

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

Complaint no. : 2261 of 2018
First date of hearing : 26.03.2019
Date of decision : 26.03.2019

1. Mrs. Manisha Sharma
R/o House no. 47, Sector 1A, Trikuta Nagar,
Jammu.

Complainants

2. Mr. Naresh Kumar Kapahi
R/o H.No. 72, B-Block, Gandhi Nagar,
Jammu

Versus

M/s VSR Infratech Pvt. Ltd.
Address: Ground floor, Plot no.14,
Sector 44, Institutional Area,
Gurugram-122003.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Dinesh Galia Advocate for the complainant
Shri Amarjeet Kumar Advocate for the respondent

ORDER

1. A complaint dated 14.12.2018 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 complainants Mrs. Manisha Sharma and Mr. Naresh Kumar Kapahi, against the promoter

M/s VSR Infratech Pvt. Ltd., on account of violation of the clause 32 of space buyer's agreement executed on 30.07.2014 in respect of service apartment described below for not handing over possession by the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since, the space buyer's agreement has been executed on 30.07.2014 i.e. prior to the commencement of the Act *ibid*, 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 statutory obligation on 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	"114 Avenue", Sector 114, Gurugram.
2.	Nature of the project	Commercial colony
3.	Project area	2.968 acres
4.	Registered/ not registered	Not registered
5.	DTCP license no.	72 of 2011 dated 20.07.2011
6.	Date of execution of space buyer's agreement	30.07.2014
7.	Service apartment/unit no. as per the said agreement	6B-26, 6 th floor
8.	Unit measuring	784.70 sq. ft.

9.	Payment plan	Construction link payment plan [page 65 of complaint]
10.	Consideration amount as per clause 3 of the said agreement	Rs.52,71,615/- (excluding taxes)
11.	Total amount paid by the complainant as admitted by respondent (page 11 of reply)	Rs. 48,53,026/-
12.	Due date of delivery of possession as per clause 32 of the said space buyer's agreement [i.e. within 36 months of signing of this agreement (30.07.2014) or within 36 months from the date of start of construction of the said building (01.10.2012), whichever is later] Note: The said agreement being executed later, the due date is computed from the signing of the said agreement	30.07.2017
13.	Delay in handing over possession till the date of decision	1year 7 months 26 days

4. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainants and the respondent. A space buyer's agreement dated 30.07.2014 is available on record for the aforesaid unit/service apartment according to which the possession of the said unit was to be delivered by 30.07.2017. The respondent has failed in delivering the possession of the said unit as on date to the purchaser. Therefore, the promoter has not fulfilled its committed liability as on date.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The respondent through its counsel appeared on 26.03.2019. The case came up for hearing on 26.03.2019. The reply has been filed by the respondent and the same has been perused.

FACTS OF THE COMPLAINT:

6. The respondent company entered into a joint venture agreement with the land owner company measuring 2.968 acres land developed into commercial project in Sector 14, Gurugram, called 114 Avenue. The complainants across the commercial project of the respondent and they were compelled to buy two units in the said project and one unit in 68 Avenue and thus payments were made by cheque on 14.07.2011. The complainants booked three units with the respondent and made advance payments dated 14.07.2011 on the assurance of the company's representative.
7. Thereafter, complainants were made to wait for around three years to sign the builder buyer agreement upto 30.07.2014 and penalized Rs. 2,80,000/- for delay payments, even though payments were not late according to the payment plan.
8. The complainants have lost their faith in the respondent and surrender two units to the company. The builder buyer agreement was signed by the complainants in good faith only

to realize much later in 2017 that the contract was completely one sided.

9. Hon'ble Supreme Court has held that any agreement which allows the builder to cancel the contract but does not allow the buyer to exercise his option is completely illegal, unfair and discriminatory and cannot be deemed to be binding upon the complainants.
10. The total sale consideration of the allotted unit no. is Rs. 52,71,615/- out of which the complainants have already paid Rs. 48,63,237/-. The first payment was made on 14.07.2011 towards buying the said unit. Seven years have elapsed till then but the building is not ready for possession as the work was stalled in between.
11. The complainant visited the site in 2017 and was shocked to see that the project was nowhere closed to be completed, so the complainant decided to get the refund of their invested amount as they are entitled for the same under the Act *ibid*.
12. The complainants have booked three units earlier in 2011 with the builder, but when the complainants were made to wait for three years for signing the builder buyer agreement, the complainants lost their faith in the respondent and surrendered their two units and the payments were adjusted towards one unit prior to signing of builder buyer agreement.

13. The complainants asked the respondent to cancel their unit but they were denied the same. The complainants then sent a legal notice dated 05.04.2018 calling upon the respondent to cancel the allotment for the said unit and refund the amount that was paid. But no reply was received from the respondent. Hence the complainants were constrained to file the present complaint before this authority.

ISSUE TO BE DECIDED:

14. The relevant issue as culled out from complaint are as follows:-

- i. Whether the complainant is entitled for refund of entire amount along with interest as per the provisions of the Act ibid?

RELIEF SOUGHT BY THE COMPLAINANT:

15. The complainant is seeking refund of entire amount paid i.e. Rs. 48,53,026/- along with interest from the date of each individual payment, on account of failure on the part of the respondent to provide the possession of the property in timely manner.

RESPONDENT'S REPLY:

16. The respondent submitted that the present complaint is not maintainable in view of the orders passed by this hon'ble authority in complaint number 529/2018 titled as: Manisha

Sharma v. VSR Infratech Pvt. Ltd. was pleased to pass the following order:

“Relief sought by the complainant from the authority does not fall within the jurisdiction of the authority and the same may be agitated before the adjudicating officer. The complaint is dismissed with liberty to file afresh before the appropriate forum”

17. The respondent submitted that the complainant has concealed the fact that the complainant had earlier also filed a complaint before this hon’ble authority on the same cause of action which was dismissed on account of lack of jurisdiction. Liberty was given to the complainant to file the complaint before the appropriate forum i.e. adjudicating officer and not to re-litigate the same matter on the same cause of action before this authority.
18. The respondent submitted that the complainant has filed a false affidavit before this authority stating that “ the complainant filed this complaint before this authority which was dismissed on 07.12.2018 because it was addressed to the adjudicating officer. The respondent submitted that the aforesaid statement clearly amounts to perjury on face of record which is evident by the order dated 07.12.2018 pass by this hon’ble authority.

19. The respondent submitted that the present complaint is not maintainable or tenable in the eyes of law as the complainant has approached this hon'ble authority with unclean hands and has not disclosed the true and material facts relevant to this case of the complainant. The respondent company is new company with a mission and vision to become the number one company and endeavor to give its customers quality construction and possession in time.
20. The respondent submitted that the present complaint pertains to compensation and interest for a grievance under section 12, 14, 18 and 19 of the said Act and are required to be filed before the adjudicating officer under rule 29 of the Rules ibid read with section 31 and section 71 of the said Act and not before this hon'ble authority under rule 28.
21. The respondent submitted that the said Act is a complete code in itself and as per provisions of the Act, the legislature had categorically framed two separate bodies i.e. the authority under section 20 of the said act for regulatory functions and the adjudicating officer under section 71 of the Act for adjudicatory function. Thus there is a clear distinction under the said Act including the regulatory and adjudicatory function as provided under the Act ibid. Even the apex court

in the matter of Brahm Dutt v. Union of India (AIR 2005 SC 730) has observed as under:

“if there are advisory and regulatory functions as well as adjudicatory functions to be performed, it may be appropriate to create two separate bodies for the same.”

Thus, based on this principle the hon’ble authority by accepting/admitting the present complaint is exercising the adjudicatory function which is against the principle of law.

22. The respondent submitted that the complainants have willfully agreed to the terms and conditions of the agreement and are now at a belated stage attempting to wriggle out of their obligations by filing the instant complaint before this hon’ble authority. The relief qua compensation can further be not awarded by this hon’ble authority as the authority does not have the jurisdiction to award any relief of compensation in accordance with the Rules framed thereunder.

23. The respondent submitted that in the present complaint, as per space buyer’s agreement dated 30.07.2014, the company was to handover the possession of the unit within 36 months from the date of signing of this agreement. Despite exercising diligence and continuous pursuance of project to be completed, the project could not be completed due to following reasons:

- i. Due to non-completion of Dwarka Expressway which is a part of master plan 2031. The Dwarka Expressway was plagued by land acquisition issues, causing a delay in completion of basic structure.
- ii. The company faced the problem of sub soil water which persisted for a period of 6 months and hampered excavation and construction work. The problem still persists.
- iii. On 19.02.2013, the office of Executive Engineer, HUDA Division No.II, Gurugram vide memo no.3008-3181 has issued instruction to all developers to lift tertiary effluent for construction purpose from sewage treatment plant Behrampur. Due to this instruction, the company faced the problem of water supply for a period of 6 months.
- iv. The company is facing labour problem for last 3 years continuously which has slowed down the overall progress of the project.
- v. The contractor of the project stopped working due to his own problems and the progress of project was completely at halt due to stoppage of work at site.
- vi. The typical design of 5th floor slab casting took a period of more than 6 months to design the shutting plans by

structural engineer which hampered the overall progress of work.

24. The respondent submitted that the parties are bound by the terms and conditions mentioned in the agreement. The said agreement was duly signed by the complainants after properly understanding each and every clause contained in the agreement. The complainants were neither forced nor influenced by respondent to sign the said agreement. It was the complainants who after understanding the clauses signed the said agreement in their complete senses.

DETERMINATION OF ISSUES:

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

25. With respect to the **first and second issues**, as per clause 32 of space buyer's agreement, the possession of the flat was to be handed over within 36 months from the date of signing of this agreement or within 36 months from the date of start of construction of the said building, whichever is later. The said agreement was executed on 30.07.2014 and the construction was started on 01.10.2012. Thus, the due date shall be computed from 30.07.2014. The clause regarding the possession of the said unit is reproduced below:

“32. That the company shall give possession of the said unit within 36 months of signing this agreement or within 36 months from date of start of construction of the said building, whichever is later...”

26. Accordingly, the due date of possession comes out to be 30.07.2017 and the possession has been delayed by 1 year 7 months and 26 days from due date of possession till the date of decision. Therefore, the respondent has breached the said agreement by not delivering the possession of the said unit by the due date. The respondent is liable to pay delay possession charges at the prescribed rate of interest @ 10.75% from the due date of delivery of possession i.e. 30.07.2017 to the complainants as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till offer of possession. The respondent is directed to adjust the payment of delayed possession charges towards dues from the complainants, if any. In such a case refund should not be allowed as allowing the same will hamper the remaining work of the project and interest of other allottees who wish to continue with the project.

FINDINGS OF THE AUTHORITY:

27. **Jurisdiction of the authority-**The The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in

Simmi Sikka V/s M/s EMAAR MGF Land Ltd. leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District. 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.

28. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter under section 11 of the Act *ibid*. The complainants requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act.
29. As per clause 32 of the space buyer's agreement dated 30.07.2014 for said unit/service apartment in the project '114 Avenue', Sector 114, Gurugram, the possession was to be handed over to the complainants within a period of 36 months from the date of execution of space buyers agreement (30.07.2014) or from the date of start of construction (01.10.2012) whichever is later which comes out to be

30.07.2017 (i.e. from date of signing of agreement). It was construction linked plan. However the respondent has not delivered the unit in time. The complainants have already paid Rs.48,53,026 /- to the respondent against the total sale consideration of Rs. 52,71,615/- excluding taxes.

DIRECTIONS OF THE AUTHORITY:

30. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions:

- a. The respondent is liable to pay delay possession charges at the prescribed rate of interest @ 10.75% from the due date of delivery of possession i.e. 30.07.2017 till actual offer of possession to the complainants as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till offer of possession.
- b. The interest so accrued from due date of delivery of possession i.e. 30.07.2017 till the date of order 26.03.2019 be paid within 90 days from the date of order and monthly interest be paid subsequently on 10th of every month.

c. The respondent is directed to adjust the payment of delayed possession charges towards dues from the complainants, if any.

31. As the project is registerable and has not been registered by the promoter, the authority has decided to take suo-moto cognizance for not getting the project registered and for that separate proceeding will be initiated against the respondent by the registration branch. A copy of this order be endorsed to registration branch for further action in the matter.

32. The order is pronounced.

33. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 26.03.2019

Judgement uploaded on 18.04.2019