

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

Complaint no. : 2444 of 2019
First date of hearing: 12.09.2019
Date of decision : 01.04.2021

Shri Vijay Wadhwa

R/o:- Flat No. A-54, DLF Capital Greens, Karam
Pura, Shivaji Marg, New Delhi-110015

Complainant

Versus

M/s Vatika Limited

Regd. office: Vatika Triangle, 4th Floor,
Sushant Lok, Phase-I, MG Road,
Gurugram-122002

Respondent

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

Member
Member

APPEARANCE:

Ms. Priyanka Aggarwal
Venket Rao

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 11.06.2019 has been filed by the complainant/allottee 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.	Name and location of the project	"Vatika India Next" in Sector 81, 82, 82A, 83, 84, 85, Gurugram
2.	Nature of the project	Residential township
3.	Project area	182.8 acres
4.	DTCP License	113 of 2008 dated 01.06.2008 valid up to 31.05.2018
5.	Name of the licensee	Browz Technologies pvt. Ltd., Mark Buildtech Pvt. Ltd. and 11 others
6.	RERA registered/ not registered	Not registered
7.	Date of execution of plot buyer's agreement	08.07.2010
8.	Unit no.	Plot No. 521, Block-D admeasuring 360 sq. yards (as per buyer's agreement dated 08.07.2010 on pg. 21 of the complaint)
9.	New unit	Plot-51/Homes Ave/83K admeasuring 360 sq. yards (as per addendum to agreement dated 09.07.2013 on pg. 35 of the complaint)

10.	Revised unit	Plot-14, St. D-2, Vatika India Next admeasuring 327.28 sq. yards (As per addendum to agreement dated 03.04.2019 on pg. 33 of the reply)
11.	Payment plan	Development Linked Payment Plan (At page 32 of the complaint)
12.	Total consideration	Rs. 79,68,737.87/- (as per statement of account dated 19.06.2019 annexed at page 36 of the reply)
13.	Total amount paid by the complainant	Rs. 1,15,14,011.21/- (as per statement of account dated 19.06.2019 annexed at page 36 of the reply)
14.	Due date of delivery of possession (as per clause 10 of the agreement: 3 years from the date of execution of agreement)	08.07.2013
15.	Possession letter	28.09.2014 (pg. 36 of complaint)
16.	Delay in delivery of possession	1 year 2 months and 20 days
17.	Specific reliefs sought	<ol style="list-style-type: none"> 1. Direct the respondent to handover the possession of the re-allotted unit and pay interest for delay in delivery from the date of payment to the actual date of possession. 2. Direct the respondent to pay for the reduced size of the plot by 38.72 sq. yds. 3. Direct the respondent to return the PLC paid by the complainant as new re-allotted plot is not located at prime location.

B. Facts of the complaint

3. The respondent issued an allotment letter on 22.05.2010 for plot No. D/360/521, Vatika India Next, Sector 83 Gurugram admeasuring 360 sq. yards with booking date as 04.03.2010 and a plot buyer agreement was executed on 08.07.2010. As per clause 10, the respondent was required to complete development of the plot within 3 years from the date of plot buyer agreement dated 08.07.2010 and give possession of the plot to the complainant by 08.07.2013.
4. The complainant submitted that he purchased the subject plot from original allottees, and the plot was assigned to him by the respondent on 12.12.2011. The plot was reallocated by the respondent on 16.05.2013 to Plot no.51 in Vatika India Next, Street no. Home Avenue, Sector 83, Gurugram by increasing size from 360 sq. yard to 366 sq. yard. The complainant was asked to deposit Prime Location Charges (PLC) OF Rs.25,62,000 @ Rs.7000 psy and cost of increased size which were duly deposited by him.
5. The respondent issued addendum on 09.07.2013 for allotment of the Plot no. 51 in Vatika India Next, Street No. Homes Avenue, Sector 83 Gurugram and the possession of the plot was given to the complainant on 28.09.2014 and commenced charging Maintenance Charges of the said plot.

6. The complainant found a prospective buyer of the plot and sent an email to the respondent on 21.01.2019 for enquiring about the formalities for the registration of the said plot. The complainant further submitted that on 19.02.2019, he received an email from the respondent informing that plot 51 needs to be cancelled and will refund the paid amount as per Builder Buyer Agreement due to some unavoidable reasons. Further, the complainant was offered a smaller plot which was without any preferential location. The complainant sent an email to the respondent on 11.03.2019 for payment of market rate for reduced area of new plot, PLC, interest on PLC paid in 2013, interest on delayed possession and refund of maintenance charges.
7. The respondent allotted a new plot no 14 in Vatika India Next, Street no.D-2, Sector 82-A, Gurugram on 01.04.2019 with smaller size of 327.28 sq. yards and without any prime location The complainant was required to sign Addendum for allotment of a new plot. The complainant sent an email on 05.04.2019 to the respondent to refund the amount balance payable and give possession of the new slot at the earliest. An email was received from the respondent on 11.04.2019 that refund will take place by 17.04.2019 but no refund was received by that date and possession of the plot is also pending. The Respondent offered plots to the

public in Vatika India Next 2 in April 2019 @ Rs.60,000 per sq. yard for plots of similar size in the new developing area.

C. Relief sought by the complainant:

8. The complainant has sought following relief:
 - (a) To give possession of the re-allotted Plot no 14 in Vatika India Next, Street no. D-2, Sector 82-A, Gurugram and to pay interest @18 % p.a from the date of payment to the date of actual possession of re-allotted plot.
 - (b) Direct the respondent to pay for the reduced size of the plot by 38.72 sq. yds.
 - (c) Direct the respondent to return the PLC paid by the complainant as new re-allotted plot is not located at prime location and to pay interest @18% p.a on PLC of Plot buyer agreement.
9. 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:

10. It is submitted that the complainant is attempting to seek an advantage of getting the speculative gain by selling it to other on higher rates as one of his mail shows his intention. It is apparent from the facts of the present case that the main purpose of the

present complaint is to harass the promoter by engaging and igniting frivolous issues. It is **further** submitted that the complainant relied upon various e-mails as annexed with the complaint and the same was not supported by affidavit/certificate under section 65(B) of Evidence Act. Hence, the e-mails placed on record by the complainant has no authenticity, be invalid and are not an admissible document.

11. It is submitted that the plot of the complainant is ready for possession but instead of taking possession, it wants to re sell the same in secondary market and tried to create unnecessary pressure on the respondent.

E. Rejoinder filed by the complainant:

12. The respondent originally allotted plot no. D/360/521 in Vatika India Sector 83, Gurugram in 2010 and the complainant purchased the same in 2011. A new plot no. K-51 in Vatika India Next, Homes Avenue, Sector 83, Gurugram was reallocated in 2013 after getting layout approved and the plot number was duly marked. The respondent collected PLC and additional cost towards increase in area of the plot. The respondent commenced collection of maintenance charges from the possession of this plot.
13. The respondent had defective title of the K-51 in Vatika India Next, Homes Avenue, Sector 83, Gurugram and fraudulently reallocated

the same to the complainant to extract the amounts towards PLC. This plot was cancelled and the new plot was offered in 2019. The complainant had no other option but to opt for a new smaller size Plot no. 14 in Vatika India Next, Street no. D-2, Sector 82-A, Gurugram which was not preferentially located. The provisions of the plot buyer agreement are invalid to the extent as these are one sided, unreasonable and no giving equal rights to the respondent and complainant.

F. Written Submission by the respondent:

14. It is submitted that the Original allottees Ms. Sunita Rani and Mr. Amit Vats purchased the Plot with reference No. D/360/521 through Property Dealer "Delhi NCR Realtors Pvt. Ltd." from the secondary market in November, 2011 and the endorsement in the Plot Buyer Agreement to that effect has been processed and passed on 17.11.2011 after fully understanding the scheme of the said project. The Plot Buyer Agreement was executed between the Respondent and Original Allottee's. The development work of the project wherein the plot of complainant is situated is not solely based as per the clause no. 10 of 'PBA' but also subject to the other imperative clauses as agreed and detailed in the 'PBA' pertaining to completion of development work of project.

15. That the Respondent has been facing the hardships on the ground due to changes again & again in the layout plan of the project and numerous other reasons and roadblocks in development works in projects in its licensed land comprised of the Township owing to the initiation of the GAIL Corridor, which passes through the same. The negative effects of such a colossal change necessitated realignment of the entire layout of the various projects, including plotted / Group Housing in the entire Township. This was further complex with the non-removal or shifting of the defunct High-Tension lines passing through these land, which also contributed to the inevitable change in the layout plans.
16. That on 09.07.2013 due to above mentioned changes in the circumstances which were beyond the control of respondent, its officials apprised the whole scenario to the complainant and with his consent, the plot has been re-allotted to a Plot 51/ Homes Ave. / 83K/ 360 Sq. yard/ Sector-83 and the allotment letter for the same had issued in his favour.
17. That the re-allotted plot is under the category of 360 sq.yds, with an increased area admeasuring 366 Sq. yards along with the additional Preferential Location. The complainant is liable to pay the additional cost of increased area and Preferential Location

Charges for the re-allotted plot as per the terms of Booking and Plot Buyer Agreement ('PBA').

18. That the maintenance charges being levied as per maintenance agreement as executed with complainant and now, the same has to be adjusted against and to the account of the further re-allotted plot towards maintenance. That the residential plots in the project were not aligned and completed and changes are done due to the above and several other reasons & circumstances which were absolutely beyond the control of the Respondent on various counts.
19. It is further submitted that the Respondent had offered many Plots of different sizes (with less or more area) to Complainant in the same & other locations as well and also with the Preferential Locations, but the complainant only opted for Plot No. 14, D-2, Vatika India Next, Gurugram, admeasuring 327.28 Sq. yds.
20. That vide mail dated 11-03-2019 the Respondent explained in detail about the policy for refund of PLC and about the adjustment of maintenance. The complainant had accepted the new re-allotted Plot No. 14, D-2, Vatika India Next, Gurugram, admeasuring 327.28 Sq. Yds. With his free will and consent and he signed the addendum dated 03.04.2019 to give effect to the change in Plot.
21. The plot of the complainant is ready for possession but instead of taking possession, he wants to re-sell the same in secondary re-sale

market just to get the speculative gain and for the same reason is buying time and tried to create unnecessary pressure on respondent by using the arm twisting technique for getting the additional illegitimate benefits from it, by filling baseless complaint before this Hon'ble Authority.

22. It is respectfully submitted that the respondent, at all stages and even today has been ready and willing to give possession of the said unit to the complainant whereas he who has refused to take the possession on one pretext or other.
23. 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.
24. 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. Jurisdiction of the authority

25. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that

it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 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.

E. II Subject matter jurisdiction

The respondent has contended that the reliefs regarding refund and compensation are within the jurisdiction of the adjudicating officer and jurisdiction w.r.t the same does not lie with the authority. It seems that the reply given by the respondent is without going through the facts of the complaint as the same is totally out of context. The complainant has nowhere sought the relief of refund and regarding compensation part the complainant has stated that he is reserving the right for compensation and at present he is seeking only delay possession charges. 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. (complaint no. 7 of 2018)*** leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage. The said decision of the authority has been upheld by the Haryana Real Estate Appellate Tribunal in its judgement dated 03.11.2020, in appeal nos. 52 & 64 of 2018 titled as ***Emaar MGF Land Ltd. V. Simmi Sikka and anr.***

F. Findings on the Relief Sought filed by the complainant:

Relief sought by the complainant: The respondent immediately be directed to grant the possession of unit along with compensation for the delay caused herein to the complaint.

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

Section 18:- Return of amount and compensation

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. As per clause 10 of the Plot buyer's agreement dated 08.07.2010, the possession of the subject unit was to be handed over by of 08.07.2013. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provisions of this agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. This is just to comment as to how the builder has misused his dominant position and drafted such clause in the agreement and the allottee is left with no option but to sign on dotted lines. Clause 10 of the apartment buyer agreement (in short, agreement) provides for handover possession and is reproduced below:

"10 HANDING OVER POSSESSION OF THE SAID PLOT TO THE ALLOTTEE

The Promoter based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said Unit within a period of three years from the date of execution of this Agreement unless there shall be delay or there shall be failure due to reasons mentioned in Clauses (11), (12 and Clause (30) or due to failure of Allottee(s) to pay in time the price of the said independent dwelling unit along with all other charges and dues in accordance with the schedule of payments given herein in Annexure-II or as per the demands raised by the Company from time to time or any failure on the part of the Allottee(s) to abide by any of the terms or conditions of this Agreement."

28. At the outset it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default in making payments as per the schedule of payment or upon demand raised by the promoter or failure on part of the allottee to abide by any of the terms and conditions of the buyer's agreement. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards

timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines. The promoter has proposed to hand over the possession of the apartment by 08.07.2013. As a matter of fact, the promoter has not applied for occupation certificate within the time limit prescribed by the promoter in the Plot buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong.

29. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges at the rate of 18% p.a. however, proviso to section 18 provides 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 possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

- (1) *For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.*

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

30. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases. The Haryana Real Estate Appellate Tribunal in **Emaar MGF Land Ltd. vs. Simmi Sikka (Supra)** observed as under:

"64. Taking the case from another angle, the allottee was only entitled to the delayed possession charges/interest only at the rate of Rs.15/- per sq. ft. per month as per clause 18 of the Buyer's Agreement for the period of such delay; whereas, the promoter was entitled to interest @ 24% per annum compounded at the time of every succeeding instalment for the delayed payments. The functions of the Authority/Tribunal are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the home buyers. This Tribunal is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the Buyer's Agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the Buyer's Agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the Buyer's Agreement dated 09.05.2014 are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the Buyer's Agreement will not be final and binding."

31. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 11.02.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
32. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

“(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

- (i) *the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.*
- (ii) *the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;”*

Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.

33. On consideration of the documents available on record and submissions made by both the parties, the authority is satisfied that the respondent is in contravention of the provisions of the Act. Vide application form dated 22/05/2010, the predecessor of the complainant booked a unit in 'Vatika India Next' of the respondent. In pursuance of aforesaid application form they executed a buyer's agreement on 08.07.2010 in respect of unit no. Plot No. D/360/521, admeasuring 360 sq. yd. After that the claimant purchased that plot from the original allottee and an endorsement in this regard was made in his favour on 06.12.2011 which led to issuance of re allotment letter on 12.12.2011 by the respondent builder. Thereafter, due to unavoidable reasons beyond the control of the respondent, the complainant was reallocated an alternate plot/unit/apartment and an addendum dated 09.07.2013 was executed to that effect allotting a new unit bearing no. 51/Homes Ave83K/360 sq. yd./Sector 83 admeasuring 360 sq. yd. The relevant para of the addendum is reproduced below:

"...That Allottee have booked a plot with the company i.e 'Vatika Ltd.' Having its registered office at Floor no. 621 A,6th floor Devika Towers,06, Nehru Place, New delhi and have been allotted an Plot no. D/360/521 admeasuring about 360 sq.yd. area in "Vatika India Next". And the allottee has executed the Builder buyer agreement dated 08.07.2010.That now aforesaid plot has been changed due to circumstances, which has been explained to and understood by the Allottee and accordingly, Allottee has been re-allotted a new plot no. 51/Homes Ave/83K/36 sq. yd./Sector 83 admeasuring about 360 sq. yd. built up area in project "Vatika India Next" in lieu of the old plot no. D/360/521 which has been duly accepted by the allottee. The Allottee is fully satisfied and readily accepts the allotment of

new no. 51/Homes Ave/83K/36 sq. yd./Sector 83 admeasuring about 360 sq. yd. area in project "Vatika India Next" without any demur or protest. In view thereof, Allottee has been left with no right, title and interest in the old plot no. D/360/521. Therefore, in Builder Buyer's Agreement dated 08/07/2010 executed between Allottee, and the company herein plot, wherever it is written in the Agreement, shall be read as Plot no. 51/Homes Ave/83K/36 sq. yd./Sector 83. Allottee undertakes to pay the Sale Consideration on the basis of actual super Area & location of new allotted plot no. 51/Homes Ave/83K/36 sq. yd./Sector 83. in Project "Vatika India Next". All other terms and condition of the Builder buyer Agreement dated 08/07/2010 and consequent documentation and understandings in this regard executed between the Parties herein shall remain and hold good and valid for this new allotted Plot no. 51/Homes Ave/83K/36 sq. yd./Sector 83 and all payment received on account of Plot no. D/360/521 shall be treated as part payment of sale consideration of new plot no. 51/Homes Ave/83K/36 sq. yd./Sector 83 and shall constitute a valid discharge to such effect. All the terms and conditions of the executed Builder Buyer's Agreement shall remain the same & binding on the parties.

This Addendum shall be considered as an integral part & parcel of the Builder Buyer's Agreement dated 08/07/2010 modifying only those terms as have been specifically mentioned hereinabove, all other terms and conditions of the Builder Buyer's Agreement dated 08/07/2010 shall remain unaltered and effective."

34. In pursuant to re-allotment dated 12.12.2011 and addendum dated 01.07.2013 the respondent builder offered a possession of the re-allotted unit to the complainant and the same was received on 28.09.2014. It also led to levying of maintenance charges on that unit by the respondent and the same were being admittedly paid by the claimant. However, it has come on record that when the complainant enquired from the respondent with regard to necessary formalities for completion of registration then vide email dated 19.02.2019 it transferred that the allotted unit was required to be cancel and the amount received was to be refunded but that was not done for a period of more than one and a half month so, it

led to execution of another addendum dated 03.04.2019 between the parties whereby the unit of the complainant was changed again and a new unit bearing no. 14,D-2,Vatika India Next,Gurgaon-122004 admeasuring about 327.28 sq. yd. was reallocated in his favour. The relevant clauses of the addendum dated 03.04.2019 are reproduced below:

"...That Allottee have booked a plot with the company i.e 'Vatika Ltd.' Having its registered office at VATIKA LIMITED Vatika Triangle,4th Floor, Sushant Lok, Phase 1,Block A, Mehrauli-Gurgaon Road,Gurgaon-122002 have been allotted (old unit) no. 51/Homes Ave/83K/36 sq. yd./Sector 83 admeasuring about 365.70 sq. yd. area in its NH-8/plots project "Vatika India Next". And the allottee has executed the builder buyer agreement dated 08/07/2010. That now aforesaid plot has been changed due to circumstances, which has been explained to and understood by the Allottee and accordingly, Allottee has been re-allotted a new (new unit) 14, D-2, Vatika India Next , Gurgaon-122004 admeasuring about 327.28 sq. yd. area in project "Vatika India Next" in lieu of the old unit no. 51/Homes Ave/83K/36 sq. yd./Sector 83 which has been duly accepted by the allottee. In view thereof, Allottee has been left with no right, title and interest in the old unit no. 51/Homes Ave/83K/36 sq. yd./Sector 83. Therefore, in Builder Buyer's Agreement dated 08/07/2010 executed between Allottee, and the company herein the plots, wherever it is written in the Agreement, shall be read as unit no.14,D-2 Vatika India Next, Gurgaon-122004. Allottee undertakes to pay the Sale Consideration on the basis of actual super Area & location of new allotted Unit no. 14,D-2 Vatika India Next, Gurgaon-122004 in Project "Vatika India Next". All other terms and condition of the Builder buyer Agreement dated 08/07/2010 and consequent documentation and understandings in this regard executed between the Parties herein shall remain and hold good and valid for this new allotted Unit no. 14,D-2,Vatika India Next,Gurgaon-122004 and all payment received on account of 51/Homes Ave/83K/36 sq. yd./Sector 83 shall be treated as part payment of sale consideration of new Unit no. 14,D-2,Vatika India Next,Gurgaon-122004 and shall constitute a valid discharge to such effect. All the terms and conditions of the executed Builder Buyer's Agreement shall remain the same & binding on the parties.

That we are fully aware of the present construction status of the re allotted unit/project and unequivocally and unconditionally.

This Addendum shall be considered as an integral part & parcel of the Builder Buyer's Agreement dated 8/7/2010 modifying only those terms as have been

specifically mentioned hereinabove, all other terms and conditions of the Builder Buyer's Agreement dated 8/7/2010 shall remain unaltered and effective."

35. From the above clauses of addendum to the buyer's agreement it is quite evident that this addendum forms an integral part and parcel of the buyer's agreement dated 08.07.2010 and the original agreement shall stand changed only to the extent of change in unit number and its location. In other words, all the terms and conditions of buyer's agreement dated 08.07.2010 including but not limited to possession clause (clause 10.1) remained effective and unaltered except change in unit. Therefore, the due date of possession shall be calculated as per clause 10 of the agreement dated 08.07.2010. As far as disentitlement to claim compensation as per aforesaid clause of addendum dated 09.07.2013 is concerned, the respondent has not clarified as to why a need arose for the complainant to agree on such a clause and as to why the complainant has agreed to surrender his legal rights which were available or had accrued in his favour. The respondent has also not stated the compelling circumstances on ground of which the respondent has kept on changing the unit allotted to the complainant. The respondent has not provided any documentary proof which shows that the units has been changed again and again on the request of the complainant-allottee. So, it can be concluded that the change in unit and execution of addendum was only at the

unilateral wish of the respondent at that effect is proved from email dated 19.2.2019(Annexure 8)

We reference to the above captioned booking, we would like to inform you that your plot no.51/HOMES AVENUE/83K/360/SECTOR 83,Gurgaon need to be cancelled and will refund your paid amount as per builder buyer agreement due to some unavoidable reason.

36. In these circumstances, it can be said that the allottee was left with no choice but to sign on the dotted lines of the addendum. Also, it can be said that by incorporating such clause wherein the allottee was compelled to waive his right to compensation for delay in handing over possession, the respondent-promoter can be said to be in a win-win situation wherein on one hand he has violated terms of buyer's agreement dated 08.07.2010 by not handing over possession within time stipulated therein and on the other hand disentitling the allottee to claim delay possession charges. So, the clause regarding waiving of delay possession charges incorporated in the addendum becomes ineffectual. Such a clause whereby a person gave up his valuable rights must be shown to have been executed in a free atmosphere and should not give rise to a suspicion. If even a slightest of doubt arises in the mind of the adjudicator that such an agreement was not executed in an atmosphere free of doubts and suspicions, the same would be

deemed to be against public policy and would also amount to unfair trade practices.

37. By virtue of clause 10 of the dwelling unit buyer's agreement executed between the parties on 08.07.2010, possession of the booked unit was to be delivered within a period of 3 years from the date of execution of the agreement which comes out to be 08.07.2013. Though it has come on record that in pursuance to plot buyer agreement the possession of the allotted unit was to be offered to allottee by 08.07.2013 but the same was offered on 28.09.2014 and the same was accepted by the complainant without any protest. Admittedly after that the respondent started levy maintenance charges for that unit and the same were being paid by the claimant. But unfortunately when the complainant enquired by writing email dated 21.01.2019 (Annexure 7) then he received another email dated 19.02.2019 (Annexure 8) informing him about the need to cancel the unit and refund of the paid up amount as per plot buyer agreement. So it means that as per addendum dated 03.04.2019 and a letter of allotment dated 01.04.2019 the possession of the re-allotted unit with reduced size was required to be offered to the complainant within 3 year as per plot buyer agreement dated 08.07.2013 ie 09.07.2013 .Though possession of the unit was offered to the complainant on 28.09.2014 and which

was admittedly taken by him in way of addendum dated 03.04.2019 and re-allotment dated 12.04.2019. The same does not carry any weight and is invalid one. It is pleaded by the respondent builder that the allotted unit is fit and ready for possession but no document in this regard has been placed on the file. So mere assertion in this regard can't be taken on face value and its afterthought. Since, the respondent has not offered the possession of the subject unit to the complainant so far, it is the failure on the part of the respondent-promoter to fulfil its obligations and responsibilities as per the dwelling unit buyer's agreement dated 08.07.2010 to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) of the Act on the part of the respondent is established. As such the complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 9.30% p.a. w.e.f. 08.07.2013 till the date of handing over the possession, as per provisions of section 18(1) of the Act read with rule 15 of the rules.

G. Directions of the authority

38. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act:
- i. The respondent shall pay 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. 08.07.2013 till the date of offer of possession.


- ii. The respondent is directed to pay interest accrued from 08.07.2013 till the date of offer of possession to the complainant within 90 days from the date of order and subsequent interest to be paid till the date of handing over possession on or before the 10th of each succeeding month;
- iii. The respondent is directed to adjust the amount already received against the remaining sale consideration of re-allotted unit if any and return the remaining amount within two months of offer of possession with interest at the prescribed rate from the date the same became due up to the date of actual payment to the complainant.

39. Complaint stands disposed of.

40. File be consigned to registry.


(Samir Kumar)
Member

Haryana Real Estate Regulatory Authority, Gurugram


(Vijay Kumar Goyal)
Member

Dated: 01.04.2021

Judgement uploaded on 04.09.2021.