

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

Complaint no. : 2751 of
2020
First date of hearing: 03.11.2020
Date of decision : 29.09.2021

1.Praveen Yadav
2.Kiran Yadav

R/o: - IF-08/01, Block B1, DLF New Town
Heights, Sector 86, Near Village Hayatpur, **Complainants**
Gurgaon-122004

Versus

Vatika limited

Regd. office: Vatika Triangle, 4th floor, Sushant
Lok, Phase 1, Block A, Mehrauli Gurgaon Road

Respondent

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

Member
Member

APPEARANCE:

Shri. Manoj Yadav
Shri. Venket Rao

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 01.10.2020 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 complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Name and location of the project	"Town Square" Sector 82A, Village Shikhopur, Gurugram
2.	Nature of the project	Commercial project
3.	Project area	2.961 acres
4.	DTCP License	110 of 2010 dated 29.12.2010 valid till 28.12.2016
	Name of the licensee	Sh. Tej Pal
5.	HRERA registered/ not registered	Registered vide no. 366 of 2017 dated 22.11.2017 valid till 31.12.2018
6.	Date of execution of buyer's agreement	BBA not executed
7.	Date of allotment letter	11.02.2019 [As per page 17 of the complaint]
8.	Unit no.	706,7 th floor, tower D
9.	Super Area	997 sq. ft
10.	Payment plan	Possession linked payment plan

		[Page 17 of the complaint]
11.	Total consideration	Rs. 53,93,770/- [As per letter of allotment dated 11.02.2019 at page 17 of the complaint]
12.	Total amount paid by the complainant	Rs. 53,93,770/- [As per account statement dated 07.11.2019 at page 29 of the complaint]
13.	Due date of delivery of possession	16.09.2019 <i>(By virtue of allotment letter dated 11.02.2019, possession of the said unit was to be delivered when 96% of the basic sale consideration were made by the allottees)</i> [Page 17 of the complaint]
14.	Intimation of possession	24.07.2019 [Page 19 of the complaint]
15.	Occupation certificate	Not obtained for tower D
16.	Delay in delivery of possession up to the date of order i.e. 29.09.2021	2 years 13 days

B. Facts of the complaint

3. A unit # RET -004, Tower - D -7- 706, was booked on 04.02.2019 in a project named "Town Square", sector 82 A in a commercial colony being developed by the respondent for a total sales consideration of Rs. 53,93,770. At the time of booking an amount of Rs. 3,00,000 was paid by way of bank cheque and Rs. 11,00,000 by way of cash to Mr. Tarun (vatika sales team) in presence of Mr. Samrath Bhatia (Jones Lang LaSalle representative).

4. An advance of Rs. 3 lakhs by way of cheque and Rs 11 lakhs in cash was taken by vatika Ltd whereas the provisions of section 13 of Act 2016 forbid a promoter to accept a sum more than ten per cent of the cost of the unit as an advance payment without first entering into a written agreement for sale and register the said agreement for sale. The agreement for sale has to be in a form prescribed at appendix A to Rules 2017 and shall specify the particulars of development of the project along with specifications and internal development works and external development works, the dates and the manner by which payments are to be made, the date on which the possession of the unit is to be handed over and the rates of interest payable by the promoter to the allottee and the allottee to the promoter in case of default. However, no such written agreement for sale has been entered into by vatika Ltd.
5. The initial rate of property had been quoted Rs. 6,712 per sq. ft, then revised to Rs. 6,512 per sq. ft and finally at the time of payment, it was agreed to Rs. 5,410 per sq. ft (all inclusive, except stamp duty charges) with a commitment that the cash amount of Rs. 11,00,000 paid by me will be returned.
6. At the time of booking, it was assured that the possession of the unit will be given up to July 2019 and balance payment will be demanded accordingly at the time of handing over of the unit. We have received the intimation for possession of the said unit on 24.07.2019 but unit has never been handed over till today. It seems that vatika limited has not received the occupation certificate for the building and in the absence of same, they are unable to

handover the said unit. Despite non-receipt of occupation certificate, the respondent demanded full and final payment. Accordingly, a payment of Rs 50,93,770 was paid through bank as the full & final payment on 16.09.2019 (after receipt of second reminder towards the Intimation of possession). Thus, a total amount of Rs 64,93,770/- has been paid, out of which Rs 11,00,000/- stands in excess payment towards the respondent. It was mutually agreed that the cash amount paid initially by me of Rs, 11,00,000 will be refunded by vatika Ltd at the time of full payment by way of cheque, but neither the payment has been returned nor the possession is given till date.

C. Relief sought by the complainants:

7. The complainants have sought following reliefs:

(a) Direct the respondent to handover the possession of the unit after obtaining occupancy certificate and execute all the necessary and required documents including the conveyance deed in respect of the said unit.

(b) Direct the respondent to provide interest for every month of delay at prevailing rate of interest the possession after obtaining occupancy certificate is handed over to the complainants.

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 complainant was called time and again for the purpose of execution of necessary document regarding unit, however, he never turned up for execution of the same and engaged the respondent in a false litigation.
10. It is submitted that the complainant voluntarily with his free will and consent after agreeing with all the terms and condition booked a unit in the respondent's project. The respondent totally denies the fact that any commitment of returning the alleged amount was been made by the respondent. It is further submitted that whatever amount paid by the complainant has been invested for the development of the project by the respondent. However, the complainant is making false averments without producing any documents to prove the same.
11. It is further denied that Rs. 11,00,000/ was ever paid by the complainants. It is submitted that the respondent being a law-abiding builder has sent intimation of possession dated 24.07.2019 to the complainants. The respondent has received the occupation certificate on 05.01.2021 but till date complainant has not accepted the possession.
12. The respondent being the responsible builder has always updated the information regarding the construction of the project on its website and also updated to each and every allottee individually about the same and informed about the reasons for delay in handing over of the possession.

13. 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.

E. Written arguments by the complainants:

14. That the complainants are original allottees and had booked the unit on 01.01.2019. That at the time of booking it was represented and assured by the sales staff of the respondent that the possession of the unit would be handed over within 6 months of the booking. That at the time of booking the said unit/office space, the complainants had paid Rs 3,00,000/- through cheque and Rs. 11,00,000/- in cash to the respondent. That the payment plan provided to the complainants envisaged payment of the balance payment/consideration at the time of offer of possession of the said unit i.e. after 6 months by 11.08.2019.
15. That after the booking of the said unit the complainants repeatedly requested the respondent to execute the buyer agreement for the said unit. That despite repeated requests, the buyer agreement for the said unit was not shared/executed by the respondent.
16. That vide letter dated 24.07.2019, the respondent fraudulently offered possession of the said unit to the complainants and demanded a sum of Rs 51,89,482/- to be paid. That believing on the representations and assurances of the respondent that the respondent was legally authorized to offer possession, the complainants paid an amount of Rs 50,93,770/- on 16.09.2019. That it is pertinent to mention here that the offer of possession

didn't say it was a possession for fit-outs that was being offered. The respondent purported to have all documents for offering possession of the unit/office space.

17. That after making the full payment of the office space, the complainants repeatedly requested the respondent to share the copy of the occupancy certificate and handover the possession of the said unit/office space. That despite repeated requests, the respondent failed to share the occupancy certificate and also refused to hand over the physical possession of the unit/office space.
18. That it is also pertinent to mention here that even with the reply of the complaint, the respondent has not attached copy of the occupancy certificate. The document dated 05.01.2021 filed by the respondent and issued DTCP, Haryana which clearly establishes that till date the respondent does not have an occupancy certificate for the said unit.
19. That from above it is clearly established that the offer of possession dated 24.07.2019 had no legal basis and the respondent had no right to offer possession.
20. That it is reiterated that the respondent was obligated to handover the possession of the said unit by 11/08/2019. The construction of the said complex was not completed for many years. The respondent has fraudulently collected the entire sale consideration of the unit/office space but the respondent has not fulfilled his

promise to handover the legal possession of the unit/office space within the promised time.

21. It is reiterated that the respondent were required to handover the possession of the unit/office space to the complainants within 6 months from the date of the booking as committed during the booking process. On the commitment of the respondent the complainant(s) have made the entire amount so demanded towards the consideration by the respondent till date. The respondent on the other hand have failed to fulfill their part of commitment and have not delivered the possession of the unit/office space within the agreed period and till date.

That the respondent have caused inordinate and extraordinary delay to initiate and construct the planned milestones of the project and the construction was not been completed despite a lapse of many years of the booking of the unit/office space. The complainant(s) repeatedly tried to contact the respondent to enquire about the construction status of the project and their unit/office space but could not get any satisfactory reply. The complainants also made repeated telephonic enquiries from the respondent between 2019 and 2020 as well as made personal visits to check the status of the unit/office space which was booked by them by depositing their hard-earned money.

F. Jurisdiction of the authority:

22. 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.

F. 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.

F. II Subject matter jurisdiction

The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per the provisions of section 11(4) (a) of the act of 2016 leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

G. Findings regarding relief sought by the complainants:

Relief sought by the complainants: Direct the respondent to make the payment of delay on the amount already paid by the complainants to the respondent.

G.1 Admissibility of delay possession charges:

23. In the present complaint, the complainants 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

24. 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 agreement 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.
25. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottee are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate

event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit. In pre-RERA period it was a general practice among the promoters/developers to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoter/developer or gave them the benefit of doubt because of the total absence of clarity over the matter.

26. The authority has gone through the possession clause of the agreement. 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 complainant not being in default under any provisions of this agreements and in 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 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.

27. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges 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.

28. 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.
29. 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., 29.09.2021 is @ 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
30. 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 complainants 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 complainants in case of delayed possession charges.

On consideration of the circumstances, the evidence and other record and submissions made by the complainants and the respondent and based on the findings of the authority regarding contravention as per provisions of Act, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of allotment letter dated 11.02.2019, possession of the said unit was to be delivered when 98% of the basic sale consideration were made by the allottees. Therefore, the due date of handing over of possession comes out to be 16.09.2019.

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 complainants are entitled for delayed possession charges @9.30% p.a. w.e.f. 16.09.2019 till handing over of possession as per provisions of section 18(1) of the Act read with rule 15 of the rules.

H. Directions of the authority:

31. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the authority under section 34(f) of the Act of 2016:
 - 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 complainants from 16.09.2019 till handing over

of possession as per provisions of section 18(1) of the Act read with rule 15 of the rules.

- ii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order and thereafter monthly payment of interest to be paid till date of handing over of possession shall be paid on or before the 10th of each succeeding month as per rule 16(2) of the Act of 2016.
 - iii. Both the parties are directed to execute the agreement for sale as per terms and conditions of letter of allotment.
 - iv. The respondent shall not charge anything from the complainants which is not the part of buyer's agreement. The respondent is not entitled to charge holding charges from the complainants/allottees at any point of time even after being part of the builder buyer's agreement as per law settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 on 14.12.2020
32. Complaint stands disposed of.
33. File be consigned to registry.


(Samir Kumar)
Member

Haryana Real Estate Regulatory Authority, Gurugram


(Vijay Kumar Goyal)
Member

Dated:29.09.2021

Judgement uploaded on 22.11.2021