

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

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| Complaint no. : | 4197 of 2021 |
| Date of filing complaint: | 18.10.2021 |
| First date of hearing: | 09.11.2021 |
| Date of decision : | 28.10.2022 |

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| Narendra Singh and Mrs Anita Singh R/O: C-94, South city- 1, Gurugram, Haryana | Complainants |
| Versus | |
| 1. M/s VSR Infratech Private Limited Regd. office: GF, Plot no. 14, Sector-44, Institutional Area, Gurugram. 2. M/s. AMD Estate and Developers Pvt. Ltd. Regd. Office: FF,18, Pusa Road, Karol Bagh , New Delhi | Respondents |
| CORAM: | |
| Shri Vijay Kumar Goyal | Member |
| Shri Sanjeev Kumar Arora | Member |
| APPEARANCE: | |
| None | Complainants |
| Ms. Unnati Anand (Advocate) | Respondents |

ORDER

1. The present complaint has been filed by the complainant/allottees under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and

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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 under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Project and unit related details

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

| S. N. | Particulars | Details |
|-------|--------------------------------------|---|
| 1. | Name of the project | "68 Avenue", Sector 68, Gurugram |
| 2. | Project area | 3.231 acres |
| 3. | Nature of the project | Commercial Colony |
| 4. | DTCP license no. and validity status | 04 of 2012 dated 23.01.2012 |
| 5. | Name of licensee | Sh. Yad Ram |
| 6. | RERA Registered/ not registered | 119 of 2017 dated 28.08.2017 |
| 7. | RERA registration valid up to | 30.06.2018 |
| 8. | Date of Allotment Letter | 08.11.2011 in Project 114 Avenue (On page 36 of complaint) |
| | Project 114 Avenue | |



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| 9. | Unit no. | Commercial unit- 5A-08, 5 th floor (on page 50 of the complaint) |
| | Unit area admeasuring | 784.70 sq. ft. (on page 50 of the complaint) |
| 10. | Space Buyer's Agreement (Project 114 Avenue) | 18.08.2012 (on page 49 of the complaint) |
| 11. | Possession Clause in SBA (Project 114 Avenue) | 32. Possession Clause That the company shall give possession of the said unit within 36 months of signing of this agreement or within 36 months from the date of start of construction of the said building, whichever is later. (page 59 of the complaint) |
| 12. | Due date of Possession for unit in Project 114 Avenue | 18.08.2015 (calculated as per BBA from date of signing of agreement as date of start of construction is not on record) |
| 13. | MoU | 20.01.2018 (on page 68 of the complaint) |
| 14. | Addendum Agreement to MoU | 23.02.2018 (on page 87 of the complaint) |
| 15. | Assured return clause | 3. It is hereby agreed and undertaken by the developer that from 23.12.2017 till the application for offer of possession is issued, the developer shall pay to the allottee an assured return at the rate of Rs. 54.10 per sq. ft. of super area of premises per month. |
| 16. | Project 68 Avenue | |

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| | Unit no. | Unit no.____, 3 rd Floor, Tower-B (on page 70 of the complaint) | |
| | Unit area admeasuring | 800 sq. ft. (on page 70 of the complaint) | |
| 17. | Possession clause (taken from SBA annexed in another file of the same project) | 31. Possession Time and Compensation "The company will be based on its present plans and estimates contemplates to offer possession of the said unit to the allottee(s) within 36 months of signing of this Agreement or within 36 months from the 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". | |
| 18. | Due date of possession for unit in 68 Avenue | Cannot be ascertained | |
| 19. | Total sale consideration | Rs. 52,24,000/- (on page 89 of the complaint) | |
| 20. | Amount paid by the complainant | Rs. 56,83,364/- (on page 15 of the complaint) | |
| 21. | Occupation certificate /Completion certificate | Project 68 Avenue | Project 114 Avenue |
| | | 02.08.2019 (on page 65 of reply) | 17.02.2021 (on page 44 of the reply) |
| 22. | Offer of Possession (In Project 68 Avenue) | 01.01.2019 (on page 63 of reply) | |

B. Facts of the complaint

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3. The complainants initially booked a commercial unit space in project namely 114 Avenue situated in sector-114, Gurugram. The respondent/builder allotted commercial unit no. 5A-08 on fifth floor having super area of 784.74 sq. ft. with basic sale price of Rs. 49,20,069/-.
4. On 18.11.2011 allotment letter was issued and followed by space buyer agreement was executed between the parties dated 18.08.2012. As per the space buyer's agreement the possession of the unit was to be delivered 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.
5. Till 2018, the possession was not delivered to the complainant instead the respondent approached the allottee for an alternative office space in project 68 Avenue situated in sector 68, Gurugram. The complainants were left with no option but to shift to the alternative unit. On 20.01.2018, Memorandum of understanding was executed between the parties. The complainant was allotted a new unit in tower- B, on 3rd floor having super area of 800 sq. ft.
6. On 23.02.2018 an addendum agreement was executed between the parties. As per clause 3, the developer from 23.12.2017 till the offer of possession shall pay to the allottee an assured return at the rate of Rs. 54.10 per sq. ft. of super area of premises per month. The complainants paid a total sale consideration of Rs.

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56,83,364/- and a no dues certificate dated 28.02.2019 was issued by the respondent for office space in 68 Avenue.

7. The complainants have not been offered a valid possession of the unit till date. The respondents have also charged Interest free maintenance security, power backup, contingency, part payment against stamp duty and registration charges.
8. That the respondent-company has withheld the hard-earned money of the complainant for its benefit and has used the money for the own purpose and did not invest the money in the completion of the project for which the complainant was duped to pay

C. Relief sought by the complainants:

The complainants have sought following relief(s):

- i. To direct respondent to pay Assured Return @ 9% per sq. ft. of super area of premises per month as first lease guarantee in terms of addendum dated 23.02.2018.
- ii. To direct the respondent to pay penalty to the complainants on account of delay in delivering possession of the commercial unit.
- iii. To direct the respondent to pay an amount of Rs. 55,000/- to the complainants as cost of present litigation.
- iv. Cost of the present complaint may also be awarded in favour of the complainants as cost of the present litigation.
- v. To direct the respondent to pay the following excessive charges till possession of the unit is taken:

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- Interest Free Maintenance Security of Rs. 1,20,000/-

D. Reply by the respondent

The respondent has contested the complaint on the following Grounds:

9. The complainants were allotted an office space in project "114 Avenue" bearing unit no. 5A-08 area admeasuring 784.74 sq. ft. vide application dated 13.07.2011. Builder buyer agreement was executed between the parties dated 18.08.2012 and as per clause 32 of the agreement, the possession was to be offered to the complainant by 18.08.2015.
10. As submitted by the respondent that the complainant approached the respondent to transfer his unit to a different project known as 68 Avenue and was allotted an office space on 3rd floor in tower-B. The parties entered an MOU 20.01.2018, according to which assured return was to be given to the complainant till offer of possession. The amount paid by the complainant for project 114 Avenue was transferred by the respondent in project 68 Avenue.
11. It is further submitted by the respondent that the amount paid by the complainants was Rs. 38,96,144/- towards unit in project 114 Avenue. Hence, complainants made another payment of Rs. 12,52,564/- which included maintenance, interest free maintenance security, power back up charges, service tax and such other levies / cesses/ VAT as per the demands raised by respondent.

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12. It is pertinent to mention that the respondent has paid assured return of Rs. 9,74,497/- till March 2020. The payment was stopped after March 2020 due to force majeure condition i.e. covid-19, which was not in control of the respondent.
13. All averments were denied in toto.
14. 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 and submission made by the parties.

E. Jurisdiction of the authority

15. The respondent has raised preliminary objection regarding jurisdiction of authority to entertain the present complaint. 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

16. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana 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

17. 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;

The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

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.

18. So, in view of the provisions of the Act of 2016 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 complainant at a later stage.

F. Findings on the relief sought by the complainants:

- (FI). To direct respondent to pay Assured Return @ 9% per sq. ft. of super area of premises per month as first lease guarantee in terms of addendum dated 23.02.2018.

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F(II). To direct the respondent to pay penalty to the complainants on account of delay in delivering possession of the commercial unit.

19. The above-mentioned relief no.1 and 2, as sought by the complainant are being taken together as the findings in one relief will affect the result of the other relief and these reliefs are interconnected.
20. In the present case, the complainants were offered possession vide a letter dated 01.01.2019 in respect of a unit in the Project 68 Avenue. The OC for the tower was obtained on 02.08.2019 i.e., after the offer of possession was made. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 18.08.2012 executed between the parties.
21. **Validity of offer of Possession**
It is necessary to clarify this concept because after valid and lawful offer of possession liability of promoter for delayed offer of possession comes to an end. On the other hand, if the offer of possession is not valid and lawful, liability of promoter continues till a valid offer is made and allottee remains entitled to receive interest for the delay caused in handing over valid possession. The authority after detailed consideration of the matter has arrived at

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the conclusion that a valid offer of possession must have following components:

- Possession must be offered after obtaining occupation certificate.
- The subject unit should be in habitable condition.
- Possession should not be accompanied by unreasonable additional demands.

22. In the present, the respondent offered the possession of the allotted unit to the complainant on 01.01.2019. Since the first condition to a valid offer of possession is not satisfied, therefore, the said offer of possession cannot be regarded as a valid offer of possession. There is delay on part of the respondent in handing over of the possession of the allotted unit. Accordingly, the complainants are entitled for delayed possession charges as per the proviso of section 18(1) of the Real Estate (Regulation and Development) Act, 2016 at the prescribed rate of interest i.e. 10.25% p.a. for every month of delay on the amount paid by the complainant to the respondent from the due date of possession i.e., 18.08.2015 till the date of actual handing of possession or valid offer of possession plus 2 months whichever is earlier.
23. The complainants have sought assured return as per clause 3 of memorandum of understanding a monthly return @ Rs. 54.10 per sq. ft. with effect from 23.12.2017 till the application for offer of possession of the said unit under reference is issued. The

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respondent has not complied with the terms and conditions of the agreement. Though, as alleged by the respondent on page 5 of the reply, it had paid Rs. 9,74,497 /- as assured return till March 2020 but the same was stopped due to COVID-19. The builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured returns. Moreover, an agreement defines the builder-buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allottee arises out of the same relationship and is marked by the original agreement for sale.

24. **Now the proposition before the authority is whether an allottee is entitled for assured return even after expiry of due date of possession, can claim both the assured return as well as delayed possession charges?**

To answer the above proposition, it is worthwhile to consider that the assured return is payable to the allottee on account of a provision in the BBA or in a MoU having reference of the BBA or an addendum to the BBA/MOU or allotment letter. The complainants are entitled to delay possession charges from the due date of possession i.e., 18.08.2015 till 23.12.2017 i.e., date from when assured return is agreed upon between the parties.

If we compare this assured return with delayed possession charges payable under proviso to section 18 (1) of the Real Estate

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(Regulation and Development) Act, 2016, the assured return is much higher i.e., the assured return in this case is payable an amount of Rs. 43,280/- per month whereas the monthly delayed possession charges are payable at the rate of 10.25% per annum i.e., Rs. 37,846/- per month.

25. Accordingly, the interest of the allottee is protected even after the due date of possession is over as the assured return are payable till the possession of the said unit. The purpose of delayed possession charges after due date of possession is served on payment of assured return after due date of possession as the same is to safeguard the interest of the allottee as his money is continued to be used by the promoter even after the promised due date is over and in return, he is paid either the assured return or delayed possession charges whichever is higher.
26. Accordingly, the Authority directs that in cases where assured return is reasonable and comparable with the delayed possession charges under section 18 and assured return is payable even after due date of possession till the possession of a said unit, then the allottee shall be entitled to assured return or delayed possession charges whichever is higher without prejudice to any other remedy including compensation.
27. Therefore, considering the facts of the present case, the respondent is directed to pay the amount of assured return at the agreed rate from the date the payment of assured return has not

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been paid till the possession of a said unit as per clause 3 of MOU dated 20.01.2018.

28. The counsel for the respondent has given post-dated cheque dated 07.11.2022 bearing no. 001936 for Rs. 193316/- and another cheque dated 07.11.2022 bearing no. 001937 for Rs.193316/-which are kept in the custody of the registrar to be given to the complainant. The counsel for the respondent is directed to make the balance payment to the complainant as per MOU.

29. The respondent is directed to pay the outstanding accrued assured return amount, if any, till date at the agreed rate within 90 days from the date of this order after adjustment of outstanding dues, if any, from the complainant and failing which that amount would be payable with interest @ 7.40% p.a. till the date of actual realization.

(FIII). To direct the respondent to pay an amount of Rs. 55,000/- to the complainants as cost of present litigation.

(FIV). Cost of the present complaint may also be awarded in favour of the complainants as cost of the present litigation.

30. Both the issues being interconnected are being taken together. The complainants in the aforesaid head are seeking relief w.r.t compensation. Hon'ble Supreme Court of India, in case titled as **M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors. (Civil appeal nos. 6745-6749 of 2021, decided on**

11.11.2021), has held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of compensation.

(FV). To direct the respondent to pay the following excessive charges till possession of the unit is taken:

- **Interest Free Maintenance Security of Rs. 1,20,000/-**

31. FMS is a lump sum amount that the home buyer pays to the builder which is reserved/accumulated in a separate account until a residents' association is formed. Following that, the builder is expected to transfer the total amount to the association for maintenance expenditures. The system is useful in case of unprecedented breakdowns in facilities or for planned future developments like park extensions or tightening security. The same is a one-time deposit and is paid once (generally at the time of possession) to the builder by the buyers. The builder collects this amount to ensure availability of funds in case unit holder fails to pay maintenance charges or in case of any unprecedented expenses and keeps this amount in its custody till an association of owners is formed. IFMS needs to be transferred to association of owners (or RWA) once formed.

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32. In the opinion of the authority, the promoter is allowed to collect a nominal amount from the allottees under the head "IFMS". However, the authority directs and passes an order that the promoter must always keep the amount collected under this head in a separate bank account and shall maintain the account regularly in a very transparent manner. If any allottee of the project requires the promoter to give the details regarding the availability of IFMS amount and the interest accrued thereon, the promoter must provide details to the allottee. Therefore, respondent is justified in charging Interest-Free Maintenance Security Deposit (IFMSD) from the complainant.

Directions of the authority

33. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

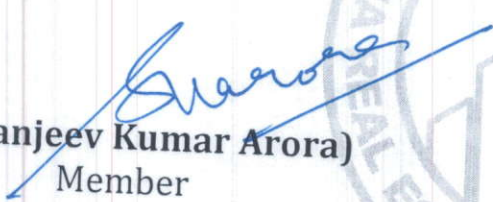
- i. The respondent is directed to pay the arrears of amount of assured return at agreed rate to the complainant(s) from the date the payment of assured return has not been paid till the date of completion of construction of building.
- ii. After completion of the construction of the building, the respondent/builder would be liable to pay monthly assured returns at agreed rate of the super area up to 3 years or till the unit is put on lease whichever is earlier.

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- iii. The respondent is also directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of order after adjustment of outstanding dues, if any, from the complainant(s) and failing which that amount would be payable with interest @10.25% p.a. till the date of actual realization.
- iv. The respondent shall not charge anything from the complainant(s) which is not the part of the agreement of sale.

34. Complaints stand disposed of.

35. Files be consigned to registry.


(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 28.10.2022

Haryana Real Estate Regulatory Authority, Gurugram


(Vijay Kumar Goyal)
Member