

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

Complaint no.	:	1609/2021/3110/2019
Date of filing complaint:		29.07.2019
First date of hearing:		10.10.2019
Date of decision	:	30.08.2022

1.Sunita Sharma 2.Yamini Kaushik R/o: -House no. 9, Gali no. 4B, Ashok Vihar, Phase 3, Gurugram, Haryana	Complainants
Versus	
1.M/s Mascot Build cone Pvt. Ltd. Regd. office: 111, First floor, Antriksh Bhawan 22, Kasturba Gandhi Marg, New Delhi- 110001	Respondents
2.M/s Hometown Properties Private Limited Regd. office: 294/1, Vishwakarma Colony, Opposite Lal Kuan, New Delhi-110044	
CORAM:	
Dr. K.K. Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Mohit Dua	Advocate for the complainants
None	Advocate for the respondents

ORDER

- The present complaint 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 delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Name and location of the project	"Oodles skywalk", Sector 83, Village sihi, Gurugram
2.	Nature of the project	Commercial complex
3.	Project area	3.0326 acres
4.	DTCP License	08 of 2013 dated 05.03.2013 valid up to 04.03.2017
5.	Name of the licensee	Dharam Singh
6.	RERA registered/ not registered	Registered vide no.294 of 2017 dated 13.10.2017 valid up to 31.12.2019
7.	Date of allotment	18.01.2016 [Page 39 of the complaint]
8.	Date of execution of space buyer's agreement	BBA has not been executed
9.	Memorandum of understanding	05.03.2015 [Page 20 of the complaint]
10.	Date of commencement of construction of the project	21.03.2014 as per CR no. 2311 of 2021

		30.03.2014 as per CR no. 843 of 2022
11.	Unit no.	Virtual space (FC-11), 2nd floor [Page 23 of the complaint]
12.	Super area	250 sq. ft. [Page 23 of the complaint]
13.	Payment plan	Possession linked payment plan [Page 33 of the complaint]
14.	Total consideration	Rs.18,40,000/- [Page 24 of the complaint]
15.	Total amount paid by the complainants	Rs.18,50,489/- [As per the facts alleged by the complainants on page 8 of the complaint] Rs.17,11,628/- [As per facts alleged by the complainants on page no.5 of the complaint]
16.	Possession clause	"38. The "Company" will, based on its present plans and estimates, contemplates to offer possession of said unit to the Allottee(s) 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 with a grace period of 3 months, subject to force majeure events or Governmental action/inaction. If the completion of ..." [Taken from similar complaint]
17.	Assured return clause	3 ASSURED RETURN 3.1. Till 12 months from the date of this MOU, the Developer

		<p>shall pay to the Allottee an Assured Return at the rate of Rs. 40. /- (Rupees Forty Only) per sq. ft. of super area of premises per month and after payment of balance premium as per Schedule-1 till the notice for offer of possession is issued, the developer shall pay to the Allottee an Assured Return at the rate of Rs. 80.00/- per sq.ft. of super area of premises per month (hereinafter referred to as the 'Assured Return')</p> <p>After completion of construction and till the commencement of first lease rental to the Allottee from the Lessee, the developer shall pay to the allottee(s) an Assured Return @ Rs. 61.33/- per sq. ft. of super area of premises per month (hereinafter referred to as the 'Assured Return').</p> <p>The assured return shall be subject to tax deduction at source, which shall be payable on or before 10th day of every English Calendar month on due basis.</p>
18.	Due date of delivery of possession	<p>05.06.2018</p> <p>In this complaint no BBA has been executed so possession clause has been taken from the similar complaint from the same project and 36 months are calculated from the date of MOU which has been executed on 05.03.2015</p>

		Grace period of 3 months are allowed
19.	Offer of possession	Not offered
20.	Occupation certificate	Not obtained

B. Facts of the complaint:

3. That the said virtual space located on the 2nd floor having a super area of 250 sq. feet in tower- A in the project of the respondent namely "Oodles skywalk at Sec- 83, Gurugram was booked by the complainants by paying an amount of Rs. 1,00,000/- towards the payment plan mentioned in schedule-1 of the memorandum of understanding.
4. That on 28.02.2015 the complainants had also made the payment of Rs.8,54,114/- vide cheque no. 593443 on the demand of the respondent. The balance payment of Rs. 7, 57,514/- out of the total consideration amount was also made by the complainants to the respondent, through cheque bearing no. 000001 dated 19.06.2015 amounting to Rs.1,39,980/-, 5,79,000/- vide cheque no. 593446 dated 19.06.2015 and the remaining payment of Rs. 1,77,395/- vide cheque no. 804669 dated 31.03.2016 was also paid.
5. That the Memorandum of understanding article 3 clause 3 sub clause 3.1 the complainants had to make the payment to the tune of Rs. 40/- per sq. feet of the super art of the premises per month and after the payment of balance premium as per schedule -1 till the notice for offer of possession is issued, the respondent shall

- pay to the complainants an assured return at the rate of Rs. 80/- per sq. feet of the super area of the premises per month.
6. That as per the agreement it was also agreed between the complainants and the respondents that after the completion and till the commencement of the first lease rental to allottee from the lessee, the developer shall pay return @ 61.33/- per square feet of the super area of the premises per month.
 7. That the respondent had to pay an amount of Rs. 1,20,000/- @ 40 per square feet and till 1 year from the date of MOU and the Rs. 7,20,000/- @80 per square feet from the date of payment of balance premium till the offer of possession. It is pertinent to mention that the respondent had not offered the possession till date.
 8. That the complainants had paid the total consideration amounting to Rs. 17, 11,628/-vide receipt annexed along with the complaint. The respondents have not offered the possession till the date to the complainants.
 9. That the complainants time and again requested the respondent to make the payment of Rs. 72,000/- of assured return but to no avail. On 10.04.2018 the complainants telephonically requested the respondent to avail the buyback policy of the respondent, as the respondent is making default in making payment on the account of assured return as per the agreed between the complainants and the respondent. That in the buyback policy the complainants had to make a request for the buyback of the space

unit within a stipulated period of 36 months, but the respondent did not respond to the request of the complainants.

10. That the complainants on 12.04.2018 sent an email requesting the respondent to seeking refund of the total consideration paid by the complainants by availing buyback option as agreed between the complainants and the respondent vide article 4 of the MOU.
11. That respondent till date admittedly has failed to comply with terms and conditions of the builder buyer agreement by making default in making payments on the account of assured return amounting to Rs. 6, 30,000/- as per the agreement. The agreement was executed on 05.03.2015 and the project was to be completed in years with a grace period of six months.
12. In the light of the above-mentioned facts, it's evident that the respondent is negligent in performing his part of contract. The respondent on several events show that they are not inclined towards safeguarding interest of allottee as they have failed to pay on the account of assured return even after several reminders from the complainants and also failed to give possession till now and the respondent is also not in a position to disclose about the date of offering possession. Further, continuing with this project will cause more financial loses to the complainants.

C. Relief sought by the complainants:

13. The complainants have sought following relief:

- (a) Direct the respondents to refund the deposited amount amounting to Rs.17,11,628 paid by the complainants to the respondent alongwith interest @18% p.a. from the date of receipts of payment till date.
- (b) Direct the respondents to pay Rs.72,000/- on account of the unpaid assured return and direction seeking payment accrued on account of assured return.
- (c) Direct the respondents to give Rs.5,00,000/- as compensation on account of loss/injury as well as mental agony and litigation charges to the tune of Rs.40,000/-.

D. Reply by the respondent:

The respondent has taken grounds for rejection of complaint on the ground of jurisdiction along with reply. The respondent has contested the complaint on the following grounds:

14. It is respectfully submitted that question of offer of possession does not arise at all in the present case as the complainants till date, despite several letters/reminders, failed to sign/execute the Space Buyer Agreement with the respondent. Therefore, in the absence of having signed any Space Buyer Agreement with the respondent, the offer of possession of virtual space to the complainants does not arise at all.
15. it is submitted that issue of "assured return" cannot be adjudicated by this Hon'ble Authority as per various dictum laid down by the Hon'ble RERA Gurgaon.

16. It is submitted that the request for buy back by the complainants are totally illegal as per the MoU executed between the parties. It is pertinent to mention that as per the "Article 4" of the MoU, the complainants can only exercise the option for buy back after the expiry of 36 months from the date of payment of balance sale consideration, whereas, the complainants have till date not made the full payment of balance sale consideration amount and moreover, failed to sign/execute the space buyer agreement with the respondent. Therefore, in the absence of having signed any space buyer agreement with the respondent, the offer of possession of virtual space to the complainants does not arise at all. Even if it is considered that the complainants have made the balance payment then also, she can only after the expiry of 36 months from the date of full and final payment, can exercise the right of buy back option. It is further respectfully submitted that even in the present case, the complainants failed to exercise the "buy back option within stipulated period.
17. The complainants were required to give request/letter/notice for "buy back option" in December, 2017, however, admittedly she has put such request in the month of April, 2018, which is violative to the terms of MOU, thus, not entertain able by the respondents as "time barred".
18. It is denied that complainants have made visits at the site and observed that there are serious quality issues with respect to the construction carried out by respondent till now. It is denied that

commercial space was sold by representing that the same will be luxurious commercial space, however, all such representations seem to have been made in order to lure complainants to purchase the space at extremely high prices. It is denied that respondents have compromised with levels of quality and is guilty of mis-selling. It is denied that there are various deviations from the initial representations. It is denied that respondent marketed luxury high end apartments. It is further denied that respondent have compromised even with the basic features, designs and quality to save costs. It is denied that the structure which has been construed, on face of it is of extremely poor quality. It is denied that construction is totally unplanned, with sub-standard low grade defective and despicable construction quality. It is respectfully submitted that though the complainants have alleged various contentions against respondent, however, none of them have been supported with any documentary evidence, more so, on the contrary, the respondent has made the project only after due approvals sanctioning of layout plan and the project is developing as per the plan.

19. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority:

20. 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

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings regarding relief sought by the complainants:

- F.1. Direct the respondents to refund the deposited amount amounting to Rs.17,11,628 paid by the complainants to the respondent alongwith interest @18% p.a. from the date of receipts of payment till date.**
- F.2. Direct the respondents to pay Rs.72,000/- on account of the unpaid assured return and direction seeking payment accrued on account of assured return.**
21. The above-mentioned relief no.1 and 2, as sought by the complainants are being taken together as the findings in one relief will definitely affect the result of the other relief and these reliefs are interconnected.

Vide letter dated 18.01.2016, the complainants were allotted the subject unit by the respondents for a total sale consideration of Rs. 18,40,000/- under the payment plan annexed at page no. 33 of the complaint. The memorandum of understanding dated 05.03.2015 was executed between the parties with regard to that unit. The due date of possession of the subject unit was calculated as per clause 38 where the possession of the unit was to be handover within 36 months of signing of this agreement or within

36 months from the date of start of construction of the said building whichever was later with a grace period of 3 months, subject to force majeure events or Governmental action/inaction and which comes out to be 05.06.2018 as in this complaint no BBA has been executed so possession clause has been taken from the similar complaint from the same project and 36 months are calculated from the date of MOU which has been executed on 05.03.2015 with a grace period of 3 months. The complainants started depositing various amounts against the allotted unit and paid a sum of Rs. 17,11,628/- as is evident from the facts of the complaint at page no. 5). Neither the project is complete, nor the respondents applied for its occupation certificate up to the date of filing of the complaint up to 29.07.2019. Even now the project is not ready, and its occupation certificate has not been applied.

Keeping in view the fact that the allottees/ complainants wishes to withdraw from the project and demanding return of the amount received by the promoters in respect of the unit with interest on failure of the promoters to complete or inability to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. The matter is covered under section 18(1) of the Act of 2016.

The due date of possession as per agreement for sale as mentioned in the table above is 05.06.2018 and there is delay of 1 year on the date of filing of the complaint.

22. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondents-promoters. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which he has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in ***Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors., civil appeal no. 5785 of 2019, decided on 11.01.2021***

“” ... The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project.....”

23. Further in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra)*** reiterated in case of ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022.*** it was observed-

25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate

prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed

The promoters are responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). The promoters have failed to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. Accordingly, the promoter is liable to the allottee, as the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.

This is without prejudice to any other remedy available to the allottee including compensation for which allottee may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.

The execution of MOU dated 05.03.2015 between the parties is not disputed which provides a provision for assured returns against the allotment of the unit purchased under payment plan on page 33 of the complaint. The complainants even admitted

having received assured returns against the allotted unit as per clause 3 of MOU dated 05.03.2015.

The authority hereby directs the promoter to return the amount received by him with interest at the rate of 10% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*. So, if any amount has been received by the complainants under assured returns, then the same would be deducted while calculating the amount to be refunded to him by the respondents besides interest at the prescribed rates from the date of each payment.

F.3. Compensation/cost of litigation:

The complainants are claiming compensation in the present relief. The authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee can claim. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainants may file a separate complaint before adjudicating officer under section 31 read with section 71 of the Act and rule 29 of the rules.

G. Directions of the authority:

24. 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 respondents /promoters are directed to refund the amount received by them from the complainants along with interest at the rate of 10% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till actual date of refund of the deposited amount.
- ii. The amount received by the complainants if any by way of assured returns from the respondents as per clause 3 of MOU dated 05.03.2015, would be deducted while calculating the amount to be refunded to them by the respondents.
- iii. A period of 90 days is given to the respondents to comply with the directions given in this order and failing which legal consequences would follow.

25. Complaint stands disposed of.

26. File be consigned to registry.


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram


(Dr. K.K. Khandelwal)
Chairman

Dated:30.08.2022