

Corrected vide order dated 06-12-2022

A 60.



HARERA
GURUGRAM

Complaint No. 2694 of 2020

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

Complaint no. :	2694 of 2020
Date of filing complaint:	14.09.2020
First date of hearing:	08.10.2020
Date of decision :	10.05.2022

RAJESH Naresh Kumar S/o Shri Attar Singh R/o: House no. 11 ¹⁶⁹ , Near Shiv Mandir, Sakatpur, Palra, Gurugram-122101	Complainant
Versus	
1. M/s Mascot Buildcon Private Limited 2. M/s Hometown Properties Private Limited Both R/o: 294/1, Vishwakarma Colony, MB Road, Lalkuan, New Delhi-110044	Respondents

CORAM:	
Dr. KK Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Sh. Gaurav Bhardwaj (Advocate)	Complainant
Sh. Kailash Ram proxy counsel of Shri. Rahul Bhardwaj (Advocate) Sh. B. N Sahoo AR on behalf of the respondent	Respondents

ORDER

1. The present complaint has been filed by the complainant/allottee 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 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. 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 and delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	"Oodles Skywalk", Sec 83, Gurugram
2.	Project area	3.0326 acres
3.	Nature of the project	Commercial colony
4.	DTCP License	08 of 2013 dated 05.03.2013 and valid up to 04.03.2017
5.	Name of the licensee	Dharam Singh
6.	RERA Registered/ not registered	Registered 294 of 2017 dated 13.10.2017
	RERA Registration valid up to	31.12.2019
7.	Unit no.	G-47A, Ground floor [Annexure P/4 at page 32 of the complaint]
8.	Unit measuring (carpet area)	497.51 sq. ft. [Annexure P/4 at page 32 of the complaint]
9.	Date of allotment	18.01.2016 [Annexure P/3 at page 26 of the complaint]
10.	Date of execution of space buyer agreement	25.02.2016 [Annexure P/4 at Page 29 of the complaint]
11.	Memorandum of understanding	26.04.2014 [Annexure P/2 at page 12 of the complaint]



12.	Start of construction	21.03.2014 as per CR no. 2311 of 2021 30.03.2014 as per CR no. 843 of 2022
13.	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....." (Emphasis supplied)
14.	Due date of possession	25.05.2019 Due date is calculated from the date of signing of the agreement Grace period of 3 months are allowed
15.	Total sale consideration	Rs.77,95,982/- [Annexure P/4 at page 32 of the complaint]
16.	Total amount paid by the complainant	Rs.80,72,697/- [As per Clause 1.3 of MOU dated 26.04.2014 at page no. 18 of the complaint]
17.	Payment plan	Down payment plan [Page 52 of the complaint]
18.	Occupation Certificate	Not obtained
19.	Offer of possession	Not offered

B. Facts of the complaint:

3. That in March 2014, the complainant booked a retail space in the project detailed above by paying an amount of Rs. 1,00,000/- towards the said unit to the respondent no.1 vide cheque bearing no. 014605 dated 22.03.2014 followed by subsequent payments in



April'2014 under 'Down payment plan'. The complainant paid a sum of Rs. 80,72,697/- from March'2014 till April'2014, i.e., within one month of booking

4. That thereafter, on 26.04.2014, a memorandum of understanding was executed between the parties laying down the basic terms and conditions concerning the sale transaction and all the points of understanding at the time of purchase. However, it is pertinent to mention here that the respondent no.1 failed to adhere to its obligations regarding 'Assured return' which was paid only for a few months until mid-2016 and thereafter, it has been defaulting in paying the same.
5. That after paying 100% of the total consideration amount, the complainant approached the respondent no.1 company to execute the buyer's agreement and to which the latter kept assuring the former that the same shall be executed soon.
6. That thereafter, the complainant kept pursuing the respondent no.1 to issue an allotment letter allotting the booked unit in accordance with MOU and to execute the agreement as complete payment was already made by him on the basis of trust reposed in it, but to no avail. It was only on 18.01.2016 that the respondent issued an allotment letter thereby allotting retail space/shop bearing no. 'G-47A' on ground floor, admeasuring 497.51 sq. ft. super area.
7. That after a delay of almost 2 years from the date of booking, finally on 25.02.2016, a space buyer's agreement was executed between the parties for the unit in question. However, to the utter shock of the complainant, as per clause 38 pertaining to the due

date for handing over possession, the respondent no.1 undertook to handover possession within 36 months from the date of agreement or date of start of construction, whichever was later along with 3 months grace period. This left the complainant completely stunned as he had already made 100% payment for the unit in 2014 itself and the due date should have been calculated from date of booking or at the most from the date of MOU. The complainant conveyed the same to the respondent no.1 prior to signing the said agreement dated 25.02.2016 but to no avail as the latter simply refrained from responding to his objections and having no other option left after making full payment and after spending almost all of his life savings, the complainant had to sign the agreement bearing such one-sided clauses.

8. That subsequently, the complainant visited the project site in September 2017 only to find out that no construction was going on and merely foundation work had been done despite lapse of more than 3 years from the date of booking. Thereafter, the complainant kept making calls to the respondent no.1 and kept visiting its office in order to find out about the construction and as to when possession shall be handed over as the due date had already elapsed on 26.07.2017 but of no avail.

C. Relief sought by the complainant:

9. The complainant has sought following relief(s):
- Direct the respondent to refund of amount of Rs. 80,72,697/- paid along with interest at the prescribed rate from the date of receipt of each instalment of payment till the date of refund.

- ii. Direct the respondent to pay Rs. 5,00,000/- as compensation on account of loss/injury as well as mental agony and to pay litigation charges to the tune of Rs. 40,000/-.

D. Reply by respondents:

The respondents by way of joint written reply dated 25.08.2021 made the following submissions:

10. The case of respondents as set up in the written reply is that the complainant is their allottee in the project detailed above but neither the complaint is maintainable in the present form nor he has any cause of action against them.
11. It is pleaded that a space buyer agreement was executed between the parties on 25.02.2016 but due to certain orders passes by NGT, banning construction in the NCR region, shortage of labour, construction material, demonetisation, delay I making payments by various allottees, Covid 19, farmers protest, implementation of social schemes and increase in demand of labour, the construction of the project was struck affecting the pace of construction activities.
12. It was denied that the complainant was not provided any updates with regard to the project. He was well aware of the updates of the project including force majeure circumstances affecting the pace of construction of the project which has been completed almost up to 95%.
13. It was denied that the queries raised by the complainant were not attended to by respondent no.1. He was time and again asked to visit its office and resolve his concerns.

14. It was further pleaded that there was delay in obtaining various approvals with regard to the project from the competent authorities, So, delay in such a situation if any is natural and is covered by force majeure events.
15. It was also pleaded that the complaint seeking refund of the deposited amount is not maintainable as same would be detrimental to the interest to the project and other allottees who have invested their hard-earned money and are waiting for the results of their investment.
16. It was further pleaded that though there was a clause of assured return in MOU but the same merged into space buyer agreement dated 25.02.2016. Thus, after execution of space buyer agreement between the parties the claimant is not entitled to any assured returns. Lastly, it was pleaded that though there is delay in completion of the project but the claimant is bound by the terms and conditions in space buyer agreement and the Act of 2016 does not permit rewriting of agreements earlier entered into between the parties.
17. All other averments made in the complaint were denied in toto.
18. 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:

19. 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 completed 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 complainant at a later stage.

F. Findings on the objections raised by the respondents:

F.1 Objection regarding default in making payments due by the complainant:

The respondents have alleged that the complainant having breached the terms and conditions of the agreement and contract by defaulting in making timely payments. Further the above-mentioned contention is supported by the space buyer agreement executed between both the parties. Clause 24 provides those timely payments of the instalments and other charges as stated in the schedule of payment is essence of the agreement.

But the plea raised in this regard is devoid of merit. The unit in question was booked by the complainant in March 2014 and within a month of its booking he paid a sum of Rs. 80,72,697/- against total sale consideration of Rs. 77,95,982/- so, there was no occasion for the complainant in making delay of any payment against the allotted unit as alleged by the respondents. Thus, the plea in this regard is just for the sake of objection and is untenable.

F.2 Objection regarding force majeure conditions:

The respondent-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as commonwealth games held in Delhi, shortage of labour due to implementation of various social

schemes by Government of India, slow pace of construction due to a dispute with the contractor, demonetisation, lockdown due to covid-19 various orders passed by NGT and weather conditions in Gurugram and non-payment of instalment by different allottees of the project but all the pleas advanced in this regard are devoid of merit. The flat buyer's agreement was executed between the parties on 25.02.2016 and the events taking place such as holding of commonwealth games, dispute with the contractor, implementation of various schemes by central govt. etc. do not have any impact on the project being developed by the respondent. Though some allottees may not be regular in paying the amount due but whether the interest of all the stakeholders concerned with the said project be put on hold due to fault of on hold due to fault of some of the allottees. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

F.3 Objections regarding the complainant being investor:

20. It is pleaded on behalf of respondents that complainant is an investor and not consumer. So, he is not entitled to any protection under the Act and the complaint filed by him under Section 31 of the Act, 2016 is not maintainable. It is pleaded that the preamble of the Act, states that the Act is enacted to protect the interest of consumer of the real estate sector. The Authority observes that the respondents are correct in stating that the Act is enacted to protect the interest of consumer of the real estate sector. It is settled principle of interpretation that preamble is an introduction

of a statute and states the main aims and objects of enacting a statute but at the same time, the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the space buyer's agreement, it is revealed that the complainant is buyer and paid total amount towards purchase of subject unit. At this stage, it is important to stress upon the definition of term allottee under the Act, and the same is reproduced below for ready reference:

"Z(d) 'allottee' in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent."

21. In view of above-mentioned definition of allottee as well as the terms and conditions of the space buyer's agreement executed between the parties, it is crystal clear that the complainant is an allottee as the subject unit allotted to him by the respondent/promoters. The concept of investor is not defined or referred in the Act of 2016. As per definition under section 2 of the Act, there will be 'promoter' and 'allottee' and there cannot be a party having a status of 'investor'. The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal No.0006000000010557 titled as **M/s Srushti Sangam Developers Pvt Ltd. Vs Sarvapriya Leasing (P) Ltd. and anr.**

has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

G. Entitlement of the complainant for refund:

G.1 Direct the respondents to refund of amount of Rs. 80,72,697/- paid along with interest at the prescribed rate from the date of receipt of each instalment of payment till the date of refund.

22. Vide letter dated 18.01.2016, the complainant was allotted the subject unit by the respondents for a total sale consideration of Rs. 77,95,982/- against payment of Rs.1,00,000/- as booking amount under the down payment plan. A space buyer's agreement dated 25.02.2016 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 25.05.2019 as grace period of 3 months is allowed. After execution of space buyer's agreement, the complainant started depositing various amounts against the allotted unit and paid a sum of Rs. 80,72,697/- from March 2014 to April 2014 as per Clause 1.3 of MOU dated 26.04.2014 at page no. 18 of the complaint. The possession of the allotted unit was to be offered to the complainant as per clause 38 within 36 months of the signing of the agreement or the date of

start of construction of the building whichever being later with a grace period of 3 months and the same comes to 25.05.2019. That date has already expired. Neither the project is complete, nor the respondents applied for its occupation certificate up to the date of filing of the complaint up to 14.09.2020. Even now the project is not ready, and its occupation certificate has not been applied.

23. So, keeping in view the fact that the allottee- complainant wish to withdraw from the project and demanding return of the amount received by the promoter in respect of the unit with interest on failure of the promoter 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 **25.05.2019** and there is delay of approx. 2 years on the date of filing of the complaint on 07.09.2020.
24. Though the occupation certificate of the project where the unit is situated has not been obtained by the respondent-promoter but 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 total 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.....”

25. 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)*** and followed by the Hon'ble High Court of Punjab & Haryana in case ***Ramprashtha Promoters and Developers Pvt Ltd Vs Union of India and Ors. in CWP No.6688 of 2021*** decided on 04.03.2022, and wherein it was observed as under:

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

26. 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 allottees 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 promoters are liable to the allottees, as they wish to withdraw from the project, without prejudice to any other remedy available, to return the amount received by them 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 allottees including compensation for which they 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 authority hereby directs the promoter to return to the complainant the amount received by them i.e., Rs. 80,72,697/- with interest at the rate of 9.40% (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.

While filling the complaint it was pleaded by the complainant that under clause 3.3 of MOU dated 26.04.2014 the respondents agreed to pay him assured returns at the rate of Rs.156.70/- per sq. ft. super area of the premises per month till offer of possession. Though the same was paid until mid-2016 but later on did not pay anything. The averments made in this regard were denied in toto while filling reply. However, it was pleaded that the assured return clause merged into space buyer agreement and on account of that the respondents are not liable to pay any amount. But the averments made in this regard are devoid of merit. The execution of MOU dated 26.04.2014 between the parties is not disputed which provides a provision for assured returns against the allotment of the unit purchased under down payment plan. The complainant even admitted having received assured returns against the allotted unit up to mid-2016. Even as per article 3 of

MOU dated 26.04.2014 the respondents were liable to pay assured returns till offer of possession of the allotted unit. So, in pursuant to that if any amount has been received by the complainant under that head, 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.

G.2 Legal expenses:

27. The complainant is claiming compensation under 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(s) can claim. For claiming compensation under sections 12,14,18 and Section 19 of the Act, the complainant may file a separate complaint before the adjudicating officer under Section 31 read with Section 71 of the Act and rule 29 of the rules.

H. Directions of the Authority:

28. Hence, the Authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the functions entrusted to the Authority under section 34(f) of the Act of 2016:
- i) The respondents /promoters are directed to refund the amount i.e. Rs. 80,72,697/- received by it from the complainant along with interest at the rate of 9.40% 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 complainant if any by way of assured returns from the respondents as per clause 3 of MOU dated 26.04.2014, would be deducted while calculating the amount to be refunded to him 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.

29. Complaint stands disposed of.

30. File be consigned to the Registry.


(Vijay Kumar Goyal)
Member


(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.05.2022

HARERA
GURUGRAM