BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 1506 of 2019
First date of hearing : 04.11.2019
Date of decision : 09.02.2021

1. Smt. Deepti Bhardwaj
2. Smt. Rupali Bhardwaj
3. Smt. Pooja Bhardwaj

All Resident of:- G-18/41, Sector-15, Rohini, New Delhi

Complainants

Versus

M/s VSR Infratech Pvt. Ltd.
Regd. Office:- A-22, Hill View Apartments, Vasant Vihar, New Delhi-110057

Respondent

CORAM:
Dr. K.K. Khandelwal — **Chairman**
Shri Samir Kumar — **Member**

APPEARANCE:
Shri Mukesh Suman — Advocate for the complainants
Ms. Shreya Takkar — Advocate for the respondent

ORDER

1. The present complaint dated 29.04.2019 has been filed by the complainants/allottees in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for

all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter-se them.

A. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Project name and location	"114 Avenue", Sector-114, Village Bajghera, Gurugram, Haryana.
2.	Area of the project	2.968 acres
3.	Nature of the project	Commercial Complex
4.	DTCP License	72 of 2011 dated 21.07.2011
5.	Valid up to	20.07.2024
6.	RERA registration/not registered	Registered vide no. 53 of 2019 dated 30.09.2019
7.	RERA registration valid upto	31.12.2019
8.	RERA extension	113 of 2020 dated 05.10.2020
9.	RERA extension valid upto	31.12.2020 (Extension validity expired)
10.	Extension applied for	06.03.2020
11.	Unit no.	H-51, lower ground floor
12.	Unit measuring (super area)	379.61 sq. ft.
13.	Date of execution of space buyer's agreement	Not executed
14.	Date of execution of MOU	12.04.2013

15.	Total sales consideration	Rs. 18,22,285/- (As per article 1 of MOU page no. 39 of complaint)
16.	Total amount paid by the complainant	Rs. 18,89,693/- (As per the receipts attached from pg. 51-54 of the complaint)
17.	Payment Plan	Down Payment Plan
18.	Date of commencement of construction	15.03.2012 (As admitted by the counsel for the promoter)
19.	Due date of delivery of possession ***"32. That the Company shall give possession of the said unit within 36 months of signing of this agreement or within 36 months from the date of start of construction of the said building whichever is later. If the completion of the said Building is delayed by reason of non-availability of steel and/or cement or other building materials...."*** **[clause taken from the complaint of similar project]**	15.09.2015 **Note: -** As the date of start of construction is 15.03.2012 and agreement has not been executed between the parties, the due date of possession is calculated from the date of commencement of construction and further a grace period of 6 months is allowed to the promoter as per account of certain force majeure circumstances.
20.	Assured return. (As per clause 3.1 of the MoU)	Rs. 70/- per sq. ft. per month till the notice of offer of possession and Rs. 52.50/- per sq. ft. per month after completion of construction, till tenant is inducted possession
21.	**Offer of possession to the complainant**	**Not offered**

B. Fact of the complaint

3. The complainants submitted that the said property was purchased by them on assurances and promises of the promoter that the construction of the property will be completed as specified in the space buyer's agreement and further the promoter assured to them that they would also get assured monthly return on their investments.

4. The complainants submitted that as per Article 3.1 of the said agreement/MOU, the promoter was agreed to pay assured return @ Rs. 70/- per sq. ft. of the super area per month, and @ Rs. 52.50/- per sq. ft. of super area per month after the completion of construction, till the possession is delivered to tenant.

5. The complainants submitted that initially the respondent was paying monthly returns on time till 2015. Thereafter, the promoter became very irregular in repayment of monthly assured return and paid the amount for the period of 2015-2017, after harassing them for a long time.

6. The complainants submitted that on account of false promises of the promoter they have not received assured monthly return since January 2018.

C. Relief sought by the complainants:

7. The complainants have sought following relief(s).

(i) To pay a sum of Rs.26,572/- per month for assured return monthly return (January 2018 to March 2019) = Rs.3,98,580/-.

(ii) Direct to the respondent/promoter to state the final date of completion of construction of the said unit and the said property i.e. "114 Avenue" and also the date of possession to the complainants and handover the possession of the above said property/project.

(iii) Any other relief which the authority may deem just and proper.

8. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent:

9. The respondent has contested the complainant on the following grounds: -

a. The respondent submitted that the hon'ble appellate tribunal vide its order/judgement dated 02nd May, 2019 in appeal no. 06/2018 titled as ***Sameer Mahawar vs. MG Housing Pvt. Ltd.*** has categorically held that this hon'ble authority has no powers to grant refund and the same can only be adjudged by the adjudicating officer as provided under the Act. Thus, in view of the binding judgment

passed by the hon'ble appellate authority the present case needs to be dismissed for want of Jurisdiction.

b. The respondent submitted that since this hon'ble authority in ***Brihmjeet vs. Landmark Apartment Pvt. Ltd. (HRR/GGM/VRN/141/2018)*** has already held that the matter in dispute therein was to be adjudicated by the adjudicating officer and not by the authority and accordingly dismissed the complaint with the liberty to approach the adjudicating officer. It is pertinent to mention here that the facts related to the aforesaid mentioned case and the present case in dispute are identical in nature and thus the present complaint should also be dismissed.

c. The respondent submitted that the complainant is attempting to raise issues now, at a belated stage, attempting to seek a modification of the agreement entered into between the parties in order to acquire benefits for which the complainant is not entitled in the least.

d. The respondent submitted that the issue so raised in this complaint are not only baseless but also demonstrates an attempt to arm twist the answering respondent into succumbing to the pressure so created by the complainant in filing this complaint before this forum and seeking the reliefs which the complainant is not entitled to.

e. The respondent submitted that one of the major reason for the delay was because of the non-completion of Dwarka expressway which is a part of master plan 2031.

f. The respondent submitted that on 19th February 2013, the office of the executive engineer, Huda, division no. II, Gurgaon vide memo no. 3008-3181 has issued instruction to all developers to lift tertiary treated effluent for construction purpose from sewerage treatment plant, Behrampur. Due to this instruction, the company faced the problem of water supply for a period of 6 months.

g. The respondent submitted that the building plans were approved in January 2012 and company had timely applied for environment clearances to competent authorities, which was later forwarded to state level environment impact assessment authority, Haryana. Despite of our best endeavour we only got environment clearance certificate on 28.05.2013 i.e. almost after a period of 17 month from the date of approval of building plans.

h. The respondent submitted that in July 2017 the Govt. of India further introduced a new regime of taxation under the Goods and Service Tax which further created chaos and confusion owning to lack of clarity in its implementation.

10. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute.

Hence, the complaint can be decided on the basis of these undisputed documents.

11. The authority on the basis of information and explanation and other submissions made and the documents filed by the complainant and the respondent is of considered view that there is no need of further hearing in the complaint.

E. Findings on the relief sought by the complainant:

Relief sought by the complainant: (a). To pay a sum of Rs.26,572/- per month for assured return monthly return (January 2018 to March 2019) = Rs.3,98,580/-.

(b). Direct to the respondent/promoter for the final date of completion of construction of the said unit and the said property i.e. "114 Avenue" and also the date of possession to the complainants and handover the possession of the above said property/project.

12. As per clause 3.1 of the MoU, the complainant is eligible for payment of "assured return" @ Rs. 70/- per sq. ft. per month till the notice of offer of possession and @Rs. 52.50/- per sq. ft. per month after the completion of construction, till tenant is inducted possession. Clause 3.1 of the MoU is reproduced herein below: -

> "till the notice of offer of possession is issued the Developer shall pay to the Allottee an Assured Return at the rate of Rs. 70 per sq. ft. of super area. After completion of construction, till tenant is inducted possession....."

13. According to the terms of the MoU, payment of "assured returns" will be given to the complainant per month @ Rs. 70/- per sq. ft. per month till the notice of offer of possession and @Rs. 52.50/- per sq. ft. per month after the completion, till tenant is inducted possession. Accordingly, the complainant has paid more than 100% of the value of the unit.

14. It has been contended by the respondent counsel during the hearing and in its submissions that the instant complaint shall not fall under the ambit and purview of the RERA Act since assured return is involved and no BBA has not been executed between the parties.

15. In this regard, the authority observes that section 11 of the Act ibid lays down the functions and duties of the promoter. Section 11(4)(a) of the Act is reproduced herein below:

> *"11. Functions and duties of promoter*
>
> *(1) ...*
>
> *(2) ...*
>
> *(3) ...*
>
> *(4) The promoter shall-*
>
> *(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act, 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 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".*

16. Further, an "agreement for sale" has been defined under section 2(c) of the Act as "***an agreement entered into***

between the promoter and the allottee". Also, clause 1.1 of the MoU clearly stipulates that the parties have agreed to execute a separate space buyer agreement for the premises and shall be executed between the parties pursuant to the execution of the MoU. Hence, in view of the terms of the MoU, the same has all the elements of an agreement for sale and accordingly MoU is considered as the builder buyer's agreement being basically a contract *inter se* parties w.r.t. real estate transaction. Therefore, an MoU containing assured return scheme could be considered as an agreement for sale interpreting the definition of agreement for sale under section 2(*c*) broadly by taking into consideration the objects of RERA Act. Further, the enforceability of MoU depends upon the intention and conduct of the parties as reflected in the document.

17. The authority herein refers to the judgment passed by the hon'ble Apex Court in **M/s Motilal Padampat Sugar Mills Vs. State of Uttar Pradesh & Ors.** wherein it has been observed that the true principle of promissory estoppel is that where one party has, by his words or conduct, made to the other a clear and unequivocal promise which is intended to create legal relationship effect or a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact

so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective whether there is any pre-existing relationship between the parties or not. Equity will be given case where justice and fairness demand, prevent a person from insisting on strict legal rights even where they arise, not under any contract, but on his own title deeds or under statute.

18. Reference may be placed on the **Bikram Kishore Parida Vs. Benudhar Jena judgement**, wherein the court held that the test of an intention to create legal relations is an objective one. It may be that the promisor never anticipated that his promise would give rise to any legal obligation but, if a reasonable man would consider that he intended to enter into a contract, then he will be bound to make good on his promise.

19. Earlier **Securities & Exchange Board of India (SEBI) forwarded an application bearing no. 604/1/2020 dated 10.06.2020** vide which the matter was referred for appropriate action by the authority since the allegations raised therein related to real estate transactions. Pursuant to the same, a complaint bearing no. 2623/2020 titled as ***Monica***

Ahluwalia Vs Spaze Towers Pvt. Ltd. was registered in the authority.

20. In view of the facts and circumstances stated above, it is important to understand whether assured returns are payable at all. In this context reference is drawn towards the preamble to the Securities & Exchange Board of India Act, 1992 (SEBI Act) which describes the intention behind the legislature and provides as under:

> *".....to protect the interest of investors in securities and to promote the development of, and to regulate the securities market and for matters connected therewith or incidental thereto" and introduced the definition of* ***Collective Investment Scheme (CIS)*** *which meant that any scheme or arrangement made or offered by any person or entities under which the contributions, or payments made by the investors, are pooled and utilized with a view to receive profits, income, produce or property, and is managed on behalf of the investors where investors do not have day to day control over the management and operation of such scheme or arrangement is a CIS."*

21. Assured return schemes were not regulated under the SEBI Act until 2013-14 and were not entirely treated as illegal. Such scheme came to the forefront and caught the attention of SEBI when it received complaint from a group of allottee complaining that the company was collecting money from various investors and offering properties against it with assured returns. Securities and Exchange Board of India (SEBI) asked a company named **Viswas Real Estates and Infrastructures India Ltd** to abstain from continuing its

business activity and stated that the scheme falls under the definition of CIS which requires registration as per SEBI Act. Since then, the definition of CIS has undergone amendments per se subsequent complaints and various judgments passed by SEBI. CIS is defined under section 11AA of SEBI Act which was inserted by the SEBI (Amendment) Act, 1999 w.e.f. 22.02.2000 and the section has been amended periodically.

Definition of CIS under section 11AA of the SEBI Act is as under:

"(1) Any scheme or arrangement which satisfies the conditions referred to in sub-section (2) or sub-section (2A) shall be a collective investment scheme:

Provided that any pooling of funds under any scheme or arrangement, which is not registered with the Board or is not covered under sub-section (3), involving a corpus amount of one hundred crore rupees or more shall be deemed to be a collective investment scheme.

(2) Any scheme or arrangement made or offered by any person under which, —

(i) the contributions, or payments made by the investors, by whatever name called, are pooled and utilized for the purposes of the scheme or arrangement;

(ii) the contributions or payments are made to such scheme or arrangement by the investors with a view to receive profits, income, produce or property, whether movable or immovable, from such scheme or arrangement;

(iii) the property, contribution or investment forming part of scheme or arrangement, whether identifiable or not, is managed on behalf of the investors;

(iv) the investors do not have day-to-day control over the management and operation of the scheme or arrangement.

(2)(A) Any scheme or arrangement made or offered by any person satisfying the conditions as may be specified in accordance with the regulations made under this Act.

(3) Notwithstanding anything contained in sub-section (2) or sub-section (2A) any scheme or arrangement—

(i) made or offered by a co-operative society registered under the Co-operative Societies Act, 1912 (2 of 1912) or a society being a society registered or deemed to be registered under any law relating to co-operative societies for the time being in force in any State;

(ii) under which deposits are accepted by non-banking financial companies as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934);

(iii) being a contract of insurance to which the Insurance Act, 1938 (4 of 1938), applies;

(iv) providing for any Scheme, Pension Scheme or the Insurance Scheme framed under the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (19 of 1952);"

22. The **proviso of sub-section 1 to section 11AA was amended by the SEBI (Amendment) Act 1999, w.e.f. 18.07.2013** which provides that pooling of funds under any scheme involving a corpus amount of one hundred crores or more shall deemed to be a CIS even though it does not satisfy all the four conditions under sub-section (1) of section 11AA.

A typical example of CIS under the pretext of real estate is the famous case of **P.G.F Limited & Ors. Vs. Union of India (2004) wherein**, the hon'ble Apex Court held that sale and

development of lands in certain units along with the offer to develop the same by planting trees, plants, etc., and thereby assuring the customers of a high amount of appreciation in land value, which is nothing but a return to be acquired by the customers after making the purchase of land based on the development assured by P.G.F Ltd. falls within the definition of CIS.

23. Further, the authority places reliance on the **SEBI Judgment in MVL Ltd.** wherein it was held by the Securities and Exchange Board of India that the appellant was collecting money from the investors and restrained it from launching or carrying out any collective investment scheme including the schemes which were identified as collective investment schemes. Further, SEBI ordered that MVL should return all the monies collected under the schemes which are due and payable.

In the **Pioneer Urban Land and Infrastructure Ltd. & Anr. Vs. Union of India & Ors., SC, 2019**, reference was placed on the NCLAT judgment Nikhil Mehta & Sons (HUF) v. AMR Infrastructure and it was observed,

> *" ....allottees who had entered into "assured return/committed returns" agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of the agreement, the developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of the agreement till the date of*

handing over of possession to the allottees." It was further held that," amounts raised by developers under assured return schemes had the "commercial effect of a borrowing", which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code."

24. Later the government has passed the Banning of Unregulated Deposit Schemes Ordinance on 21 February, 2019 prohibiting all deposit schemes (with or without interest) except those with regulatory approval on 31.07.2019 wherein it has been provided that incentive or assured return schemes of builders will be permitted only if the money is provided against specific immovable property to be transferred to the buyer. If the builder has to return the money with or without interest other than for situations allowed under the ordinance, it may be treated as an unregulated deposit.

Whether they fall under unregulated deposit scheme:

The Banning of the Unregulated Deposit Schemes Act,2019, in section 2(17), provides the scope of such scheme which is a, *"a scheme or arrangement under which deposits are accepted or solicited by any deposit taker by way of business and which is not a Regulated Deposit Scheme, as specified under column (3) of the First Schedule."*

If such schemes are not approved by the regulator for real estate such as the RERA, they will fall under the definition of an unregulated deposit scheme and automatically be banned henceforth. Any person acting in violation will be liable to punishment as per the provisions of the Act.

However, for the buyers who have already invested in such schemes, the developers will be bound to abide by the terms of the agreement/covenant that they have executed. Contractual/quasi-contractual obligations will have to be adhered to and in case of failure, the developer will make itself liable to pay compensation under section 73 of the Contract Act which includes damages that naturally arose as a result of the breach and which the parties knew when they made the contract to be likely to result from the breach of it.

If a builder has failed to pay the assured returns, there is a breach of contract and in such a case, it may give rise to imposition of unliquidated damages. As per the landmark case, **Hadley vs. Baxendale,** damages should, *reasonably be considered as arising naturally, i.e. according to the usual course of things from the breach or might reasonably be supposed to have been in the contemplation of both the parties, at the time they made the contract, as the probable result of the breach of it.*". This was further cemented by the elaboration in **Victoria Laundry (Windsor) Ltd. vs. Newman Industries Ltd.**," wherein it was held that "*In cases of breach of contract, the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably*

foreseeable as liable to result from the breach. What was at that time reasonably so foreseeable, depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach. For this purpose, knowledge 'possessed' is of two kinds: one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently, what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the 'first rule' in ***Hadley v. Baxendale****. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things,' of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable."*

Promissory Estoppel: Additionally, the developer is also bound by promissory estoppel. As per this doctrine, if any person has made a promise and the promisee has acted on such promise and altered his position, then the person is bound to comply with her/his promise. The principle of promissory estoppel was settled by the ***hon'ble Supreme Court in its landmark decision in Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh (supra).***

25. The authority further observes from the submission made by the parties and from the documents on record that the

respondent promoter has failed to fulfil his contractual obligation arising out of the MoU to pay the assured return as promised and assured by them nor has the delivered the possession within stipulated time frame.

Delay Possession Charges

26. In the present complaint, the complainant intends to continue with the project and is seeking possession of the subject unit and delay possession charges as provided under the proviso to section 18(1) of the Act which reads as under.

> ***"Section 18: - Return of amount and compensation***
>
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
>
> .....
>
> *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."*

27. No builder buyer agreement was executed between the parties. However, as per clause 32 of the space buyer's agreement viewed from another paper book of similar complaint pertaining to similar project, the possession was to be handed over within a period of 36 months from the date of signing of the space buyer's agreement or the date of start of construction, whichever is later with grace period of 6 months. Clause 32 of the space buyer's agreement is reproduced below:

> *"32 That the Company shall give possession of the said unit within 36 months of signing of this Agreement or*

within 36 months from the date of start of construction of the said Building whichever is later...."

28. The authority observed that the licence for the project was issued by DTCP vide licence no.72 of 2011 dated 27.7.2011 which is valid upto 20.07.2024. The date of commencement of the project is 01.01.2012. Date of start of construction is 15.03.2012 as intimated and admitted by the counsel for the respondent. It is not clear as to how the construction of the project commences without obtaining the environment clearance and environment clearance was granted on 28.05.2013 which is valid upto 27.5.2020. As the date of start of construction of the project is 15.03.2012.

29. On consideration of documents available on record and submissions made by the complainant and the respondent, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 32 of the space buyer's agreement of another complaint of similar project, possession of the booked unit was to be delivered within a period of 36 months with additional period of 6 months (force majeure) from the date of execution of space buyer's agreement or the date of start of construction, whichever is later. As the date of start of construction is 15.03.2012 and no agreement has been executed between the parties, the due date of handing over the possession is calculated from the date of commencement of construction which comes out to be

15.09.2015. The respondent has failed to handover the possession of subject unit till date.

30. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) of the Act on the part of the respondent is established. This mater is squarely covered under section 18 (1) of the Real Estate (Regulation and Development) Act 2016 and the complainant is entitled for delayed possession charges at the prescribed rate of interest i.e. 9.30% per annum on the amount deposited by the complainant with the respondent from the due date of possession i.e. 15.09.2015 till the handing over of physical possession of the allotted unit. There is also a MoU which was signed between the parties on 12.04.2013. This MoU creates obligations of the promotor to pay assured return. The assured return is to be paid by the respondent to the complainant with effect from the amount received from him till due date of possession 15.09.2015.

G. Direction of the authority

31. Hence, the authority hereby passes the following order and issues directions under section 34(f) of the Act:

    i. The respondent shall pay the interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainant from due date of possession i.e.

15.09.2015 till the handing over of physical possession.

ii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

iii. The arrears of interest accrued till date of decision shall be paid to the complainant within a period of 90 days from the date of this order and thereafter monthly payment of interest till the handing over of possession shall be paid before 10th of every subsequent month.

iv. The respondent shall not charge anything from the complainant which is not part of the MOU.

v. The respondent is further directed to get the schemes regularised as per relevant provisions of law from the appropriate authority.

32. Complaint stands disposed of.

33. File be consigned to registry.

(Samir Kumar)
(Member)

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

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 09.02.2021

Judgement uploaded on 12.08.2021