

PROCEEDINGS OF THE DAY

Day and Date	Tuesday and 29.01.2019
Complaint No.	377/2018 Case titled as Mr. Kuldeep Dudeja V/S M/S Shree Vardhaman Infra Heights Private Limited
Complainant	Mr. Kuldeep Dudeja
Represented through	Ms. Sonali Joon, Advocate for the complainant.
Respondent	M/S Shree Vardhaman Infra Heights Private Limited
Respondent Represented through	Shri Rajesh Kumar Advocate for the respondent.
Last date of hearing	21.12.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Project is registered with the authority.

Arguments heard.

Counsel for the respondent states that the respondent shall hand over the possession to the complainant before **31.12.2020**.

As per clause 14 (a) of the Builder Buyer Agreement dated 30.5.2013 for unit No.702, Tower-B, Shree Vardhman Victoria, sector-70, Gurugram, possession was to be handed over to the complainant within a period of 40 months from the date of commencement of construction (7.5.2014) + 6 months grace period which comes out to be **7.3.2018**. It was a construction linked plan. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.1,06,47,204/- to the

respondent. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f **7.3.2018** as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till handing over possession failing which the complainant is entitled to seek refund of the amount.

The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till handing over the possession shall be paid before 10th of subsequent month. The complainant is also directed to pay delayed payment charges @ 10.75% if any, to the respondent.

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

Samir Kumar
(Member)
29.1.2019

Subhash Chander Kush
(Member)

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

Complaint No. : 377 of 2018
Date of First
Hearing : 02.08.2018
Date of Decision : 29.01.2019

Mr. Kuldeep Dudeja
R/o 6B, Bellevue-6, (606-B), Central Park-II,
Sector-48, Sohna Road, Gurugram, Haryana-
122001

...Complainant

Versus

M/s Shree Vardhman Infra Heights Private
Limited
Office at : 302, III Floor, Indraprakash
Building, 21, Barakhamba Road, New Delhi-
110001

...Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Sonali Joon
Shri Rajesh Kumar

Advocate for the complainant
Advocate for the respondent



ORDER

1. A complaint dated 04.06.2018 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. Kuldeep

Dudeja, against the promoter M/s Shree Vardhman Infra Heights Private Limited, on account of violation of clause 14(a) of the flat buyer's agreement executed on 30.05.2013 for unit no. 702, tower B in the project "Shree Vardhman Victoria" for not giving possession on the due date which is an obligation of the promoter under section 11 (4) (a) of the Act *ibid*.

2. Since the flat buyer's agreement has been executed on 30.05.2013, i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot be initiated retrospectively, hence, the authority has decided to treat the present complaint as an application for non-compliance of contractual obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.
3. The particulars of the complaint are as under: -

1.	Name and location of the project	"Shree Vardhman Victoria" in sector 70, Gurugram
2.	Unit no.	702, Tower B
3.	Project area	10.9687 acres
4.	Unit area	1950 sq. ft.
5.	Registered/ not registered	Registered (70 of 2017)
6.	Revised date of completion as per RERA registration certificate	31.12.2020



7.	DTCP license	103 of 2010
8.	Date of booking	28.05.2012
9.	Date of flat buyer's agreement	30.05.2013
10.	Total consideration	BSP-Rs. 1,01,08,800/- (as per agreement, pg 37 of the complaint) Rs.1,16,53,800/- (as per customer ledger dated 28.04.2018, annexure P-3 of the complaint)
11.	Total amount paid by the complainant	Rs. 1,06,47,205.40/- (as per customer ledger dated 28.04.2018, annexure P-3 of the complaint)
12.	Payment plan	Construction linked plan
13.	Date of delivery of possession	07.03.2018 Clause 14(a) – 40 months from commencement of construction (07.05.2014, as per respondent's reply) + 6 months grace period, i.e. by 07.03.2018
14.	Delay of number of months/ years upto 29.01.2019	10 months
15.	Penalty clause as per flat buyer's agreement dated 30.05.2013	Clause14(b)- Rs. 107.64 per sq mtr. or Rs. 10/- per sq. ft. per month



4. As per the details provided above, which have been checked as per record of the case file, a flat buyer's agreement is available on record for unit no. 702, tower B according to which the possession of the aforesaid unit was to be

delivered within 40 months of commencement of construction including 6 months grace period, i.e. by 07.03.2018. The promoter has failed to deliver the possession of the said unit to the complainant. Therefore, the promoter has not fulfilled his committed liability as on date.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. Accordingly, the respondent appeared on 02.08.2018. the case came up for hearing on 02.08.2018, 05.09.2018, 04.12.2018, 21.12.2018 and 29.01.2019.

Facts of the complaint

5. From 28.05.2012 to 02.02.2013, the complainant booked a unit in the project named "Shree Vardhman Victoria" in sector 70, Gurugram by paying an advance amount of Rs. 29,17,925 /- to the respondent. Accordingly, the complainant was allotted a unit bearing 702, tower B.
6. On 30.05.2013, flat buyer's agreement was entered into between the parties wherein as per clause 14(a), the construction should have been completed within 40 months + 6 months grace period from the date of commencement of construction. However, till date the possession of the said unit has not been handed over to the complainant despite



making all requisite payments as per the demands raised by the respondent. The complainant made payments of all instalments demanded by the respondent amounting to a total of Rs 1,06,47,204/-.

7. The complainant submitted that the respondent company has failed to develop and complete the project in accordance with the sanctioned plans and specification as approved by the competent authorities and it is on account of such defects that the project is facing delays. Furthermore, the respondent company has not cared to disclose to the allottee any alterations in the sanctioned plans, layout plans and specification of the project after the alteration and additions to the same. The respondent company as such is in non-compliance of the mandate of section 14 of the RERA 2016.
8. The complainant submitted that the respondent company has further failed to obtain the requisite insurance for the said project only to save out on the premium and other changes in respect of the insurance as such the respondent company has failed to protect the interest of the innocent and bona fide allottee and expose the allottee to the risks which could be easily set off had the respondent company cared to apply for and purchase the insurances as required. The respondent



company is merrily waiting for some mishappening so that they could further claim an extension of time.

9. The complainant submitted that the respondent company has not maintained a separate account for the funds collected from the allottees of the present project and the cheques/draft have been asked to be issued in favour of one's account maintained with Indusind Bank, New Delhi, which is a common pool from where the funds have been diverted to make payments for construction of commercial sites and the project in which the allottee i.e. the complainant herein has invested, has suffered on account of non-availability of funds.
10. The complainant submitted that despite repeated intimations sent to the respondent, no definite commitment was shown to timely completion of the project and no appropriate action was taken to address the concerns and grievances of the complainant. Complainant further submitted that given the inconsistent and lack of commitment to complete the project on time, the complainant decided to terminate the agreement.
11. As per clause 14(a) of the flat buyer's agreement, the company proposed to hand over the possession of the said unit within 40 months from commencement of construction



and 6 months grace period, i.e. 07.03.2018. The clause regarding possession of the said unit is reproduced below:

“ 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 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. No claims by way of damages/compensation shall be against the Company in case of delay in handing over the possession on account of said reasons. For the purpose of this Agreement, the date of application for issuance of occupancy/completion/part occupancy/completion certificate of the Said Complex or the Flat shall be deemed to be the date of completion.....”

12. The complainant submitted that while the respondent reserved very high penalties upon the buyer/complainant for delayed payment of even a few days, it safeguarded itself from the similar liabilities by various clauses. As clause 14(b) entitles the developer/respondents for reasonable extension in the delivery of the possession of the apartment and also the developer/respondent had specifically accepted a meagre liability to pay Rs.10/- per square feet per month on super area for the delay in the delivery of possession of the flat unit



beyond 46 months. Further, the respondent is liable to be penalised for no compliance of the mandate under section 11 RERA, 2016 wherein it has not created its webpage on the website of the authority nor disclosed the status of the project.

13. The complainant submitted that the last call notice/ demand letter from the respondent to the complainant was issued on 19.01.2016 which was raised by the respondent on commencement of brick work. Even from the latest pictures of the project, it is still under construction and will be taking more time to reach the completion stage and giving the physical possession.
14. The complainant further submitted that there have been no such unforeseeable circumstances that prevented the respondents from fulfilling the contract that can come under force majeure conditions as such and that this extended period of is not applicable and objected upon by the complainant.
15. The complainant submitted that left aghast with no surety as to when the project will be completed, the complainant was left with no other option but to send a legal notice dated 02.05.2018 demanding respondent to refund the entire amount paid by him along with interest @ 24% p.a. but there has been no reply from the respondent regarding this.



16. Issues raised by the complainant

- I. Whether or not the respondent failed to perform upon the said agreement and could not handover the possession of flat within the stipulated time period mentioned in the agreement dated 30.05.2013?
- II. Whether or not an extension of the grace period of 6 months on top of 40 months as envisaged in the agreement by respondent is justified and can be extended as there has been no force majeure conditions and also according to the facts and circumstances of the case?
- III. Whether the respondent company is liable to be penalized for the wrong and false advertisement u/s 12 of RERA Act, 2016?
- IV. Whether or not the respondent company is in defiance of the provision u/s 13 of the RERA 2016 by taking more than 10% as deposit/advance money before the signing of the agreement in terms of the cost of the flat of the complainant?
- V. Whether or not the respondent company is liable to be penalised and the complainant compensated for non-adherence to project specification in terms of the quality of the material used and non-intimation/approval from the allottee for alteration/addition the sanctioned plans with respect to the projects under section 14 RERA 2016?



VI. Whether or not the meagre penalty of Rs. 10 per sq. ft. per month as mentioned in clause 14(b) w.r.t delay in delivery of possession adequate and whether, further penalty over and above it is payable by the respondent to the complainant?

VII. Whether or not the complainant has a right to receive the principal amount paid by him as against the invoice bill raised by the respondent along with an interest @ 24% p.a. and/or the State Bank of India highest marginal cost of lending rate plus 2% for non-delivery of the possession of the flat unit to the complainant on time?

17. Relief sought

- I. To fully refund the amount paid by the complainant amounting to Rs. 1,06,47,204/- .
- II. To direct the respondents severally and jointly to pay interest @ 24% per annum compounded quarterly on amount of Rs 1,06,47,204/- from date of receipt till the date of payment of arrears by the complainant.
- III. Direct the respondent to grant such a penalty towards the delay in delivery of possession over and above the rate of Rs 10 per sq ft. per month along with pendent lite and future compensation at the same rate till the date of actual realization of the amount.



Respondent's reply

18. The respondent submitted that the said project has been registered as an "ongoing project" u/r 2(1)(o) of HARERA rules, 2017 vide registration no. 70 of 2017 dated 18.08.2017 and as per the said registration the completion date undertaken by the respondent and acceptable by the authority is 31.12.2020. Therefore, until the date lapses no cause of action arises in favour of the complainant to file the present complaint.
19. The respondent submitted that as per clause 14(a) of the agreement the date of completion of construction was tentative and subject to various factors and conditions. The date was to be calculated from the date of commencement of construction of tower in question which commenced on 07.05.2014. Moreover, clause 14(a) is to be read with 14(b) and (c) and not in isolation.
20. The respondent submitted that the complainant paid an amount of Rs 29,17,925/- before 30.05.2013 i.e. the date of agreement. However, the said payment was received, and the flat buyer agreement was executed between the parties much prior to the date when the RERA provisions came into force.



Thus, receipt of such payment can't be said to be in violation of the provisions of RERA, 2016.

21. The respondent submitted that it had already opened an ESCROW account no. 259810875857 with IndusInd bank. It was further submitted that the account was not open for common pooling of funds and neither the funds have been diverted for commercial purposes, and the complainant has not suffered anything on account of non-availability of funds.

22. The respondent submitted that basic sale price as indicated in the agreement was based upon the tentative super area of the flat indicated in the agreement and the same was to vary with the variation in the area of the flat. In addition to the said basic sale price and other charges were payable as per the agreement.

23. The respondent submitted that the complainant did not make payments as per the construction linked plan. It is further submitted that documents have been placed on record that the complainant failed to make timely payment of instalments demanded through various letters issued by the respondent.

24. The respondent submitted that they never promised or made false representations about the date of delivery of possession.



No definite or committed date of delivery of possession was given by the respondent company. The due date given in the agreement was tentative and subject to various factors and conditions.

25. The respondent submitted that the complainant entered into the flat buyer agreement with his free will and accord and is bound by the terms and conditions of the said agreement. The agreement did not violate any law existing at the time of execution of the said agreement and the binding nature of the said agreement cannot be questioned by the parties. No relief can be granted out of the purview of the agreement.
26. The respondent submitted that the construction of the said project could not be completed due to various factors like, economic meltdown, sluggishness in the real estate market, defaults committed by the allottees in making timely payments, shortage of labour, non-availability of water for construction etc.
27. The respondent submitted that due to above factors the complaint is liable to be dismissed.



Determination of issues

28. In respect to the **first issue** raised by the complainant, the respondent is liable for delayed possession to the

complainant. This is fortified from the fact that as per clause 14(a) of the agreement dated 30.05.2013 the due date of possession is 07.03.2018 i.e. 40 months from the date of commencement of construction plus 6 months of grace period. Thus, as the status of the project is not known so refund cannot be decided so the complainant is entitled for interest at the prescribed rate under RERA on the delayed possession i.e. from 07.03.2018 till date as possession has not been offered till date.

29. With respect to the **second issue** raised by the complainant, the authority grants grace period to every respondent company as a matter of practice as it is mentioned in the agreement signed by both the parties and thus the complainant cannot drift away from this fact when earlier he signed the agreement after going through all the terms and conditions therein. Thus, the authority is justified in granting grace period as mentioned in the agreement.

30. With respect to the **third issue** raised by the complainant, due to lack of sufficient documentary proof this issue cannot be decided and remains unascertained.



31. With respect to the **fourth and fifth issue**, the agreement was executed prior to coming in force of RERA, 2016. Thus, section 13 and section 14 cannot be applied retrospectively.

32. With respect to **sixth issue**, the terms of the agreement are drafted mischievously by the respondents as in this case 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. With respect to the **seventh issue**, as per the RERA registration certificate, the revised date for completion of the project as undertaken by the respondent is 31.12.2020. Thus, keeping in view the intervening circumstances and the interest of the other allottees, refund of principal amount paid by the complainant cannot be granted. However, the complainant is entitled to the delayed possession interest at



the prescribed rate of 10.74% per annum from the due date of possession till the actual handing over of possession failing which the complainant is entitled to seek refund of the amount.

34. As the promoter has failed to fulfil 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.



35. 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.”

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

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.

Findings of the authority

37. **Jurisdiction of the authority-** The project “Shree Vardhman



Victoria” is located in sector 70, Gurugram. As the project in question is situated in planning area of Gurugram, therefore the authority has complete territorial jurisdiction vide notification no.1/92/2017-1TCP issued by Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint. As the nature of the real estate project is commercial in nature so the authority has subject matter jurisdiction along with territorial jurisdiction.

The preliminary objections raised by the respondent regarding subject matter jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint regarding 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.

38. As per clause 14 (a) of the agreement dated 30.5.2013, possession was to be handed over to the complainant within a period of 40 months from the date of commencement of construction (07.05.2014) + 6 months grace period which comes out to be 07.03.2018. It was a construction linked plan. However, the respondent has not delivered the unit in



time. Complainant has already paid Rs.1,06,47,204/- to the respondent. However, the project is registered with the authority and vide the registration certificate, the respondent had undertaken to complete the construction by 31.12.2020. Thus, keeping in view the status of the project and the interest of other allottees, the authority is of the considered opinion that refund cannot be allowed at this stage. However, the complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 from the due date of possession, i.e. 07.03.2018 till the handing over of possession, failing which the complainant is entitled to seek refund of the amount.

Decision and directions of the authority

39. 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:

- (i) The respondent is directed to pay the interest at the prescribed rate i.e. 10.75% per annum for every month of delay on the amount paid by the complainant from due date of possession till the actual handing over of possession,



failing which the complainant is entitled to seek refund of the amount.

(ii) The respondent is directed to pay interest accrued from 07.03.2018(due date of possession) to 29.01.2019(date of this order) on account of delay in handing over of possession to the complainants within 90 days from the date of this order.

(iii) Thereafter, the monthly payment of interest till handing over of the possession so accrued shall be paid before 10th of every subsequent month.

40. The complaint is disposed of accordingly.

41. The order is pronounced.

42. Case file be consigned to the registry.

HARERA
GURUGRAM



(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

(Subhash Chander Kush)

Member

Date: 29.01.2019

Judgement uploaded on 25.02.2019