

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

Complaint no.	:	5796 of 2022
Date of pronouncement of order	:	02.02.2024

Naresh Kumar Goel R/O: - 906, Siddhi Vinayak Apartment, Plot no. 65, Sector - 55, Gurugram	Complainant
Versus	
Shree Vardhman Infraheights Pvt. Ltd., 302, 3 rd floor, Indraprakash Building, 21- Barakhamba Road, New Delhi - 110001	Respondent

CORAM:	
Shri Sanjeev Kumar Arora	Member

APPEARANCE:	
Mr. Nihit Nagpal (Advocate)	Complainant
Mr. Gaurav Rawat (Advocate)	Respondent

ORDER

1. The present complaint dated 06.09.2022 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 provision of the act

or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of 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. No.	Heads	Information
1.	Name and location of the project	"Shree Vardhman Victoria", village Badshapur, Sector-70, Gurugram
2.	Project area	10.9687 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	103 of 2010 dated 30.11.2010 valid upto 29.11.2020
5.	Name of the Licensee	Santur Infrastructures Pvt. Ltd.
6.	RERA registered/ not registered and validity status	Registered From 18.08.2017 till 31.12.2020 Registration expired
7.	Unit no.	A 1004, Tower - A (Page 19 of complaint)
8.	Unit admeasuring	1950 sq. ft. (Page 19 of complaint)
9.	Date of flat buyer's agreement	26.06.2013 (Page 16 of complaint)
10.	Payment plan	Construction linked payment plan

		(Page 35 of complaint) (Inadvertently the payment plan mentioned in proceeding dated 15.12.2023 is time linked plan)
11.	Tripartite agreement	24.01.2015 (Page 39 of complaint) between complainant, respondent and SBI
12.	Total consideration	Rs. 1,24,47,684/- (Page 87 of reply)
13.	Total amount paid by the complainant	Rs. 1,07,37,543/- (Page 87 of the reply and page c of complaint)
14.	Possession clause	14(a) The construction of the flat is likely to be completed within a period of 40 months of commencement of construction of the particular tower/ block in which the subject flat is located with a grace period of 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)
15.	Date of commencement of construction	12.07.2014 (Page 11 of the reply)
16.	Due date of delivery of possession	12.05.2018 (Calculated from the date of foundation of tower)
17.	Occupation certificate	Obtained as on 13.07.2022 (Page 16 of reply)
18.	Offer of possession	28.07.2022 (page 23 of reply)
19.	Grace period utilization	Grace period is allowed in the present complaint.

B. Facts of the complaint

- I. That parties executed an agreement on 26.06.2013 with respect to subject unit bearing flat bearing No. 1004, Tower No. A, having an approximate super area of 1950 Sq. Ft. (equivalent to 181.23 Sq. Mtr.) for the basic price for flat of Rs. 1,00,05,450/- at Shree Vardhman Victoria. He had paid a sum of Rs. 35,01,907.50/- towards basic price as on the date of signing of the agreement dated June 26, 2013.
- II. As per the statement of account (Appendix A) attached by the respondent in their letter dated July 28, 2022 Mr. Naresh Kumar Goel has paid a total amount of Rs. 1,07,37,543.15/- to M/s Shree

Vardhman Infraheights Pvt. Ltd. As per clause 14 (a) of the agreement dated June 26, 2013, the construction of the flat was 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.

III. Further, for the purposes of this agreement, the date of application for issuance of occupancy/completion/part occupancy/completion certificate of the flat shall be deemed to be the date of completion. The respondent has failed to hand over the possession of the said flat within stipulated time period from the date of execution of the agreement dated June 26, 2013. Additionally, the grace period of six months has also expired. The respondent has failed to hand over the possession of the said flat even as on present date. Hence, the present complaint.

C. Relief Sought

3. This Authority may direct the respondent as follows:

1. Direct the respondent to pay interest for every month of delay at prevailing rate of interest.
2. Direct the respondent to pay total amount of Rs. 12,28,500/- to the complainant.
3. Direct the respondent to pay rentals
4. Direct the respondent to waive of following charges.
 - a. CGST
 - b. SGST
 - c. Value added tax

- d. Interest amount due up to July 28,2022
 - e. Labour cess
5. Legal cost.

D. Reply by the respondent

4. The present complaint filed under Section 31 of the Real Estate "RERA Act" is not maintainable under the said provision. The respondent has not violated any of the provisions of the Act. As per rule 28(1) (a) of Rules, a complaint under section 31 of Act can be filed for any alleged violation or contravention of the provisions of the Act after such violation and/or contravention has been established after an enquiry made by the Authority under Section 35 of Act. In the present case no violation/contravention has been established by the Authority under Section 35 of Act and as such, the complaint is liable to be dismissed.
5. The complainant has sought reliefs under section 18 of the Act, but the said section is not applicable in the facts of the present case and as such, the complaint deserves to be dismissed. It is submitted that the operation of Section 18 is not retrospective in nature and the same cannot be applied to the transactions which were entered prior to the Act came into force. The complaint as such cannot be adjudicated under the provisions of Act.
6. That the expression "**agreement to sell**" occurring in Section 18(1)(a) of the RERA Act covers within its folds only those agreements to sell that have been executed after RERA Act came into force and the FBA

- executed in the present case is not covered under the said expression, the same having been executed prior to the date the Act came into force.
7. It is submitted without prejudice to above objection, in case of agreement to sell executed prior to RERA coming into force, the dates for delivery of possession committed therein cannot be taken as trigger point for invocation of Section 18 of the Act. When the parties executed such agreements, section 18 was not in picture and as such the drastic consequences provided under section 18 cannot be applied in the event of breach of committed date for possession given in such agreements. On this ground also, the present complaint is not maintainable.
8. That the FBA executed in the present case did not provide any definite date or time frame for handing over of possession of the flat to the complainant and on this ground alone, the refund and/or compensation and/or interest cannot be sought under RERA Act. Even clause 14 (a) of the FBA merely provided a tentative/estimated period for completion of construction of the Flat and filing of application for Occupancy Certificate with the concerned Authority. After completion of construction, the respondent was to make an application for grant of occupation certificate (OC) and after obtaining the OC, the possession of the flat was to be handed over.
9. The relief sought by the complainant is in direct conflict with the terms and conditions of the FBA and on this ground alone, the complaint deserves to be dismissed. The complainant cannot be allowed to seek any

relief which is in conflict with the said terms and conditions of the FBA. It is submitted that delivery of possession by a specified date was not essence of the FBA and the complainant was aware that the delay in completion of construction beyond the tentative time given in the contract was possible. Even the FBA contain provisions for grant of compensation in the event of delay. As such, it is submitted without prejudice that the alleged delay on part of respondent in delivery of possession, even if assumed to have occurred, cannot entitle the complainant to ignore the agreed contractual terms and to seek interest and/or compensation on any other basis. It is submitted without prejudice that the alleged delay in delivery of possession, even if assumed to have occurred, cannot entitle the complaint to rescind the FBA under the contractual terms or in law. It is submitted that issue of grant of interest/compensation for the loss occasioned due to breach committed by one party of the contract is squarely governed by the provisions of section 73 and 74 of the Contract Act, 1872 and no compensation can be granted de-hors the said sections on any ground whatsoever. A combined reading of the said sections makes it amply clear that if the compensation is provided in the contract itself, then the party complaining the breach is entitled to recover from the defaulting party only a reasonable compensation not exceeding the compensation prescribed in the contract and that too upon proving the actual loss and injury due to such breach/default. On this ground, the compensation, if at all to be granted

to the complainant, cannot exceed the compensation provided in the contract itself.

10. Copies of all the relevant documents have been duly filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority

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

11. 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

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

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoter, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

13. 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.

F. Findings on the objections raised by the respondent

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

14. The contention of the respondent is that authority is deprived of the jurisdiction to go into the interpretation or rights of the parties inter-se in accordance with the flat buyer's agreement executed between the parties and no agreement for sale as referred to under the provisions of the act or the said rules has been executed inter se parties. The authority is of the view that the act nowhere provides, nor can be so construed, that

all previous agreements will be re-written after coming into force of the act. Therefore, the provisions of the act, rules and agreement have to be read and interpreted harmoniously. However, if the act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the act and the rules after the date of coming into force of the act and the rules. 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 interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

15. Further, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal observed- as under

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

16. The agreements are sacrosanct save and except for the provisions which have been abrogated by the act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under 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.

17. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the

prescribed rate, 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.

18. 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.

19. 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., 02.02.2024 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.

20. 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;"

21. 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 the complainant in case of delayed possession charges.

22. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the act by not handing over possession by the due date as per the agreement. By virtue of clause 14(a) of the agreement executed between the parties on 26.06.2013, the possession of the

subject flat was to be delivered within stipulated time i.e., by 12.05.2018. As far as grace period is concerned, the same is allowed as clause being unconditional. The respondent has delayed in offering the possession but the same is offered now as on 28.07.2022. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the act on the part of the respondent is established. As such, the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 12.05.2018 till offer of possession i.e., 28.07.2022 plus two months 28.09.2022 at prescribed rate i.e., 10.85 % p.a. as per proviso to section 18(1) of the act read with rule 15 of the rules.

23. No direction with respect to relief no. 2 and 3 can be given as both the parties have not pressed the same during proceedings.
24. This issue with respect to labour cess has already been dealt with by the authority in complaint titled as **Mr. Sumit Kumar Gupta and Anr. Vs. Sepset Properties Private Limited (962 of 2019)** decided on 12.03.2020, where it was held that since labour cess is to be paid by the respondent, as such no labour cess should be charged by it. Thus, the respondent is directed to withdraw the unjustified demand of the pretext of labour cess. The builder is supposed to pay a cess from the welfare of the labour employed at the site of construction and which goes to welfare

boards to undertake social security schemes and welfare measures for building and other construction workers. So, the respondent is not liable to charge the labour cess.

25. The due date of possession is after 01.07.2017 i.e., date of coming into force of GST. Thus, the builder is entitled to charge GST, but it is obligated to pass the statutory benefits of that input tax credit to the allottee(s) within a reasonable period.

26. As was held in CR/4031/2019 and others case titled as Varun Gupta Vs. Emaar MGF Land limited, the promoter is entitled to charge VAT from the allottee for the period up to 31.03.2014 @ 1.05% (one percent VAT + 5 percent surcharge on VAT). However, the promoter cannot charge any VAT from the allottees/prospective buyers for the period 01.04.2014 to 30.06.2017 as the same was to be borne by the promoter-developer only. The respondent-promoter is bound to adjust the said amount, if charged from the allottee with the dues payable by him or refund the amount if no dues are payable by him.

27. Separate proceeding to be initiated by the planning branch of the Authority for taking an appropriate action against the builder as the project registration has been expired.

G. Directions of the authority

28. Hence, the authority hereby passes this order and issues the following directions under section 37 of the act to ensure compliance of obligations

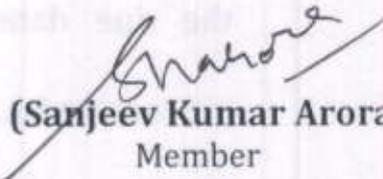
cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent is directed to pay delayed possession charges at the prescribed rate of interest i.e., 10.85% p.a. for every month of delay on the amount paid by complainant to it from the due date of possession i.e., 12.05.2018 till offer of possession i.e., 28.07.2022 plus two months 28.09.2022.
- ii. The promoter shall not charge anything which is not part of the BBA.
- iii. The arrears of such interest accrued from due date of possession till its admissibility as per direction (i) above shall be paid by the promoters to the allottee within a period of 90 days from date of this order as per rule 16(2) of the rules.
- iv. The rate of interest chargeable from the allottee, in case of default shall be charged at the prescribed rate i.e., 10.85% by the respondent/promoters which is the same rate of interest which the promoters 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.
- v. The complainant is also directed to take possession of the

allotted unit and pay outstanding dues, if any, after adjustment of interest for the delayed period.

29. Complaint stands disposed of.

30. File be consigned to registry.


(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 02.02.2024



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GURUGRAM