following grounds: -

- I. That the present complaint filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 is not maintainable as there has been no violation of the provisions of the Act. The complaint under section 31 can only be filed after a violation or contravention has been established by the authority under section 35. Since no violation or contravention has been established, the complaint should be dismissed. Additionally, the section 18 of the Act of 2016, under which the complainant seeks relief, is not applicable to the present case as it does not have retrospective effect

and cannot be applied to transactions entered into before the Act of 2016 came into force. Therefore, the section 18 cannot be applied in the present case as buyers' agreement was executed before the Act of 2016.

- II. That in June 2012, Mr. Madan Lal Hasija made an advance registration for the allotment of a residential apartment in a proposed group housing complex to be developed by the respondent. Thereafter, Mr. Madal Lal Hasija sold the advance registration to the complainant and requested the respondent to transfer the unit in the complainant's name, which was approved by the respondent. Subsequently, a flat buyer agreement dated 10.05.2013 was executed for flat C-904 between the complainant and the respondent. The agreed total cost of the said unit was Rs.90,20,641/- exclusive of maintenance charges. The payment plan opted for payment of the agreed sale consideration and other charges was as per construction-linked payment plan. The respondent raised demands as per the agreed payment plan. However, the complainant committed severe defaults and failed to make the payments as per the agreed payment plan, despite various call letters and reminders from the respondent. The complainant paid a total amount of Rs.82,14,020/- against the total sale consideration.
- III. That the buyer's agreement did not provide a definite date for handing over possession and the tentative period as per clause 14(a) for completion was subject to various conditions, including force majeure events and timely payments of instalments by the complainant and other allottees. The occupancy certificate for the tower in question was applied on 23.02.2021, and the respondent cannot be held liable for any interest or compensation beyond the application date. The tentative period as per the buyer's

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agreement was not the essence of the contract, and the complainant was aware of the possibility of delays in handing over possession.

IV. That the delay in construction was due to various factors beyond the control of respondent, such as orders from environmental authorities, NGT/State Govts. /EPCA from time to time putting a complete ban on the construction activities and the impact of the Covid-19 pandemic, which resulted in significant delays in construction. Additionally, the defaults in payment by the complainant and other allottees adversely affected the pace of construction and caused significant financial losses. Therefore, the complainant should be held liable for payment of interest at the agreed rate mentioned in the agreement to compensate for the losses caused by the defaults of delay payments

6. All other averments made in the complaint were denied in toto.
7. 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 made by both the parties.

E. Jurisdiction of the authority

8. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint.

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 allottees 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 of 2016 quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside the compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent:

F.I Objection regarding jurisdiction of the complaint w.r.t the apartment buyer's agreement executed prior to coming into force of the Act.

9. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the buyer's agreement was executed between the parties prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.

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10. The authority is of the view 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. The Act nowhere provides, nor can be so construed, that all previous agreements would 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 would 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....."

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

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interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

11. Also, 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 has observed-

"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."

12. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the 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.

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F.II Objections regarding force majeure.

13. The respondents-promoter has raised the contention that the construction of the tower in which the unit of the complainant is situated, has been delayed due to force majeure circumstances such as orders passed by National Green Tribunal to stop construction, non-payment of instalment by allottees. The plea of the respondent regarding various orders of the NGT and other authorities advanced in this regard are devoid of merit. The orders passed by NGT banning construction in the NCR region was for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. Also, there may be cases where allottees has not paid instalments regularly but all the allottees cannot be expected to suffer because of few allottees. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

F.III Objection regarding delay in completion of construction of project due to outbreak of Covid-19.

14. The 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 (1) (Comm.) no. 88/2020 and LAS 3696-3697/2020* dated 29.05.2020 has observed as under:

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."

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15. In the present case also, the respondents were liable to complete the construction of the project and handover the possession of the said unit by 07.03.2018. It is claiming benefit of lockdown 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 cannot be excluded while calculating the delay in handing over possession.

G. Findings regarding relief sought by the complainants.

G. I Direct the respondent to pay interest at the prescribed rate on account of delay in offering possession.

16. In the present complaint, the complainant intends to continue with the project and is 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."

17. Clause 14(a) of floor buyer's agreement provides for handing over of possession and is reproduced below:

"Clause 14(a)

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The Construction of the Flat is likely to be completed within a period of forty (40) months of commencement of construction of the particular tower/ block in which the Flat is located with a grace period of six(6) months, on receipt of sanction 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(s) in the Said Complex.

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18. Due date of possession and admissibility of grace period: The promoter has proposed to hand over the possession of the said unit within 40 months from the date of commencement of construction and it is further provided in agreement that promoter shall be entitled to a grace period of six months. The date of construction commencement was initially to be commenced from 07.05.2014 as per the intimation/demand letter dated 16.04.2014 issued by the respondent. Therefore, the due date of possession comes out to be 07.03.2018 including grace period of six months being unqualified and unconditional.

19. Admissibility of delay possession charges at prescribed rate of interest: The complainant is seeking delay possession charges 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.

20. 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.
21. 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., 21.12.2023 is @ 8.85 %. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.
22. 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;"*

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23. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.85 % by the respondent/promoter which is the same as is being granted to them in case of delayed possession charges.
24. On consideration of the circumstances, the evidence and other record and submissions made by the parties, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 14(a) of the buyer's agreement executed between the parties on 10.05.2013, the possession of the said unit was to be delivered within a period 40 months from the date commencement of construction i.e. 07.05.2014 and it is further provided in agreement that promoter shall be entitled for a grace period of six months. As far as grace period is concerned, the same is allowed being unconditional and unqualified. Therefore, the due date of handing over of possession comes out to be 07.03.2018. In the present complaint the complainant was offered possession by the respondent on 05.08.2022 after obtaining occupation certificate dated 13.07.2022 from the competent authority. The authority is of view that there is a delay on the part of the respondent to offer physical possession of the allotted unit to the complainant as per the terms and conditions of the buyer's agreement dated 10.05.2013 executed between the parties.
25. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 13.07.2022. The respondent offered the possession of the unit in question to the complainant only on 05.08.2022, so it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the

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complainant should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession till the expiry of 2 months from the date of offer of possession (05.08.2022) which comes out to be 05.10.2022.

26. 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 complainant are entitled to delay possession charges at prescribed rate of the interest @ 10.85 % p.a. w.e.f. 07.03.2018 till expiry of 2 months from the date of offer of possession (05.08.2022) i.e., up to 05.10.2022 as per provisions of section 18(1) of the Act read with rule 15 of the rule.

G. Directions of the authority:

27. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the authority under section 34(f) of the act of 2016:

- I. The respondent is directed to pay interest to the complainant against the paid-up amount at the prescribed rate i.e., 10.85% per annum for every month of delay on the amount paid by the complainant from due date of possession i.e., 07.03.2018 till expiry of 2 months from the date of offer of possession (05.08.2022) i.e., up to 05.10.2022 only. The arrears of interest

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accrued so far shall be paid to the complainant within 90 days from the date of this order as per rule 16(2) of the rules.

- II. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.85% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
 - III. The complainant is directed to pay outstanding dues, if any, after adjustment of delay possession charges within a period of 30 days. The respondent is directed to handover the physical possession of the unit within next 30 days to the complainant/allottee.
 - IV. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement.
28. Complaint stands disposed of.
29. File be consigned to registry.

Dated: 21.12.2023

HARERA
GURUGRAM


(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram