

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

**Complaint no. : 412 of 2018**  
**First date of hearing : 07.08.2018**  
**Date of decision : 20.11.2018**

Mr. Sudhanshu Malhotra,  
R/o. 47C, Masjid Moth, Phase-I,  
Near Chirag Delhi Flyover, New Delhi.

**Complainant**

**Versus**

M/s Vatika Ltd.  
Regd. Office: 621-A, 6<sup>th</sup> floor, Devika  
Towers-6, Nehru Place, New Delhi-110019.

**Respondent**

**CORAM:**

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

**Chairman**  
**Member**  
**Member**

**APPEARANCE:**

Shri Sudhanshu Malhotra Complainant in person  
Ms. Rekha Rani Dey Advocate for the complainant  
Shri Kamal Dahiya Advocate for the respondent  
Ms. Aakanksha Sinha Authorised representative on  
behalf of respondent company

**ORDER**

1. A complaint dated 08.06.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainant Mr. Sudhanshu Malhotra, against the promoter M/s Vatika Ltd.



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

1.	Name and location of the project	"Seven Elements", Sector 89-A, Gurugram
2.	RERA registered/ not registered.	<b>Registered (281 of 2018 for phase 1 only)</b>
3.	Apartment/unit no.	804 on 8 <sup>th</sup> floor, tower 'A3'
4.	Apartment measuring	1620 sq. ft.
5.	Booking date	04.04.2013
6.	Allotment letter	24.09.2018
7.	Date of execution of builder buyer's agreement	<b>Not executed</b>
8.	Payment plan	Construction linked payment plan
9.	Total sale price	Rs.1,24,46,671/-
10.	Total amount paid by the complainant till date	Rs.16,45,068/-
11.	Percentage of consideration amount	Approx. 13.2 Percent
12.	Date of delivery of possession	Cannot be ascertained as BBA has not been executed till date.
13.	Delay in handing over possession till date	Cannot be ascertained

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. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The respondent appeared on 07.08.2018. The case came up for hearing on 07.08.2018, 18.09.2018, 23.10.2018 and 20.11.2018. The reply filed on behalf of the respondent has been perused. The complainant



has filed a rejoinder dated 22.10.2018 in which he has denied each and every submission and averments made by the respondent in their reply to the complaint.

### **Facts of the complaint**

4. Briefly stated, the facts of the complaint are that the complainant was approached by respondent in the month of April 2013 and made an offer for allotment of a residential unit in its upcoming project namely 'Seven Elements' located at Sec-89/A, Gurugram, Haryana. The complainant opted for construction linked payment plan and booked a 2BHK+S flat which was duly acknowledged in the receipts issued by the respondent. It was further assured to the complainant that construction would commence within next six months and thereafter construction would be completed within period of 36 months.
5. The complainant submitted that on verbal assurances and persuasion of representatives of respondent, the complainant as an expression of interest in the project deposited Rs.6,00,000/- on 2nd April, 2013, acknowledged and shown in receipts as "on account of booking amount", and



Rs.10,45,068/- on 16.09.2013 shown and acknowledged in receipt as "on account of instalment/ interest/ other charges/taxes", in lieu of which respondent issued valid receipts.

6. The complainant submitted that in the month of December 2014, respondent sent a detailed builder buyer agreement enunciating complete details of the purchase of the residential unit in its project wherein new onerous terms have been introduced to the complainant and the terms of the said agreement are not acceptable to him and the same cannot be culminated into a valid contract. Thereafter, the complainant decided to withdraw his expression of interest and issued notices to the respondent calling upon to refund the amount. First notice sent to the registered office of the opposite party came back unserved, thereafter another notice was sent to the corporate office which was received by the opposite party. Respondent replied to the aforesaid legal notice and denied claim for refund to the complainant.



7. The complainant submitted that the terms and conditions agreed between the parties do not provide for the whole or

partial forfeiture of the earnest money. Even when it is the case in which default is on the part of the buyer, the only remedy open to the builder is to prove the actual damages, if any, sustained by it on account of buyer backing out from his contractual obligations and only on proving such damages, it could seek to deduct those expenses from the money deposited by the buyer. In absence of any proof, the developer is bound to refund the full amount. In the present case there is no contractual clause mutually agreed between the parties which would entitle the respondent to forfeit amount given by the complainant.

8. The complainant submitted that till date the complainant has not given his acceptance to the buyer's agreement sent by the respondent and it cannot be the case that mere sending of buyer's agreement would bind complainant to the clauses in the said agreement. The complainant has every right to refuse terms and conditions mentioned in the buyers agreement, signing of said agreement cannot be mere formality to be exercised on part of complainant. It is respectfully submitted that the complainant is well within his



right to back out of any contractual obligation which might arise from signing of builder buyer agreement even without assigning any reason. While in the facts of present case there is already delay in the project and conditions imposed in buyers agreement are onerous and drafted one sided to the benefit of respondent.

9. The complainant submitted that respondent has sent a final reminder notice to the complainant threatening to cancel allotment. Instead of processing refund of payments made by the complainant, the respondent continued to issue reminders for further payments in mechanical manner.
10. The complainant further submitted that the respondent had no requisite permissions for starting the project at the time of accepting first payment from the complainant and even the plan, layout and price of the unit were not determined. It is pertinent to mention here that in the builder buyer agreement it has been clearly mentioned in recital 'A' that respondent has obtained license no.41 of 2013 dated 06.06.2013 from the Director General Town and Country Planning, Govt. of Haryana, Chandigarh (DTCP) for





development of group housing colony on the said land. Hence, it is clearly evident that the respondent had received payment from complainant even before it had requisite permissions for the project which is clearly in violation of DTCP provisions and reflect impropriety on part of respondent and its promoters.

11. The complainant being aggrieved by the above stated acts and omissions of the respondent have now approached this hon'ble forum. The total amount paid to the opposite party is Rs.16,45,068/- out of total consideration of Rs.1,24,46,671/- and the complainant is entitled to refund of full amount along with interest at the rate of 18% from the date of payment till the realization of said amount.

12. The complainant submitted that earlier same complaint had filed before District Consumer Dispute Redressal Forum, South-11, Delhi but while hon'ble forum raised questions on pecuniary jurisdiction of complaint, then complainant had, with the permission of the hon'ble forum, withdrawn the said complaint. After withdrawing, complainant come to know that the Real Estate Regulatory Authority, Gurugram is



established, accordingly filed complaint before this hon'ble authority and same is within limitation.

**Issues raised by the complainant:**

13. The relevant issues raised by the complainant are as follow:
- i. Whether complainant after going through the contents of builder buyer agreement which is illegal and arbitrary can withdraw his interest from the project and can claim his invested money with interest from the respondent?
  - ii. Whether complainant is entitled to get relief and compensation under section 18 of the Real Estate (Regulation and Development) Act, 2016?
  - iii. Whether there has been deliberate or otherwise, misrepresentation on the part of the respondent and thus cheated the complainant?
  - iv. Whether the respondent has violated section 12 and complainant is entitled to get relief under section 12 of the Real Estate (Regulation and Development) Act, 2016?
  - v. Whether the respondent has violated the terms and condition under section 13 of the Real Estate (Regulation and Development) Act, 2016?





- vi. Whether the respondent violated the directions notified by the Directorate of Town and Country Planning, Haryana Sector 18, Chandigarh vide notification dated 30.12.2010?

**14. Reliefs sought:**

The complainant is seeking the following reliefs:

- i. Direct the respondent to refund the entire amount of Rs. 16,45,068/- along with interest @ of 18% p.a. from the date of payment till the realization of the said amount.
- ii. Direct the respondent to pay a sum of Rs.2,00,000/- in lieu of damages/compensation/litigation cost or amount as deem fit by this hon'ble authority.

**Respondent's reply**

15. The respondent has raised various preliminary objections and submissions challenging the jurisdiction of this hon'ble authority. They are as follow:

- i. The respondent submitted that the claim for possession of the plot with interest and compensation would be adjudged by the adjudicating officer as appointed under section 71 of the Act ibid and that too keeping in view the factors mentioned in section 72 of the Act. No



complaint can be entertained much less before this Ld. authority in respect of the matters to be adjudicated by the adjudicating officer. Hence, the Ld. authority lacks jurisdiction to deal with the present complaint.

- ii. The respondent further submitted that till such time the project is registered with this Ld. authority, no complaint or claim, much less as raised by the complainant can be adjudicated upon.
- iii. The respondent submitted that the complaint is liable to be dismissed as it is barred by the principle of delay and laches. The complainant had booked unit on 04.04.2013. It is also pertinent to mention that the complainant had carried out inspection of the documents in respect of the said project and was duly informed about the completion date of the said apartment which was subject to date of execution of the agreement but same was never executed between the parties as the complainant never signed and returned for its execution. The complainant now in 2018 after passage of more than 5 years from the date of booking application form cannot



be allowed to raise the flimsy and frivolous objections at such juncture where the project is near to completion, when the complainant has not even bothered to execute the BBA even after several reminders and follow-ups.

iv. The respondent submitted that the complainant is doing forum shopping, as the complainant had filed the case in NCDRC qua same subject matter which has been raised vide present complaint. It is pertinent to mention that complainant has withdrawn his case from NCDRC, which was at an advance stage, just to get favorable decision from this hon'ble authority. Such practice is abhorred and abrogated by the Hon'ble Supreme Court vide various judgements, so the instant petition is liable to be dismissed solely on this ground.

v. The respondent submitted that it is evident that the 'agreement for sale', for the purposes of 2016 Act as well as 2017 Haryana Rules, is the one as laid down in Annexure-A, which is required to be executed inter-se the promoter and the allottee. It is matter of record that no such agreement, as referred to under the provisions



of 2016 Act and 2017 Haryana Rules, has been executed between the respondent company and the complainant. Rather, the agreement that has been referred to, for the purpose of getting the adjudication of the complaint, though without jurisdiction, is the builder buyer's agreement, executed much prior to coming into force of 2016 Act.

- vi. The respondent further submitted that "BBA" was never executed between the parties. It is important to submit that a BBA was sent to the complainant in December 2014 along with a forwarding letter. But, the complainant failed to adhere the terms of booking application form and allotment letter and did not sign and returned the BBA till date. It is pertinent to mention that, the respondent was sending various request letters, reminder letters and follow ups to the complainant for execution of the BBA but the complainant neglected and failed to get executed BBA. Thus, the complainant had defaulted and breached the terms of booking form and allotment letter, repeatedly.



vii. The respondent submitted that it is a settled proposition of law that without execution of any BBA no rights have been conferred to the instant complainant. It has been held by Hon'ble Supreme Court in "Hansa V. Gandhi V/S. Deep Shankar Roy" AIR (2013) SC 2873, that allotment letter cannot be treated as agreement of sale. Thus, the instant complaint is liable to be dismissed solely on this ground.

16. The respondent denied that respondent company approached the complainant. The respondent submitted that the complainant approached the respondent after gathering complete information about the property and project through a broker named 'Genesis Real Estate Consultant' through its representative 'Mr. Zahid'. The respondent denied that the builder buyer agreement which has been sent to the complainant was consisting of any onerous terms. All the terms and conditions as stipulated in the BBA were already explained to the complainant. The respondent stated that the complainant wants to wriggle out of his financial obligation due to which he has been raising false and frivolous issue



against the project and property leading to file a present complaint before hon'ble authority.

17. The respondent submitted that the reply to the legal notice dated 17.10.2015, it has been specifically made clear by the answering respondent that due to the failure or default on the part of the complainant, the respondent may be constrained to refund the amount. Furthermore, it has been specifically made clear vide such reply that the whole process is being delayed by the complainant himself and that all the terms and conditions of expression of interest and booking form are valid and binding on the complainant.

18. The respondent submitted that all the terms and conditions of Expression of Interest (EOI) are valid and binding on the complainant. It is an admitted position that an invitation for offer of allotment was sent to the complainant vide letter dated 11.09.2014 and in response to such letter the complainant has chosen the unit no.804 tower A-3, Sector 89A, admeasuring 1620 sq. ft. super area with preferential location of being corner unit. The complainant made his choices by his own free will, therefore, the respondent issued





an allotment letter dated 29.09.2014, wherein the aforesaid unit was allotted in favor of the instant complainant.

19. The respondent submitted that the complainant is backing out from the agreed terms without any justification and to cover up his misdeeds, the complainant is making an excuse about the terms and conditions of BBA. It would be against the principal of natural justice and equity as well as rule of estoppel to allow the instant complainant to retract from the agreed terms. It would cause grave injustice and would be prejudicial to the interest of the other allottees in the same project if the respondent be permitted to withdraw from the project at such stage wherein the project is about to complete. Moreover, it is submitted that the complainant herein is making averment without any valid factual or legal basis and is put to strict burden of proof regarding the same.

20. The respondent submitted that the answering respondent has done whatever they could have done for the execution of BBA. The respondent has sent the BBA on 19.12.2014 for the purpose of execution thereof to the complainant. However, the complainant neither returned the BBA nor communicated



any reasons for not executing the BBA. The respondent submitted that the complainant sent e-mail dated 15.02.2015 wherein he stated that due to cash crunch he is not in a position to pay the demand as raised by the respondent and requested for extension of time to make financial arrangements and remit the outstanding dues. Thus, the respondent remains under impression that such BBA would be executed and accepted by the complainant.

21. The respondent submitted that the application of respondent for setting up a group housing colony has been accepted by DGTCP on 31.12.2012 vide its memo no. LC-2758-JE(VA)-2012/27397 i.e. much before to the date of expression of interest made by the complainant i.e. in April 2013. Thus, it is submitted that the complainant herein is making averment without any valid factual or legal basis and is put to strict burden of proof regarding the same.

### **Determination of issues**

After considering the facts submitted by the complainants, reply by the respondent and perusal of record on file, the issue wise findings of the authority are as under:



22. With respect to the **first issue** raised by the complainant, there is no documents in support tendered by the complainant to prove that the terms incorporated in the agreement is considered to be illegal and arbitrary. However, the complainant has admitted that he is not willing to continue with his booking in the project due to financial incapability and sought refund of the paid amount through various emails dated 15.02.2015 and 19.02.2015. Therefore, it seems that the issue raised by the complainant is an afterthought.
23. With respect to the **second issue** raised by the complainant, as there is no concluded contract executed between the parties to the instant complaint hence, the respondent cannot be made liable as per the provisions of section 18 of the Act.
24. With respect to the **third issue** raised by the complainant, the complainant has again failed to tender any documentary evidence to prove the alleged cheating and/or misrepresentation been committed by the respondent.
25. With respect to the **fourth issue** raised by the complainant, the complainant has not given any concrete document to



prove that any kind of alleged loss and furthermore quantum of loss, if any, be sustained by the complainant. Hence, this issue is also answered in negative.

26. With respect to the **fifth issue** raised by the complainant, the respondent has taken an amount of Rs.16,45,068/- which is more than 10% of cost of apartment without first entering into agreement for sale. However, section 13 does not apply upon retrospective transaction.

27. With respect to the **sixth issue** raised by the complainant, the respondent has accepted the booking amount of Rs.6,00,000/- on 02.04.2013 from the complainant however, the license was granted to the respondent on 06.06.2013. Therefore, it is evident from the above facts that the respondent has pre-launched the project without taking the license which is illegal.

### **Findings and directions of the authority**

28. 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. As per notification no. 1/92/2017-1TCP dated 14.12.2018 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.

29. After taking into consideration all the material facts as adduced by the parties, both respondent/builder and complainant/buyer are given two options (i) settle their matter out of the court (ii) the authority is giving liberty to the respondent to exercise his right of cancellation of the allotment and forfeit 10% of the earnest money as per settled preposition of law in the case of **DLF v. Bhagwati Narula (revision petition no. 3860 of 2014 decided on 6.01.2018)** and refund the balance amount along with



prescribed rate of interest i.e. 10.75% per annum within 90 days.

30. The authority takes suo-moto cognizance that the project is registerable and has not been registered by the promoters. The authority has decided to take suo-moto cognizance for not getting the project registered and for that separate proceeding will be initiated against the respondent u/s 59 of the Act.

31. The order is pronounced.

32. Case file be consigned to the registry. Copy of this order be endorsed to registration branch.

**(Samir Kumar)**  
Member

**(Subhash Chander Kush)**  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 20.11.2018





**PROCEEDINGS OF THE DAY**

Day and Date	Tuesday and 20.11.2018
Complaint No.	412/2018 case titled as Mr. Sudhanshu Malhotra Vs. Vatika Ltd.
Complainant	Mr. Sudhanshu Malhotra
Represented through	Complainant in person with Ms. Rekha Rani Dey, Advocate.
Respondent	Vatika Ltd.
Respondent Represented through	Shri Kamal Dahiya, Advocate for the respondent.
Last date of hearing	23.10.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

**Proceedings**

Arguments heard.

It has been stated by the counsel for the complainant that he got an allotment letter dated 24.09.2014 for purchase of flat No. 804 in Tower A3 in project 'Seven Elements', Sector 89-A, Gurugram for total sale consideration of Rs.1,24,46,671/- out of which complainant has paid a sum of Rs.16,45,068/- till date. No Builder Buyer Agreement has been signed inter se both the parties. However, only an allotment letter dated 24.09.2014 is on record. Respondent/builder kept on writing number of notices asking the complainant to deposit the due amounts. However, complainant/buyer has failed to deposit any amount with the respondent nor any BBA was signed inter se the parties. However, complainant kept on sending legal notices but

the parties failed to proceed due to lack of signing of BBA. Complainant has shown his intention to wriggle out of the project.

As on date since no BBA has been executed inter se the parties, as such, complainant/buyer has no locus standi at the moment under the provisions of RERA Act. Project is not registered with the authority. However, keeping in view all the facts on record, both respondent/builder and complainant/buyer are given two options (i) settle their matter out of the court (b) builder can forfeit 10% of the earnest money and refund the balance amount alongwith prescribed rate of interest i.e. 10.75% per annum within 90 days. Since the project is not registered, as such notice under section 59 of the Real Estate (Regulation & Development) Act, 2016 for violation of section 3(1) of the Act ibid be issued to the respondent

Complaint is disposed of accordingly. Detailed order will follow. File be consigned to the registry.

Samir Kumar  
(Member)

Subhash Chander Kush  
(Member)