

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

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| Complaint no. : | 1321/2022 |
| Date of filing complaint: | 08.04.2022 |
| First date of hearing: | 20.07.2022 |
| Date of decision : | 07.02.2024 |

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| Saroj Gupta Resident of: Modern Hi tech auto products, Sector 18, main road, village Sarhaul, Near Huda Market, Gurugram 122015, Haryana | Complainant |
| Versus | |
| M/s Vatika One on One Pvt Ltd Regd. office: Flat no. 621 A, 6 th Floor, Devika Towers, 6, Nehru Place, New Delhi 110019. | Respondent |

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| CORAM: | |
| Shri Ashok Sangwan | Member |
| APPEARANCE: | |
| Complainant in person | Complainant |
| Ms. Simran Goel | 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 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 complainants, the date of proposed handing over of the possession, and the delay period, if any, have been detailed in the following tabular form:

| Sr. No. | Particulars | Details |
|---------|--------------------------------------|-------------------------------------------|
| 1. | Name of the project | Vatika One on One Sector 16 Gurugram. |
| 2. | Project area | 42452.291 Sq. Mtrs |
| 3. | Nature of the project | Commercial colony |
| 4. | DTCP license no. and validity status | 05 of 2015 dated 06.08.2015 |
| 5. | Name of licensee | Keshav Dutt and others. |
| 6. | RERA Registered/ not registered | 237 of 2017 dated 20.09.2017 |
| 7. | Unit no. | P-726 (Page no. 18 of complaint) |
| 8. | Unit area admeasuring | 500 Sq. Ft. (Page no. 18 of complaint) |
| 9. | Date of allotment | 06.03.2018 (Page no. 18 of complaint) |

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| 10. | Date of execution of BBA | Not executed |
| 11. | Possession clause | None |
| 12. | Due date of possession | <p>06.09.2021</p> <p><i>Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018</i> Hon'ble Apex Court observed that "a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract.</p> <p>"An additional extension of 6 months is provided in view of HARERA Notification no. 9/3-2020"</p> <p>In view of the above-mentioned reasoning, the allotment letter dated 06.03.2018 ought to be taken as the date for calculating the due date of possession. Therefore, the due date for handing over the possession of the unit comes out to be 06.19.2021.</p> |
| 13. | Assured return | Clause 2 of allotment letter |

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| | <p><i>"That the payment of your assured return of Rs. 130.15/- per sq. ft. per month on super area will commence only on receipt of 70% of Basic Sale Consideration by us from you, in terms of the payment plan/schedule of payments as agreed/opted by you and will be paid till the completion of the construction of the said building. Post completion of construction of the said building, you will be paid committed return of Rs. 131/- per sq ft per month on super area for upto three years from the date of completion of construction of the said building or the sand unit is put on lease, whichever is earlier. You will be entitled to receive lease rent in respect of said unit from the Rent Commencement Date in accordance with lease document as may be executed with prospective tenant. If there is any rent free period on account of fir-cut or otherwise then you will not be entitled for rent during Rent free period."</i></p> <p>Clause 3 of allotment letter</p> <p><i>"That you have intended to purchase the said unit with leasing arrangement and in terms of Builder Buyer Agreement, the Company shall be authorized to put the said unit on lease for and on your behalf (individually or in combination with other adjoining units) as and when the said unit is ready and fir for occupation. The company expects to lease the said unit (individually or in combination with other adjoining units) at minimum lease rent of Rs 131/- per sq.ft. per month on super area of said unit for the first lease. However, in the event the achieved lease rent being higher or lower than Rs 131/- per sq. ft. as aforesaid, the following would be applicable.</i></p> <p><i>a If the achieved rate of rent is less than Rs 131/- per sq. ft., you will be refunded amount calculated @ Rs 141.18/- per sq. ft. for every Rs.1/- by which achieved rent is less than Rs 131/- per sq. ft.</i></p> |
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| | | <i>b If the achieved rate of rent is more than Rs. 131 per Sq. ft, you will be liable to pay additional sale consideration calculated @ Rs. 70.59/- per sq. ft. on super area of said unit for every rupee of additional rent achieved over Rs. 131/- per sq. ft."</i> |
| 14. | Basic sale consideration | Rs. 41,25,000/- (Page no. 20 of complaint) |
| 15. | Amount paid by the complainants | Rs. 32,34,000/- (Page no. 20 of complaint) |
| 16. | Legal Notice to the respondent by complainant | 02.02.2022 (Page no. 24 of complaint) |
| 17. | Occupation certificate /Completion certificate | Not obtained |
| 18. | Offer of possession | Not offered |

B. Facts of the complaint:

3. The complainant trusting the respondent had booked a commercial space and was allotted priority bearing unit no. p-726 measuring area of 500Sq. Ft. vide allotment letter dated 06.03.2018 in the Vatika limited project namely "VATIKA ONE ON ONE" situated at Sector-16 in Gurugram-122020, Haryana.
4. The complainant had made payment of Rs. 32,34,000/- against aforesaid commercial space under the Name Mrs. Saroj Gupta under assured return linked payment plan with total basic consideration of Rs. 41,25,000/-, but still the complainant has not

- received any builder buyer agreement or any other agreement for the said commercial property.
5. As per allotment letter dated 06.03.2018 issued by the respondent against the aforesaid commercial property, it had to pay Rs. 130.15/- per Sq. Ft. per month on 500 Sq. Ft. area which comes to Rs. 65,075/- as an assured return to the complainant.
 6. The respondent has paid assured return amount to complainant only for the period from 08.02.2018 to 30.09.2018. The complainant attempted to contact the respondent officers/staff on several occasions however the complainant officers deliberately ignored all calls.
 7. That an e-mail dated 11.11.2019 duly sent by sh. Sumit Arora (who is working as a Sr. Manager Client Services respondent Co.) with the company informed the complainant that pending assured return amount will be adjusted in due course with complainant's pending dues (if any) or with the excess area if arose in future under this property and also a mail dated 17.07.2020 was also received from sh. Vishal Saini (who is working as a sales and client services team manager respondent Co.) who shared a detailed sheet and promised to pay for pending assured return against the aforesaid unit, however almost 3.5 years passed but still respondent has not released any amount for the same.
 8. Since the respondent was deliberately avoiding the telephonic calls made and letters issued by the complainant requesting the respondent to honour its obligations as per the allotment letter, the complainant was constrained to issue a legal notice dated 02.02.2022 through their counsel calling upon them to make

payment of the assured returns in terms of allotment letter and to also execute the title documents for the unit and peaceful possession of the same.

9. The complainant discovered from the respondent website that project at which the unit was allotted and paid for in full by the complainant is being advertised as completed through no possession has been handed over to complainant.

C. Relief sought by the complainants:

10. The complainants have sought the following relief(s):
- Direct the respondent to handover physical possession of the unit.
 - Direct the respondent to execute the title documents in complainant's favour.
 - Direct the respondent to make payment of pending period (October 2018 to till date of actual realization) along with interest.

D. Reply by the respondent.

11. That in the year 2018, the complainant learned about the commercial project launched by the respondent titled as "ONE ON ONE" situated at Sector 16, Gurugram and visited the office of the respondent to know the details of the said project. The complainant further inquired about the specifications and veracity of the commercial project and was satisfied with every proposal deemed necessary for the development. On having keen interest in the commercial project constructed by the respondent, the complainant herein booked a unit vide application form dated 08.02.2018, on his own judgement and investigation. That on

06.03.2018; an allotment letter was issued to the complainant for the Unit bearing no. P-726, admeasuring to 500 Sq. Yards. for a total sale consideration of Rs. 46,20,000/-.

12. The complainant herein was well aware of the fact that the commercial unit in question was subject to be leased out post completion and the same was evidently mentioned and agreed by the complainant in the allotment letter dated 06.03.2018. That the said application form and allotment letter clearly stipulated provisions for "lease" and admittedly contained a "lease clause". That in the light of the said facts and circumstances it can be concluded beyond any reasonable doubt that the Complainant herein is not a "Consumer" or "Allottee". The complainant had booked one more unit in the project of the respondent for steady monthly returns. It is an evident fact that since starting the complainant herein booked the unit in question considering the same as an investment opportunity. The complainant herein is not a "Consumer". The complainant is simply investor who approached the respondent for investment opportunities and for a steady rental income.
13. The relief of granting assured return is beyond the jurisdiction of the Authority.
14. Since starting, the respondent herein was committed to complete the project and has invested each and every amount so received from the complainant towards the construction of the same. However, the construction was slightly delayed due to the reasons

beyond the control of the respondent and the same are reproduced herein:

- i. Environmental Pollution (Prevention and Control) Authority, NCR (EPCA) vide its notification bearing no. EPCA-R/2019/L-49 dated 25.10.2019 banned construction activity in NCR during night hours (6 pm to 6 am) from 26.10.2019 to 30.10.2019 which was later on converted to complete ban from 1.11.2019 to 05.11.2019 by EPCA vide its notification bearing no. R/2019/L-53 dated 01.11.2019.
- ii. The Hon'ble Supreme Court of India vide its order dated 04.11.2019 passed in writ petition bearing no. 13029/1985 titled as "*MC Mehta vs. Union of India*" completely banned all construction activities in Delhi-NCR which restriction was partly modified vide order dated 09.12.2019 and was completely lifted by the Hon'ble Supreme Court vide its order dated 14.02.2020. These bans forced the migrant labourers to return to their native towns/states/villages creating an acute shortage of labourers in the NCR Region. Due to the said shortage the Construction activity could not resume at full throttle even after the lifting of ban by the Hon'ble Apex Court.
- iii. The Ministry of Home Affairs, GOI vide notification dated March 24, 2020 bearing no. 40-3/2020-DM-I(A) recognised that India was threatened with the spread of Covid-19 pandemic and ordered a completed lockdown in the entire country for an initial period of 21 days which started on

March 25,2020. By virtue of various subsequent notifications, the Ministry of Home Affairs, GOI further extended the lockdown from time to time and till date the same continues in some or the other form to curb the pandemic. Various State Governments, including the Government of Haryana have also enforced various strict measures to prevent the pandemic including imposing curfew, lockdown, stopping all commercial activities, stopping all construction activities.

15. That right from the date of booking of the commercial unit, the respondent herein had been paying the committed return of Rs.65,075/- every month to the complainant without any delay. That as on 01.09.2018, the complainant herein has already received an amount of Rs. 5,04,331/- as assured return as agreed by the respondent under the aforesaid agreement.

E. Jurisdiction of the authority:

16. The plea of the respondent regarding the rejection of the complaint on the grounds 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.1 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 the entire Gurugram District for all purposes 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 the 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 with the obligations cast upon the promoters, the allottees, and the real estate agents under this Act and the rules and regulations made thereunder.

17. So, given 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 complainants at a later stage.

F. Findings on the objections raised by the respondent:

F.1 Objections regarding force Majeure.

18. The respondent-promoter has raised the contention that the construction of the unit of the complainant has been delayed due to force majeure circumstances such as orders passed by the Hon'ble NGT, Environment Protection Control Authority, and Hon'ble Supreme Court. The pleas of the respondent advanced in this regard are devoid of merit. The orders passed were 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. Furthermore, the respondent should have foreseen such situations. Thus, the promoter respondent cannot be given any leniency on the basis of aforesaid reasons and it is a well-settled principle that a person cannot take benefit of his own wrong. Furthermore, the respondent seeks an extension in the timeline for due date of possession in view of the Covid 19 pandemic. On perusal of records brought before this Authority, it is of the view that the allotment of the unit was done on 06.03.2018 though no specific timeline was specified as to the due date of handing over of possession, therefore, in view of "**Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018**" wherein the Hon'ble Apex Court observed that:

"a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract."

The due date of possession had to be calculated from the date of allotment, therefore the due date becomes 06.03.2021.

19. As per HARERA notification no. 9/3-2020 dated 26.05.2020, an extension of 6 months is granted for the projects having completion date on or after 25.03.2020. The completion date of the aforesaid project in which the subject unit is being allotted to the complainant is 06.03.2021 i.e. after 25.03.2020. Therefore, an

extension of 6 months is to be given over and above the due date of handing over possession in view of notification no. 9/3-2020 dated 26.05.2020, on account of force majeure conditions due to outbreak of Covid-19 pandemic. Therefore, the due date for handing over of possession comes out to be 06.09.2021.

F.II Objection regarding complainant being an investor.

20. The respondent has taken a stand that the complainant is the investor and not consumer, therefore, she is not entitled to the protection of the Act thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is a settled principle of interpretation that a preamble is an introduction of a statute and states the main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the allotment letter, it is revealed that the complainant is a buyer, and he has paid a total price of Rs. 32,34,000/- to the promoter towards the purchase of an apartment in its project, at this stage, it is important

to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" about a real estate project, means the person to whom a plot, apartment, or building, as the case may be, has been allotted, sold (whether as freehold or leasehold), or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

21. In view of the above-mentioned definition of "allottee" as well as all the terms and conditions of the space buyer's agreement executed between promoter and complainant, it is crystal clear that the complainant is allottee as the subject unit was allotted to him by the promoter. The concept of investor is not defined or referred to in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having the status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 000600000010557 titled as M/s Srushti Sangam Developers Pvt Ltd. Vs. Sarvapriya Leasing (P) Ltd. Anr. has also held that the concept of investors is not defined or referred to in the Act. Thus, the contention of a promoter that the allottee being an investor is not entitled to protection of this act also stands rejected.

G. Findings on relief sought by the complainants.

G.1 Direct the respondent to handover physical possession of the unit.

22. The complainant contends that the instant unit was allotted to her vide allotment letter dated 06.03.2018, and no agreement to sell

was executed between them. She further contends that she has not been handed over the possession of the said unit. On the other hand, the respondent contends that the complainant had entered into a leasing arrangement vide said allotment and physical possession was not to be handed over to her.

23. On perusal of the records brought before this Authority, it is of the view that even though no schedule for possession was provided in the allotment letter, yet it is the responsibility of the builder to provide possession in a reasonable amount of time. It is important to highlight the Hon'ble Supreme court's stance in this regard, in view of "**Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018**" wherein the Hon'ble Apex Court observed that:

"a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract."

Therefore, the due date of possession had to be calculated from the date of allotment, and hence, the due date becomes 06.03.2021. Adding to it the extension of 6 months in view of HARERA notification no. 9/3-2020, the due date of possession comes at 06.09.2021.

24. The complainant has paid Rs. 32,34,000/- against the basic sale consideration of Rs. 41,25,000/- for the unit in question. The

contention of the respondent that the said allotment was merely a leasing arrangement has no merit. The respondent is under an obligation to offer constructive possession even in such cases. It is observed that no occupation certificate has yet been obtained by the respondent till date. The respondent is directed to complete the construction of the unit expeditiously and handover possession of the unit to the complainant.

G.II Direct the respondent to execute the title documents in complainant's favour.

25. Section 17 (1) of the Act deals with duties of promoter to get the conveyance deed executed and the same is reproduced below:

"17. Transfer of title. -

(1). The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment or building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws:

Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate."

26. The authority observes that OC in respect of the project where the subject unit is situated has not been obtained by the respondent promoter till date. As on date, the conveyance deed cannot be

executed in respect of the subject unit, however, the respondent promoter is contractually and legally obligated to execute the conveyance deed upon receipt of the occupation certificate/completion certificate from the competent authority. In view of above, the respondent shall execute the conveyance deed of the allotted unit within 3 months from the date of obtaining OC from the concerned authority and upon payment of requisite stamp duty by the complainant as per norms of the state government.

G.III Direct the respondent to make payment of pending period (October 2018 to till date of actual realization) along with interest.

27. The complainant is seeking unpaid assured returns on monthly basis as per the allotment letter dated 06.03.2018 at the rates mentioned therein. It is pleaded that the respondent has not complied with the terms and conditions of the said allotment letter. Though for some time, the amount of assured returns was paid (From 08.02.2018 to 30.09.2018) but later on, the respondent refused to pay the same by taking a plea that the same is not payable in view of enactment of the Banning of Unregulated Deposit Schemes Act, 2019 (hereinafter referred to as the Act of 2019). The authority has rejected the aforesaid objections raised by the respondent in *CR/8001/2022 titled as Gaurav Kaushik and anr. Vs. Vatika Ltd.* wherein the authority while reiterating the principle of prospective ruling, has held that the authority can take

different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land and it was held that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum, memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and the Act of 2019 does not create a bar for payment of assured returns even after coming into operation as the payments made in this regard are protected as per section 2(4)(j)(iii) of the Act of 2019. Thus, the plea advanced by the respondent is not sustainable in view of the aforesaid reasoning and case cited above.

28. The money was taken by the builder as a deposit in advance against allotment of immovable property and its possession was to be offered within a certain period. However, in view of taking sale consideration by way of advance, the builder promised certain amount by way of assured returns for a certain period. So, on its failure to fulfil that commitment, the allottee has a right to approach the authority for redressal of his grievances by way of filing a complaint.
29. The builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return.

Moreover, the allotment letter defines the builder/buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allottee arises out of the same relationship. Therefore, the respondent is directed to pay assured returns as per the terms of the said allotment letter.

H. Directions issued by the Authority:

30. Hence, the Authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance with 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 is directed to handover possession of the unit on obtaining the occupation certificate,
- II. The respondent is directed to pay the amount of assured return at the agreed rate as per clause 2 and 3 of Allotment letter dated 06.03.2018 i.e. at Rs. 130.15/- Sq. Ft. per month on super area of the unit till completion of construction of the said building, and thereafter at the rate of Rs. 131/- per Sq. Ft. per month on super area for up to three years from the date of completion of construction of the said building or the said unit is put on lease, whichever is earlier. The amount of Assured return already paid i.e. Rs. 5,04,331/- by the respondent to the complainant shall be deducted before paying the residual Assured return.
- III. The respondent is directed to pay the outstanding accrued assured return amount with prescribed rate of interest till



date at the agreed rate within 90 days from the date of this order after adjustment of outstanding dues, if any, from the complainant and failing which that amount would be payable with interest @ 8.85% p.a. till the date of actual realization.

- IV. The respondent shall execute the conveyance deed of the allotted unit within the 3 months from the date of receipt of the OC from the concerned authority and upon payment of requisite stamp duty as per norms of the state government.
- V. The respondent shall not charge anything from the complainant which is not the part of the builder buyer agreement.

31. Complaint stands disposed of.

32. File be consigned to the Registry.

Ashok Sangwan

(Member)

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 07.02.2024