

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

Complaint no.	3128 of 2023
Date of complaint	07.07.2023
Date of Order	07.02.2024

Anju Mittal and Pawan Mittal Registered address: 968 Saraswati Vihar, Chhakarapur, Swami Vivekanand Block, Gurugram, Haryana-122001.	Complainants
Versus	
M/s Vatika Ltd. Registered address at: Vatika Triangle, 4 th Floor, Sushant Lok, ph-1, Block-A, MG Road, Gurugram-122002	Respondent no. 1
M/s ICICI Bank Ltd. Registered address at: ICICI Bank Tower, Near Chakli Circle, Old Padra Road, Vadodra, Gujarat-390007.	Respondent no. 2

CORAM:	
Shri Ashok Sangwan	Member
APPEARANCE:	
Shri Abhijeet Gupta Advocate	Complainants
Shri Anurag Mishra Advocate	Respondent no. 1
None	Respondent no. 2

ORDER

1. The present complaint has been filed by the complainants/allottees 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 provision of the Act or the rules and regulations made there under or to the allottees as per the buyer's agreement 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:

S. N.	Particulars	Details
1.	Name and location of the project	Vatika Turning Point Phase I, Sector 88-B, Gurugram.
2.	Nature of the project	Group Housing Colony
3.	Project area	18.80 Acres
4.	DTCP license no.	91 of 2013 dated 26.10.2013
5.	Name of licensee	Vaibhav Warehousing Pvt. Ltd., Feldon Developers Pvt. Ltd., Sh Sahil Grover, Sh. Chanderbhan Grover and 5 others.
6.	RERA Registered/ not registered	Lapsed project
7.	Unit no.	302, HSG-026-West End-7 (Page no. 29 of Complaint)
8.	Unit area admeasuring (Carpet area)	899.22 sq. ft.

		(Page no. 29 of Complaint)
9.	Date of execution of builder buyer agreement.	18.01.2018 (Page no. 22 of Complaint)
10.	Possession clause	None
11.	Due date of possession	18.07.2021 <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>"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 date of execution of Builder Buyer Agreement dated 18.01.2018 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 18.07.2021.</p>
12.	Tripartite agreement	27.02.2018 (Page no. 62 of Complaint)
13.	Total sale consideration	Rs.88,28,806/- (Page no. 51 of Complaint)
14.	Amount paid by the complainants.	Rs.38,68,101/- (Page no. 85 of Complaint)
15.	Occupation certificate	Not obtained
1.	Offer of possession	Not offered

B. Facts of the complaint:

3. The complainants have made the following submissions: -

- i. That pursuant to the elaborate advertisements, assurances, and promises made by respondent no. 1 in the brochure circulated by

- them about their premium project, named as "Turning Point (Phase 1)" having HRERA registration certificate no 213/2017, the complainants considered purchasing a residential apartment bearing no. 302, HSG 026 West End 7 admeasuring 899.22 Sq. Ft., in Vatika India Next 2, Sector 88B, Gurugram along with parking in basement having total sale consideration of Rs. 88,28,806/-.
- ii. Upon enquiry by the complainants about the availability of necessary approvals for development & construction of the project, the respondent no 1 categorically and explicitly stated that the project is registered under HRERA having registration certificate no 213/2017 and has obtained all the necessary approvals for development & construction of the project from the Department of Town and Country Planning, Haryana vide License No. 91/2013.
- iii. Thereafter, a builder buyer agreement dated 18.01.2018 was executed between both the parties, wherein the respondent no.1 explicitly assigned all the rights and benefits of residential apartment bearing no. 302, HSG 026 West End 7 admeasuring 899.22 Sq. Ft., in Vatika India Next 2, Sector 88B, Gurugram to the complainants.
- iv. The respondent no. 1 informed the complainants that the respondent no. 2 is there preferred financing partner for this project and directed the complainants to respondent no. 2 in order to take a loan towards the payment of residential unit booked by the complainants. The respondents and complainants executed the tri partite agreement on date 27th Feb 2018. That vide sanction letter dated 16.03.2018, the respondent no. 2 provided the details of the loan sanctioned. The total loan amount sanctioned was Rs. 70,00,000/-.

- v. The complainants have paid total amount of Rs. 38,68,101/-. Out of this, the total amount paid by the complainants from their own pocket is Rs. 9,24,734/- and the amount disbursed by the respondent no.2 to the respondent No.1 is Rs. 28,40,936/-.
- vi. At the time of signing the application form to book a unit in respondent No.1's project, the complainants were informed that the possession of the unit would be handed over in the month of January 2020, which is almost from 3 years from the date of signing the builder-buyer agreement. However, the respondent never gave anything in writing about the possession date in any of the documents executed between respondent no.1 and complainants.
- vii. It was also assured by respondent no.1 that if due to any reason the construction of the booked unit gets delayed, then the developer, i.e. respondent no.1 undertakes to pay the PRE-EMI's to the buyer. The payment of the PRE-EMI's shall continue till the application for occupancy certificate including the actual possession.
- viii. The complainants anticipated and believed that respondent no. 1 would commence the construction of the project immediately after the disbursement of the first tranche of loan amount. However, to date, respondent no. 1 has failed to commence the construction of the project. When the complainants recently visited the site to check on the progress of the construction, they were completely shocked and appalled to see that no construction whatsoever had taken place, and no construction work was even ongoing at the site. The respondent no. 1 & respondent no. 2 have illegally and intentionally colluded in an illegal act to disburse and collect huge amount of money from the complainants even when the construction of project had not started.

- ix. Thereafter in June 2023, the complainants decided to withdraw from the project as the respondent No.1 failed to keep the construction of the project as per the construction plan and there was no sign and hope of the project getting completed and ready for the possession.
- x. As per the loan sanction letter sent by the respondent no. 2 to the complainants, the respondent no.2 informed that the total amount of Rs. 28,40,936.00/- has been already disbursed and further EMIs against the housing loan availed will be disbursed till the entire tenure of the loan. There is no obligation on the complainants to pay the pre EMIs as the onus is on the respondent no.1 to continue paying the pre EMIs and also considering the fact that the project has been abandoned.

C. Relief sought by the complainants:

4. The complainants have sought the following relief(s):
- i. Direct the respondent no. 1 to refund the entire paid-up amount along with interest.

D. Reply by respondents

D.I Reply by respondent no.1:

5. The respondent no. 1 vide reply dated 30.11.2023 contested the complaint on the following grounds:-
- i. That "TURNING POINT" is a residential group housing project being developed by the respondent no. 1 on the licensed land admeasuring 18.80 Acres situated at Sector 88B, Gurugram. That the License No.91 of 2013 and approval of building plan and other approvals granted for the "Turning point project" has been obtained on 26.10.2013 by respondent no. 1 and the construction whereof was started in terms thereof.

- ii. Further, after establishment of the Haryana Real Estate Regulatory Authority, the respondent no. 1 applied for registration of its project "Turning Point" and the authority registered the said project vide its Registration No. 213 of 2017 dated 15.09.2017.
- iii. That as per clause 7 of the agreement to sale dated 18.01.2018 executed with the complainants, the construction of the project was contemplated to be completed subject to force majeure circumstances mentioned in clause 9 thereof which provided for extension of time. The slowdown in construction and delay is primarily because of default in making timely payment of instalments by the buyers including the complainants.
- iv. That the complainants have delayed and defaulted in making timely payments of instalments to the respondent no.1. The said delay by the complainants in payment of timely instalments has also contributed to the delay in completion and possession of the apartment in addition to other factors beyond the control of the respondent. It is an established law, that if one party to the agreement defaults in its obligation under an agreement, it cannot expect the other party to fulfil its obligation in a timely manner. A defaulter under an agreement cannot seek remedy for default against the other for delay.
- v. That the demonetization of currency notes of INR 500 and INR 1000 announced vide executive order dated November 8, 2016, has also affected the pace of the development of the project. All the workers, labourers at the construction sites are paid their wages in cash keeping in view their nature of employment as the daily wages labourers. The effect of such demonetization was that the labourers were not paid and consequently they had stopped working for the

project and had left the project site/NCR which led to huge labour crisis which was widely reported in various newspapers/various media.

- vi. That prior to making the application for booking/endorsing, every allottee visited the project site, seen and verified the access/ approach roads, key distances, looked at the vicinities, physical characteristic of the project etc. and then filed an application for allotment with the respondent no.1 which factum is also recorded in the builder buyer agreement executed with each of the complainants.
- vii. That the project got delayed due to reasons beyond the control of the respondent no.1 such as, delay in payments by allottees, demonetization of currency notes, Road construction and development works in Gurugram, and Nation highway-352 construction, orders of Hon'ble National Green Tribunal, Covid 19 pandemic, etc.

D.1 Reply by respondent no.2:

6. The authority issued a notice dated 10.07.2023 of the complaint to the respondent no.2 by speed post. The service was also done by speed post dated 07.07.2023 vide consignment no. EH372882467IN. The delivery reports have been placed in the file. Despite service of notice, the respondent has preferred neither to put in appearance nor file reply to the complaint within the stipulated period. Accordingly, the authority is left with no other option but to decide the complaint ex-parte against the respondent no. 2.
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 and submission made by the complainant.

E. Jurisdiction of the authority:

8. 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

9. 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

10. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per the buyer's agreement. 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.

11. 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 complainant at a later stage.

F. Findings on the objections raised by the respondents:

F.I Objections regarding force Majeure

12. The respondent no. 1-promoter has raised the contention that the construction of the project has been delayed due to force majeure circumstances such as various direction issued by Hon'ble National Green Tribunal regarding ban on construction in NCR region, road construction in Gurugram, Demonetization on currency notes, etc. The plea of the respondent regarding various directions by NGT, etc., and all the pleas advanced in this regard are devoid of merit. The directions issued by NGT for banning on construction in the NCR region 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. Thus, the promoter-respondent no. 1 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. Though respondent no. 1 has pleaded covid 19 pandemic as one of reasons for delay in completion of project. In view of HARERA notification no. 9/3-2020, the respondent was provided an extension of 6 months for completion of project, and the respondent no.1 still could not complete the construction of the said project.

G. Entitlement of the complainant for refund:

G.I Direct the respondent to refund the amount deposited by the complainants along with interest at the prescribed rate.

13. The complainants were allotted a unit bearing no. 302, HSG-026, West End-7 in the project of the respondent/builder namely "Turning Point", Sector 88B, Gurugram, Haryana vide buyer's agreement dated

18.01.2018 for a total sale consideration of Rs. 88,28,806/-. However, there is no clause mentioned in the buyer's agreement vide which the due date for handing over of possession can be ascertained. Therefore, reliance is placed on the Supreme Court's judgement in **Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018**, where 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.

14. In view of the above-mentioned reasoning, the date for execution of BBA i.e., 18.01.2018 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 18.17.2021 (Including 6-month relaxation in view of HARERA notification no. 9/3-2020)
15. As per the records, the complainants have paid a sum of Rs. 38,68,101/- to the respondent no. 1 against the total sale consideration of Rs.88,28,806/-. However, the complainants contended that the unit was not offered to them despite this and no occupation certificate has yet been obtained, further, the aforesaid project has lapsed, and application for de-registration has been filed with the Authority. Since the respondent no. 1 is unable to complete the construction of its project and handover the possession of the subject unit in accordance with the terms of the buyer's agreement, the promoter is liable on demand to return the amount received by the promoter with interest at the prescribed rate. This view was taken by 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 the case of M/s Sana Realtors Private Limited & other vs. Union of India & others SLP (Civil) (supra) wherein it was observed as under: -

"The unqualified right of the allottees 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 allottees, 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 allottees/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 allottees 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".

16. 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 allottees as per the buyer's agreement under section 11(4)(a) of the Act. The promoter has failed to complete or is unable to give possession of the unit in accordance with the terms of the buyer's agreement or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottees, as they wish to withdraw from the project, without prejudice to any other remedy available, to return the amount received by respondent/promoter in respect of the unit with interest at such rate as may be prescribed.
17. Furthermore, it is brought to the notice of this Authority that a tripartite agreement dated 27.02.2018 was executed amongst the complainants, respondent no.1, and the bank. The bank had disbursed an amount of Rs. 28,40,936/-. As per clause 4(I)(m) and 4(I)(n) of the tripartite agreement

dated 27.02.2018, the bank shall be paid its outstanding dues in the event the respondent no.1 fails to handover possession. The said clauses are reproduced below:

"4(l)(m). The Owner/Developer agrees that in the event in which any refund becomes due and payable, under any agreement/arrangement executed/ made between the Allottee/ Borrower(s) the Owner/ Developer agrees not to pay any amount on any account to the Allottee/ Borrowers by way of refund or otherwise without written consent of the Bank"

"4(l)(n). The Owner/ Developer undertakes and agrees that in case of any failure on the part of Owner/ Developer whatsoever to allot/ hand over the possession of the said Flat to the Allottee/ Borrower(s) as per allotment terms, the Owner/ Developer shall immediately refund total money so received from the Allottee/ Borrower(s) and/ or from the Bank to the extent of its outstanding dues to which the Borrowers hereby gives his unequivocal and unconditional consent."

Therefore, in view of the aforementioned clauses, it is the view of this Authority that while refunding the amount, the respondent no. 1 shall first return the amount disbursed by the bank to it, and thereafter the remaining amount shall be returned back to the complainants.

18. There has been an inordinate delay in the project which cannot be condoned. Keeping in view the fact that the allottees/complainants wish to withdraw from the project and are demanding return of the amount received by the promoter in respect of the unit with interest on the failure of the promoter to complete or inability to give possession of the unit in accordance with the terms agreed between them. The matter is covered under section 18(1) of the Act of 2016.
19. 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 a refund of the entire amount paid by them at the prescribed rate of interest i.e., @ 8.85% p.a. (the State Bank of India highest marginal cost of lending rate (MCLR))

applicable as of 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:

20. 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 promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016.

- i. The respondent no. 1/promoter is directed to refund the amount i.e., Rs. 36,68,101/- received by it from the complainants/allottees along with interest at the rate of 10.85% p.a. at 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.
- ii. Out of the amount so assessed, the amount paid by the bank shall be refunded to it and the balance amount if any, shall be refunded to the complainants.
- iii. The respondent no. 1-promoter shall obtain a copy of no objection certificate from the bank i.e. respondent no. 2 at the time of refunding the amount paid by the complainants.
- iv. A period of 90 days is given to the respondents to comply with the directions given in this order failing which legal consequences would follow.

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21. Complaint stands disposed of.
22. File be consigned to the registry.


Ashok Sangwan
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 07.02.2024



HARERA
GURUGRAM