

PROCEEDINGS OF THE DAY

Day and Date	Thursday and 26.7.2018
Complaint No.	127/2018 case titled as Ms. Rashmi Malviya versus M/s Varali Properties Ltd.
Complainant	Ms. Rashmi Malviya
Represented through	Complainant in person with Shri Vaibhav Suri, Adv.
Respondent	M/s Varali Properties Ltd.
Respondent Represented through	Shri Tarun Arora, legal representative on behalf of the respondent with Shri Manmohan Krishan Dang, Adv.

Proceedings

The project is registered.

As per the contention of the applicant, this apartment was booked on the basis of possession link plan, **40%** of the total consideration was to be paid before signing at the time of booking and rest **60%** was to be paid at the time of possession. Total consideration amount was **Rs.2,34,15,000/-** out of which the complainant has paid **Rs.1,03,27,465/-**. Date of signing of the agreement was 11.9.2013. As per clause 21 of the agreement, possession was to be handed over within 3 years + grace period of 6 months 36+6 from the date of execution of agreement i.e. 42 months. Accordingly the due date of possession comes out to 11.3.2017. The counsel for the respondent intimated that the project is complete and occupation certificate has been applied which is likely to be obtained very soon. The possession will be handed over as soon as occupation certificate is received from the competent authority. Counsel for the complainant has stated that he is seeking refund on account of failure of the promoter to hand over the possession on the due date. As this project has already been completed and possession is likely to be given in next three months, it could not be fair to allow refund at this stage particularly when the allottee is being paid interest at the prescribed rate for every month of delay i.e. from 11.3.2017 till handing over the possession. The complainant made a submission that promoter as a

New PWD Rest House, Civil Lines, Gurugram, Haryana नया पी.डब्ल्यू.डी. विश्राम गृह, सिविल लाईंस, गुरुग्राम, हरियाणा

matter of courtesy and good will may offer this plot for sale on behalf of the complainant **if some buyer of the complainant is available and the dealing is ok by the complainant then the payment will be made by the complainant to the dealer directly.** The role of the promoter is only to facilitate the same without any obligation on his part. The complaint is disposed of accordingly. Detailed order will follow. File be consigned to the Registry.

Samir Kumar
(Member)

Dr. K.K. Khandelwal
(Chairman)
26.7.2018

Subhash Chander Kush
(Member)



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

Complaint No. : 127 of 2018
Date of Institution : 03.04.2018
Date of Decision : 26.07.2018

1. Ms. Rashmi Malviya
Flat no. 223, Tower-B, DLF PRIMUS Sec-82
A, Gurugram, Haryana

...Complainant

Versus

1. M/s Varali Properties Ltd.
India Bulls House, 448-451, Udyog Vihar
Phase-V, Gurugram Haryana-110066

...Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar
Shri Subhash Chander Kush

Chairman
Member
Member

APPEARANCE:

Complainant in person with
Shri Vaibhav Suri
Shri Tarun Arora, legal
representative with Shri
Manmohan Krishan Dang

Advocate for the complainant

Advocate for the respondent



ORDER

1. A complaint dated 03.04.2018 was filed under section 31 of the Real Estate (Regulation & Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development)



Dainik Jagran on 27.04.2013. Therefore, respondent has not wrongfully resorted to increase in floors/ increase in FAR.

21. As per clause 21 of the builder-buyer agreement, the Company proposed to hand over the possession of the said unit by 11.03.2017. The clause regarding possession of the said unit is reproduced below:

" 21 POSSESSION

(a) Time of handing over the possession

The Developer shall endeavour to complete the construction of the said building/ Unit within a period of three years, with a six months grace period thereon from the date of execution of the Flat Buyers Agreement subject to timely payment by the Buyer(s) of the Total Sale price payable according to the Payment Plan applicable to him or as demanded by the Developer"

22. Accordingly, the due date of possession was 11.03.2017. As far as the penalty clause in case of delay in possession is concerned which is Rs. 5/sq. ft. of the super area per month, it is held to be one sided as also held in para 181 of the judgment in *Neelkamal Realtors Suburban Pvt Ltd Vs. UOI and ors. (W.P 2737 of 2017)*, wherein the Bombay HC bench held that:

"...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on





delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements."

23. As the possession of the flat was to be delivered by 11.03.2017 as per the BBA clause referred above, the authority is of the view that the promoter has violated section 11(4)(a) of the Haryana Real Estate (Regulation and Development) Act, 2016, which is reproduced as under:

"11.4 The promoter shall—

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be: Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed."

24. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above. Section 34(f) is reproduced below:





“34 (f) Function of Authority -

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.”

It has been requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act which is reproduced below:

37. Powers of Authority to issue directions

The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned.

25. As per obligations on the promoter under section 18(1) proviso, the promoter is obligated to pay the complainant, interest at the prescribed rate for every month of delay till the handing over the possession as the promoter has not fulfilled his obligation. Section 18(1) is reproduced below:

“18.(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,— (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case





may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act: Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

The complainants reserve their right to seek compensation from the promoter for which they shall make separate application to the adjudicating officer, if required.

Findings of the authority

26. **Jurisdiction of the authority:** The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in *Simmi Sikka V/s M/s EMAAR MGF Land Ltd.* leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.
27. The authority has decided to take suo-motu cognizance against the said promoter for not getting the project registered and for that separate proceeding will be initiated against the respondent u/s 59 of the Act.
28. Thus, the authority, exercising powers vested in it under section 37 of the Haryana Real Estate (Regulation and Development) Act, 2016 hereby issue directions to the respondent that the project has already been completed and





possession is likely to be given in next three months, it could not be fair to allow refund at this stage particularly when the allottee is being paid interest at the prescribed rate for every month of delay i.e. from 11.03.2017 till handing over the possession @ 10.45% p.a. The said interest shall be payable from the date the respondent has received the amount from the complainant and the same shall be payable within 90 days of the date of the order.

29. The order is pronounced.
30. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member


(Dr. K.K. Khandelwal)
Chairman
(11.07.2018)

Haryana Real Estate Regulatory Authority, Gurugram



Rules, 2017 by the complainant, Ms. Rashmi Malviya, against the promoter M/s Varali Properties Ltd. on account of violation of clause 21 of the builder-buyer agreement executed on 11.09.2013 for unit no. D-122 on 12th Floor in tower no. D in the project "Indiabulls Enigma" for not giving possession on the due date i.e. 11.03.2017 which is an obligation of the promoter under section 11 (4) (a) of the Act ibid.

2. The particulars of the complaint are as under: -

1.	Name and location of the project	Indiabulls Enigma, Sector -110, Gurugram
2.	Registered/ unregistered	unregistered
3.	Flat/Apartment/Street no/Plot no./Unit No.	D-122 , tower- D
4.	Booking amount paid by the buyer to the builder/promoter/company vide agreement	Rs. 5,00,000/-
5.	Total consideration amount as per agreement dated 11.09.2013	Rs. 2,34,15,000/-
6.	Total amount paid by the complainant upto date	Rs. 1,03,27,465/-
7.	Percentage of consideration amount	44% approx...
8.	Date of delivery of possession.	Clause 21 within 3 years + 6 months grace period i.e. 11.03.2017
9.	Delay of number of months/ years upto 26.07.2018	1 year 4 months
10.	Penalty Clause as per builder buyer agreement dated 11.09.2013	Clause 22 Rs. 5/- per sq. ft. per month





11.	Cause of delay in delivery of possession	No valid reason
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3. The details provided above, have been checked as per record available in the case file which have been submitted by the both parties. A builder buyer agreement is available on record for unit no. D-122 according to which the possession of the aforesaid unit was to be delivered by 11.03.2017. The promoter has failed to deliver the possession of the said unit to the complainants by the due date and also has not paid any compensation i.e. @ Rs. 5 per sq. ft of the super area of the said unit per month for the period of the such delay as per builder buyer agreement dated 11.09.2013. Therefore, the promoter has not fulfilled his committed liability as on date.

4. Taking cognizance of the complaint, the authority issued notice to the respondent on 23.04.2018 for filing reply and for appearance. Accordingly, the respondent appeared on 08.05.2018. The case came up for hearing on 08.05.2018, 31.05.2018, 10.07.2018, 26.07.2018 respectively. The reply has been filed on behalf of the respondent dated 25.05.2018. The respondent through its reply contended that the authority does not have the jurisdiction to decide the present complaint





and that the parties are bound by the terms and conditions of the agreement.

FACTS OF COMPLAINT

5. The complainant booked a residential flat in the project of the respondent "Indiabulls Enigma" in Sector 110, Gurgaon in Pawala Khusrupur village, Gurgaon Tehsil, Gurgaon. The Indiabulls Real Estate Ltd. represented to the complainant that Indiabulls is developing the above project through its 100% subsidiary Varali Properties Ltd.
6. The complainant was further induced to sign a pre-printed flat buyer's agreement dated 11.09.2013 by virtue of which the respondent allotted unit bearing no. D-122 on 12th floor in block no. D, having super area of 3350 sq. Ft. The complainant till date has made a total payment of Rs. 1,03,27,465/- against the sale consideration.
7. The complainant submitted that during the construction the respondent and Athena Infrastructure Ltd. i.e. subsidiary of India bulls changed the original plan and revised the same to the detriment of the complainant and unilaterally increased 4 floors in towers A to D. Further the complainant states that the strength of the tower structure compromised as the foundation was built for 17 floors and would not withstand the





additional load of 4 floors and did not seek the consent of the complainant.

8. The complainant submitted that the unlawful act of increasing the FAR by the respondent is clear violation of the legal mandate whereby the developer is required to invite objections from allottees before any revision in the original building.

9. The complainant submitted that the respondent marked luxury high end apartments, but, the structure which has been constructed, on face of it is of extremely poor quality.

10. Issues to be decided

- i. Whether the respondent/ promoter is liable for unjustifiable delay in construction and development of the project in question?
- ii. Whether the respondent/ promoter is liable to refund the amount deposited by the complainant along with interest @ 15 % p.a. along with compensation?
- iii. Whether the respondent/ promoter has over charged EDC/ IDC?
- iv. Whether the respondent wrongfully resorted to increase in floors/ increase in FAR thereby changing the entire theme of the project?



11. Relief Sought

Direct the respondent to refund a sum of Rs. 1,03,27,465/- along with interest @ 15 % per annum from the date when payments were made till realization of the amount in full.

Reply

12. The respondent submitted that the complainant willingly approached the respondent and showed her interest in booking a flat in the said project and it is submitted that the complainant had booked a residential flat in the project of the respondent after thoroughly going through and understanding the contents of the booking application form and fully satisfying herself of the right & title of the respondent to develop the project as also terms & conditions of sale. The complainant with her free will executed a flat buyer's agreement dated 11.09.2013 with the respondent.
13. The respondent submitted that the terms and conditions of the agreement were mutually agreed upon and the complainant is bound to adhere to her contractual obligations contained therein.
14. The respondent submitted that the delay in completion and offering of the possession of the flat is not due to fault of the





respondent. Several defaults have been committed by other allottees in timely payment of instalments and due to this the entire project had been jeopardized. It is submitted that the respondent being a customer-oriented company is ready to pay the compensation, if any, to the complainant strictly in accordance with the terms & conditions of the flat buyer's agreement at the time of possession.

15. The respondent submitted that the complainant had made the booking in question knowing very well that in accordance with clause 18 of the flat buyer's agreement, the floor plans were tentative and were liable to be changed, altered, modified, revised, added, deleted, substituted or recast during the course of the construction. It is submitted that according to the rules and regulations, notifications were published with regard to change in plans by the respondent in leading newspapers namely, The Tribune on 26.04.2013 and in Hindustan Times and Dainik Jagran on 27.04.2013.



16. The respondent submitted that the towers in question are very much structurally safe in all respects and the complainant has made baseless and frivolous allegations.

17. It is pertinent to mention here that the complainant was aware about the lawful dues to be paid towards EDC/IDC & VAT



charges and all the concerns of the complainant towards the same were addressed by the respondent from time to time. The respondent company had also reduced the EDC/IDC charges from Rs. 315/- per sq. ft. to Rs. 225/- per sq. ft. by adjusting the same in the account of the complainant.

18. The respondent submitted that there has been delay in delivery of possession on reasons beyond the control of the respondent. There has been failure on the part of government authorities to provide a 150 m wide external road. Till date the government authorities have not acquired the green belt.

19. During hearings, oral arguments have been advanced by both the parties in order to prove their contentions. As stated by the counsel for the respondent, it has been emphasized that the project is complete and occupation certificate has been applied which is likely to be received very soon.

20. Issues Determination

- i. Regarding **first issue** raised by the complainant, from the perusal of the facts of the present matter, as per clause 21 of the said agreement, the respondent had to deliver the possession of the said unit to the complainant by 11.03.2017 and has failed to do so. Therefore, the respondent company has caused unjustifiable delay.





- ii. Regarding **second issue** raised by the complainant, during hearing the counsel of the respondent intimated that the project is complete and OC has been applied which is likely to be obtained soon as this project has already been completed and possession is likely to be given in next three months, it would not be fair to allow refund at this stage particularly when the allottee is being paid interest at the prescribed rate for every month of delay till handing over the possession. Regarding adjudicating of compensation, the complainant has made a statement that he will file a separate complaint before the adjudicating officer.
- iii. Regarding **third issue** raised by the complainant, the respondent states that the respondent company had reduced the EDC/IDC charges from Rs. 315/- per sq. ft. to Rs. 225/- per sq. ft. by adjusting the same in the account of the complainant. Therefore, the respondent/ promoter has not over charged EDC/IDC.
- iv. Regarding **fourth issue** raised by the complainant, the respondent states that the rules and regulations, notifications were published with regard to change in plans by the respondent in leading newspapers namely "The Tribune" on 26.04.2013 and in Hindustan Times and

