

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

Complaint No. : 188 of 2018
First date of hearing: 24.05.2018
Date of Decision : 09.08.2018

Mr. Anil Sodhani, R/o 23, Anand Lok, Delhi

Complainant

Versus

M/s Varali Properties Ltd. Regd. Office. Plot
no.8 , Second Floor, Dwarkasdeep Commercial
Complex, Central market, Sector- 6, Dwarka,
New delhi

Respondent

CORAM:

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

Chairman
Member
Member

APPEARANCE:

Shri Vaibhav Suri
Shri M.k. Dang

Advocate for the complainant
Advocate for the respondent

ORDER

1. A complaint dated 24.04.2018 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) Rules, 2017 by the complainant Mr. Anil Sodhani, against the promoter M/s Varali Properties Ltd., on account of violation of clause 21 of the buyers agreement



executed on 18.03.2013 in respect of unit no. D-044, 4th Floor, Sector - 110, Gurgaon described as below for not handing over possession on the due date i.e. by 18.09.2016 which is an obligation under section 11(4)(a) of the Act ibid

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

1.	Name and location of the project	Indiabulls Enigma, Sector 110, Gurugram
2.	Apartment/unit no.	D-044, 4 th floor, tower D
3.	Flat measuring	3350 sq. ft. of super area
4.	RERA registered/ not registered.	Registered
5.	Date of execution of flat buyer's agreement	18th March 2013
6.	Payment plan	Construction linked payment plan
7.	Total consideration	Rs.2,51,46,000/-
8.	Total amount paid by the complainant till date	Rs.2,33,90,685/-
9.	Date of delivery of possession as per clause 21 of flat buyer's agreement (36 Months + 6 months) from the date of execution of agreement	18.09.2016
10.	Delay in handing over possession till date	1 years 11 months
11.	Penalty clause as per flat buyer's agreement	Clause 21 of the agreement i.e. Rs.5/- per sq. ft per month of the super area of the said flat.



3. The details provided above have been checked on the basis of record available in the case file which have been provided by the complainant and the respondent. A flat buyer's agreement

is available on record for the aforesaid apartment according to which the possession of the same was to be delivered by 18.09.2016. 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 for filing reply and appearance. The respondent appeared on 24.05.2018. The case came up for hearing on 24.05.2018, 11.07.2018 and 09.08.2018. The reply filed on behalf of the respondent has been perused. The respondent has supplied the details and status of the project along with the reply. The complainant has filed a rejoinder dated 14.06.2018.

Facts of the complaint

5. The complainant booked a residential flat in the project of the respondent namely "Indiabulls Enigma" at Sector 110, Gurgaon. The flat buyer agreement executed dated 18.03.2013 of which the respondent allotted unit bearing no. D-044 on 4th floor, tower D having super area of 3350 sq. ft.
6. The complainant has paid a total sum of Rs. 2,33,90,685/- towards the aforesaid residential flat in the project.



7. The respondent had promised to complete the project within a period of 36 months form the date of execution of the flat buyer agreement with a further grace period of six months.
8. The respondent increased the saleable area much more that was originally represented by them, at the cost of the complainant.
9. The respondent did not seek the consent of the complainant for increasing the floor and increased the floors in a secretive manner. It is stated that the enhancement of FAR is in total violation of representations made in the respondent' advertisement material displayed at site as well as on the internet.
10. The unlawful act of increasing the FAR, the respondent referred to an obscure notice released by the respondent in non-descript newspaper advertising the said change in plan. This unconscionable act is clear violation of the legal mandate whereby the developer is required to invite objections from allottees before seeking any revision in the original building plans. The complainant has made visits at the site and observed that there are serious quality issues with respect to the construction carried out by the respondent till now.



11. The respondent has illegally charged car parking usage charges. The respondent has also over charged EDC and IDC and has misrepresented regarding claim of VAT. The respondent further artificially inflated measurable super is and has also wrongfully charged service tax and PLC.
12. The respondent has breached the fundamental term of the contract by inordinately delaying in delivery of the possession.
13. The agreement was executed on 18.03.2013 the project was to be completed in 36 months with grace period of six months. The respondent has committed various acts of omission and commission by making incorrect and false statement in the acts as mentioned in preceding paragraph. The complainant is entitled for refund of its entire investment along with interest @ 15 % p.a. as well as compensation.

Issues raised by the complainants are as follow:

- i. Whether the respondent/promoter made false representations about the project in question in order to induce the complainant to make a booking?
- ii. Whether the respondent/promoter is liable for unjustifiable delay in construction and development of the project in question?



- iii. Whether the respondent/promoter is reliable to refund the amount deposited by the complainant along with interest @15% p.a. along with compensation?
- iv. Whether the respondent/promoter has over charged EDC, IDC?
- v. Whether the respondent has artificially inflated measurable super area and has also wrongfully charged service tax?

Relief sought:

Direct the respondent to refund a sum of Rs.2,33,90,685/- along with interest @ 15 % per annum from the date when payments were made till realization of the amount in full.

Respondent's reply

14. The respondent has submitted that the complainant willingly approached the respondent and showed his interest in booking a flat/unit in the project being constructed and developed by the respondent and post his satisfaction voluntarily executed a flat buyers agreement dated 18.03.2013 with the respondent. It is further submitted that the complainant after thoroughly going through and further understanding the contents of the booking application form and being fully satisfying of the rights and title of the respondent to develop the project as also the terms and



conditions of the flat buyer's agreement, executed the same. The complainant with his free will signed the application form for provisional allotment of the flat/unit and flat buyer's agreement was executed on 18.03.2013.

15. The flat was provincially allotted to the complainant after mutual acceptance of the terms and conditions of allotment by the parties and the complainant cannot wriggle out of his obligations by filing the instant complaint based upon such false and frivolous allegations.

16. However, it is submitted that the delay in completion of the project as alleged in the instant complaint is not due to the fault of the respondent but due to various factors which were beyond the control of the respondent has enumerated herein not limiting to the fact that defaults have been committed by other allottees in making timely payment of their due instalments due to which the entire project has been jeopardized. It is admitted that the respondent had all necessary sanctions and approvals for the construction in question.

17. It is submitted that the complainant voluntarily made provisional booking of the unit after going through the terms and conditions of the booking form and agreement. 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, or substituted during the course of the construction. The said revision in the building plan was done in accordance to the terms and conditions of executed agreement between complainant and the respondent.

18. It is further submitted that the revised building plans were sanctioned by the competent authorities in accordance with the rules and regulations laid by such authorities. It is wrong and denied that the increase in dwelling units is unfair or that it will lead to a strain on the common facilities like open areas, car parking space, club facilities, swimming pool usage or that with an increase in population density, the ease of the use of common facilities is seriously compromised against the interest of the complainant. It is wrong and denied that the strength of the tower structure has been compromised or that the foundation designed and built for 17 floors would not withstand the additional load of 4 floors.

19. The complainant has willingly accepted “clause 18 of the flat buyer’s agreement which specifically states that the floor plans were tentative and were liable to be changed, altered,



modified, revised, added, deleted, or substituted during the course of the construction and that in such a case the complainant will have no objection to it. It is submitted that according to the rules and regulations, notifications were published with regard to change in the plans by the respondent company in leading newspaper namely "The Tribune" on 26.04.2013 and in "Hindustan Times" and "Dainik Jagran" on 27.04.2013. However, no objection were received from any of the allottees including the complainant in respect of amendments made in the building plans by the respondent company. Accordingly, revised building plans were approved and sanctioned vide letter dated 23.08.2013 by DTCP, Haryana.

20. However, it is wrong and denied that respondent never communicated any intention or actions to revise the sanctioned building plans. It is wrong and denied that the respondent conveniently avoided to take approval of the complainant for the alleged major changes in sanction plans or that it has changed the fundamental nature of the project. All the averments made by the complainant are repetitive, baseless, false and frivolous.

21. It is submitted that the respondent is in the process of completing the said project as per the requisite specifications



and the materials used for the project have not been compromised with. The respondent is a reputed real estate company having immense goodwill, comprising of law abiding and peace-loving persons and has always believed in satisfaction of its customers. All the allegation levelled by the complainant against the respondent are baseless, false and frivolous.

22. It is further denied that respondent has also over charged EDC and IDC or has misrepresented regarding claim of VAT. It is wrong and denied that the respondent further artificially inflated measurable super area or has also wrongfully charged service tax and PLC. It is submitted that as mentioned 'Clause 3" of the flat buyer's agreement, (2) car parking spaces have been provided to the complainant and the total basic price was inclusive of the charges for the parking as well. No separate amount has been charged by the respondent and the same is evident form the statement of account attached by the complainant.

23. It is further submitted that no delay can be attributed on the respondent as the respondent had completed all the works on time, the delay if any occurred was beyond the control of the respondent and the complainant himself agreed in the flat buyers agreement that no delay will be attributed on the



respondent if the delay because of force majeure conditions as per 'clause 22' of the flat buyer agreement duly executed between the parties

Proposed issued

- i. Whether the present complaint is maintainable?
- ii. Whether this hon'ble authority has the jurisdiction to decide the claim of refund, compensation and interest as falsely prayed by the complainant?
- iii. Whether the complainant has deliberately misled this hon'ble authority by concealing the relevant facts to unnecessarily harass and pressurize the respondent company?

Rejoinder on behalf of the complainant

24. It is submitted that the respondent at the time of booking did not disclose the terms of the builder buyer agreement and stated that the same will be a fair and well negotiated document. It is pertinent to mention that a copy of the BBA was provided to the complainant after the builder had taken a substantial amount of money from the complainant towards the sale consideration.

25. It is submitted that the BBA cannot be stated to be mutually accepted agreement as the terms and conditions of the said



BBA are wholly arbitrary, irrational and one-sided. The terms of the agreement clearly show that the complainant had no bargaining power while negotiating the terms of the agreement and thus the same cannot be termed as a negotiated contract.

26. It is submitted that at the time of booking the respondent had deliberately not executed the BBA and further had represented totally contrary to the BBA. The respondent executed the BBA after receiving substantial sum of money from the complainant towards the sale consideration. It is respectfully submitted that the clause 18 of the builder buyer agreement is a reflection of highly one sided, unjust, unfair terms of the agreement.

27. It is submitted that the complainant at no point of time willingly accepted clause 18 of the agreement and the same was formed part of the pre-printed format which as per the respondent was beyond any alteration. It is submitted that the respondent by changing the FAR has increased the saleable area just to reap more profits. The said act of the respondent is totally against the original representation made by the respondent at the time of booking.



28. The respondent has charged the innocent allottees for common area facilities as well as car parking spaces separately whereas as per the judgement of Hon'ble Supreme Court of India the car parking charges should have been the part of the common area facilities charges and should not have been charged separately.
29. It is denied that all the concerns of the complainant towards the IDC and EDC were addressed by the respondent company from time to time. It is submitted that the respondent after reducing the EDC/IDC charge did not refund the excess amount to the complainant and have rather adjusted towards contingency deposit of VAT.

Issues decided

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the authority decides seriatim the issues raised by the parties as under:

30. With respect of the first issue no proof was given by the complainant, but mere assertions were made by the complainant.
31. In respect to the second issue raised by the complainant the authority decides that as per clause 21 of flat buyer's



agreement, the possession of the flat was to be handed over within 36 months from the date of execution (with a grace period of 6 months) of agreement i.e.18.03.2013. Therefore, the due date of handing over possession will be computed i.e. 18.09.2016. The clause regarding the possession of the said unit is reproduced below:

... (21) offer of possession

“...the Developer proposes to handover the possession of the said flat within a period of thirty-six (36) Months with grace period of 6 Months, from the date of execution of the agreement subject to timely payment by the buyer total sale consideration according to payment plan applicable to him”

32. Accordingly, the due date of possession was 18.09.2016. The delay compensation payable by the respondent @ Rs.5/- per sq. ft. per month of the carpet area of the said flat as per clause 21 of apartment buyer’s agreement is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided as also held in para 181 of **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.”



33. As the possession of the flat was to be delivered by 18.09.2016 as per the clause referred above, the authority is of the view that the promoter has failed to fulfil his obligation under 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.”

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

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



35. The complainant requested that necessary directions be issued by the authority under section 37 of the Act ibid to the promoter to comply with the provisions and fulfil obligation 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

36. In regard to the third issue raised by the complainant, as the promoter has failed to fulfill his obligation under section 11, the promoter is liable under section 18(1) proviso to pay interest to the complainant, at the prescribed rate, for every month of delay till the handing over of possession. 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 complainant reserves his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.

37. In regard to the forth issue raised by the complainant the charges related to EDC and IDC are as per agreement executed between the parties and these are charges which are imposed by the government authorities.
38. In regard to fifth issue raised by the complainant as per the agreement charges related to service tax are accordance to the terms and conditions of executed agreement between complainant and the respondent.
39. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. 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.



40. Keeping in view the present status of the project and intervening circumstances, authority is of the considered opinion that the respondent has failed to deliver the possession of the apartment number D-044, 4th floor to the complainant by the committed date i.e. 18.03.2016 as per the said agreement and the possession has been delayed by 1 year 11 months till the date of decision. Thus, the complainant is entitled to interest at prescribed rate for every month of delay till the handing over of the possession. The complainant has made an amendment to the complaint whereby the complainant intended to continue with the said project and is seeking interest at the prescribed rate for every month of delay till actual date of handing over of possession. Further, the respondent has submitted during the oral arguments that the construction of the project is almost complete, and they shall offer the possession of the unit to the complainant within next five months.



Decision and directions of the authority

41. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues

the following directions to the respondent in the interest of justice and fair play:

- i. The respondent is duty bound to hand over the possession of the said unit within next five months as committed by the respondent.
- ii. The respondent is duty bound to pay the interest at the prescribed rate i.e. 10.45% for every month of delay from the due date of possession i.e. 18.09.2016 till the actual date of handing over of the possession.
- iii. The respondent is directed to pay interest accrued on account of delay in handing over of possession which shall be paid to the complainant within 90 days from the date of decision and subsequent interest to be paid by the 10th of every succeeding month.
- iv. The complainant is directed to file the account statement about how much amount he has paid, how much is to be payable and interest accrued on the delayed payment so that charges would be adjusted at the time of possession.

42. The order is pronounced.

43. Case file be consigned to the registry.



(Samir Kumar)
Member

(Subhash Chander Kush)
Member

(Dr. K.K. Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

Dated : 09.08.2018



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हरियाणा भू-संपदा विनियामक प्राधिकरण, गुरुग्राम

New PWD Rest House, Civil Lines, Gurugram, Haryana

नया पी.डब्ल्यू.डी. विश्राम गृह, सिविल लाईंस, गुरुग्राम, हरियाणा

PROCEEDINGS OF THE DAY

Day and Date	Thursday and 09.08.2018
Complaint No.	188/2018 case titled as Mr.Anil Sodhani versus M/s Varali Properties Ltd
Complainant	Mr. Anil Sodhani
Represented through	Shri Vaibhav Suri Advocate for the complainant
Respondent	M/s Varali Properties Ltd
Respondent Represented through	Shri M.K.Dang Advocate for the respondent.
Last date of hearing	11.7.2018

PROCEEDINGS

The project is registered

The complainant has filed amended application. He has also filed a copy of order dated 7.6.2018 passed by the authority in complaint No. 20 of 2018 titled as Shri Satish Sodhani versus M/s Athena Infrastructure Ltd.

The agreement between the parties was executed on 18.3.2013. According to clause-21 of the agreement, the developer shall endeavor to complete the construction of the unit within a period of 3 years with six months of grace period, from the date of execution of the Flat Buyer Agreement subject to timely payment by the allottee. The construction of the project is almost completed and it is not possible to allow the allottee to withdraw from the project.

The counsel for the respondent has stated that they will hand over the possession to the complainant within next five months. They have



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हरियाणा भू-संपदा विनियामक प्राधिकरण, गुरुग्राम

New PWD Rest House, Civil Lines, Gurugram, Haryana


नया पी.डब्ल्यू.डी. विश्राम गृह, सिविल लाईंस, गुरुग्राम, हरियाणा

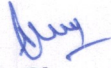
already applied for occupation certificate for the portion where the apartment of the allottee is situated. As per section 18 of the Real Estate (Regulation & Development) Act, 2016 it is the obligation of the promoter to pay interest for every month of delay till handing over the possession of the unit at the prescribed rate from the date the possession was to be handed over to the complainant as per terms of agreement.

The matter regarding compensation, if any, be brought before the Adjudicating Officer. The request of compensation is declined by the authority for want of jurisdiction.

Complainant is directed to file account statement about how much amount he has paid, how much amount is to be payable and interest accrued on the delayed payment so that these charges would be adjusted at the time of possession. The order is pronounced. Complaint is disposed of accordingly. File be consigned to the Registry.

Samir Kumar
(Member)


Dr. K.K. Khandelwal
(Chairman)
9.8.2018


Subhash Chander Kush
(Member)