

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

Complaint no. :	3968 of 2020
Order Reserve On:	02.02.2023
Order Pronounced On:	19.05.2023

M/s Pacific Envirosystems Pvt. Ltd. Formerly Known as M/s Pacific Envirosystems & Controls Pvt. Ltd. Address: B-14/6, DLF City 1, Gurgaon Haryana-122002	Complainant
Versus	
M/s KPDK Buildtech Pvt. Ltd. Regd. Office at: A-8, Paryavaran Complex, IGNOU Road, New Delhi-110030	Respondent
CORAM:	
Shri Ashok Sangwan	Member
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Shri Saurabh Gabha	Advocate for the complainant
Shri Himanshu Singh	Advocate for the respondent

ORDER

1. The present complaint dated 03.11.2020 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 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 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 unit details, sale consideration, the amount paid by the complainant, 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	Newtown Square, Sector 95A, Gurgaon, Haryana
2.	Nature of the project	Commercial Complex
3.	Project area	3.075 acres
4.	DTCP license no.	98 of 2013 dated 09.11.2013 valid upto 08.11.2019
5.	Name of license holder	Mahender Kumar Gupta
6.	RERA Registered/ not registered	Registered vide no. 192 of 2017 issued on 14.09.2017 up to 30.11.2018
7.	Unit no.	SA/623, 6th floor (page no. 40 of complaint)
8.	Unit measuring	475 sq. ft. (page no. 40 of complaint)
9.	Date of allotment letter	29.07.2015 (page no. 35 of complaint)
10.	Date of MOU	21.08.2015 (page no. 32 of complaint)
11.	Date of space buyer's agreement	05.11.2015 (page no. 39 of complaint)



12.	Assured return Clause	<p>13. From the date of this MOU till the receipt of balance Rs. 9,55,938/- plus service tax payable by second party on demand by first party on completion of building structure the Developer shall pay the Purchaser a part Assured Return at the rate of Rs. 19,278/-. From the date of receiving the Balance amount of Rs. 9,55,938/- (payable on completion of building structure) till the date of handover of the units to the designated operator, the First Party shall pay to the Second Party an Assured Return of Rs. 28,040/- (herein referred to as the Assured Return). The Assured return shall be subject to tax deduction at source which shall be payable on or before 7th day of every English Calendar month on due basis. The said Assured Return shall be paid, via Post dated Cheque' till such time the possession is handed over to the designed operator and not thereafter.</p>
14.	Possession clause	<p>2. Possession</p> <p>"Subject to Force Majeure circumstances, intervention of statutory authorities and Purchaser having timely</p>



		<p>complied with all its obligations, formalities or documentation, as prescribed by Seller and not being in default under any part hereof and the Agreement, including but not limited to the timely payment of instalments of the Total Sale Consideration and other charges as per the payment plan opted, the seller proposes to offer possession of the said premises to the Purchaser within a period of 36 months from the date of execution of the Agreement (Commitment Period) subject to an extension of 6 months grace period. (emphasis supplied)</p>
15.	Due date of Possession	<p>05.05.2019 (calculated from the date of agreement including grace period of 6 months)</p>
16.	Payment Plan	<p>Best Western 55 (page no. 58 of complaint)</p>
17.	Total sale consideration	<p>Rs. 41,32,500/- (as per payment plan on page no. 58 of complaint) Rs. 42,92,449/- (as per SOA dated 22.06.2020 on page no. 59 of complaint)</p>

18.	Amount paid by the complainant	Rs. 35,23,294/- (as per SOA dated 22.06.2020 on page no. 59 of complaint)
19.	Offer of Permissive Possession	19.10.2019 (page no. 62 of complaint)
20.	Reminder for Outstanding Payment	28.07.2020 (page no. 76 of complaint)
21.	Pre Cancellation Letter	15.09.2020 (page no. 74 of complaint)
22.	Final Notice for cancellation	22.10.2020 (page no. 88 of complaint)
23.	Occupation certificate for Basement/Lower Ground, Ground Floor to 5 th Floor Note: Unit of the complainant is on 6 th floor.	04.08.2020 (page no. 86 of reply)
24.	Offer of possession	Not offered

B. Facts of the complaint

3. That the complainant desired to purchase a commercial unit in the project being developed by the respondent as the same was being advertised by it as one of the best commercial spaces. It assured the complainant that it has taken all the necessary permissions and approvals for the project from the competent authorities and will deliver possession in the project within a period of 36 months from the date of execution of the memorandum of understanding.



4. That it was further assured by the respondent that the complainant from the execution of MOU till the receipt of the balance payment will be eligible for an assured return of Rs. 19,728/- per month and furthermore from the date of payment of balance (on completion of building structure) till the date of handover of the unit to the operator will be eligible for an assured return of Rs. 28,040/- per month.
5. That the complainant was also assured that the possession will be handed over to the operator as per the agreed terms and the complainant will be eligible for an assured return of 9% for 12 months from the date of commencement of operations and thereafter the complainant will get 45% of the room rent as generated by the operator.
6. That believing the representations made by the respondent they paid an amount Rs. 3,94,114/- for registration/booking to the respondent vide demand draft dated 17.07.2015. The respondent after clearance of the demand draft further requested the complainant that the balance amount be deposited at the earliest and then only then can proceed with the signing of the MOU.
7. That the complainant duly paid the balance amount before the due date mentioned by the respondent vide a demand draft dated 17.08.2015 and subsequently MOU dated 21.08.2015 was executed by the respondent in favour of the complainant by way of which it was informed to the complainant that the respondent had obtained statutory approval vide license no. 98 of 2013 by DTCP, Haryana for the construction of the project.
8. That all the terms agreed between the complainant and respondent were made part of the MOU, however unilaterally clause 9 was added

in the MOU by which the respondent was eligible for a 6-month grace in completing the project. Having already paid a significant sum in respect of the unit, complainant was in no position to argue about the matter and had no choice but to sign on the dotted line.

9. That on 05.11.2015 complainant was asked by the respondent to execute a builder buyer agreement. The terms of the BBA are extremely unfair, one sided, unreasonable to the advantage of the respondent. Despite all the issues complainant continued to make all payments as demanded and prescribed by the respondent.
10. That on or about 19.10.2019 respondent issued a so-called "notice of permissive possession " along with a statement of account in order to claim the final payment. That the letter also included at annexure II an "indemnity & undertaking for permissive possession "asking complainant to execute the same confirming that he had " taken over permissive possession " of the unit for fit out works. The fit out works for this commercial unit was never part of complainant scope and once again shows improper intent on the part of the respondent.
11. That on 27.10.2019 complainant sought the copy of OC from the respondent before making the final payment. In spite of several reminders no copy of OC was provided by the respondent. Further the respondent with effect from October 2019 also stopped making the assured return of Rs. 28,040/- per month.
12. That on 22.06.2020 respondent advised the complainant vide email that OC had been received for the unit of the complainant and along with the OC a revised statement of account including the interest on delayed payment was sent by the respondent however no positive

adjustment was made by the respondent for the assured returns of Rs. 28,040/- per month since Oct 2019.

13. That after requesting the respondent for sending the copy of OC they sent it on 17.08.2020. the complainant was shocked to see that the OC was dated 04.08.2020 and secondly the OC was received only for ground to 5th floor and not for the unit of the complainant.
14. That the respondent started threatening the complainant and sent a notice for cancellation dated 15.09.2020 on the failure of payment of the last instalment which was to be paid on the offer of possession. Further on 22.10.2020 respondent issued final notice of termination on the same grounds.
15. That the respondent has failed to handover the possession of the unit within 36 months i.e., November 2018 and offered the possession in 2019 that too on the basis of defective OC. Further the respondent has failed to provide the assured return to the complainant since October 2019 as agreed in the MOU. So hereby complainant is demanding the refund of the paid up amount.

C. Relief sought by the complainant:

16. The complainant has sought the following relief:
- Direct the respondent to handover the possession of the unit to the complainant along with interest accrued from the originally promised date of possession till the actual delivered date of possession.
 - Direct the respondent to refund the entire amount paid by the complainant along with interest accrued from the originally promised date of possession till the actual delivered date of



possession calculated at 18% p.a. on the payments made by the complainant.

- Direct the respondent to pay a sum of Rs. 5,27,853/- towards the assured return not paid since October 2019 as was agreed between the complainant and the respondent in the MOU along with interest.

17. On the date of hearing, the authority explained to the respondent/promoter about the contraventions 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 Filed by the Respondent

18. In 2015, the complainant learned about the said project which was being developed by the respondent and accordingly made an application for booking a commercial apartment/ unit in the said project. The said booking was made by the complainant for unit no. SA/623 for a basic sale price of Rs. 38,23,750 /-.

19. That upon payment of the initial booking amount as per the payment schedule opted by the complainant, the respondent allotted the said unit in favour of the complainant and accordingly issued an allotment letter dated 29.07.2015 thereby provisionally allotting the said unit in the name of the complainant.

20. Thereafter, the complainant and the respondent entered into a memorandum of understanding dated 21.08.2015 for the allotment of the said unit. Under the terms of the MOU, it was agreed by both parties that the said unit which was to be finally allotted in the name of the complainant shall be a commercial apartment under the best western



brand and it was further agreed that the said unit shall be run and operated under the best western franchise.

21. That the complainant had agreed upon the terms with regard to the permissive possession which was to be handed over to the complainant after payment of the final installment under the MOU.

22. That under the MOU, it was primarily agreed that the complainant shall be entitled to return on its investment made in the said project as per the terms of the agreement and shall be given only permissive / notional / deemed possession for the purposes of handing over the said unit to best western franchise. Clause 13 of the agreement is reproduced hereunder for the sake of convenience of this Hon'ble Authority -

"13. From the date of this MOU till the Receipt of balance Rs.9,55,938/- (Rupees Nine Lac Fifty Five Thousand Nine Hundred Thirty Eight Only) plus service tax payable by second party on demand by first party on completion of building structure, the Developer shall pay to the Purchaser a part Assured Return at the rate of Rs. 19,278/- (Rupees Nineteen Thousand Two Hundred Seventy Eight Only). From the date of receiving the Balance amount of Rs. 9,55,938/- (payable on completion of building structure) till the date of handover of the units to the designate operator, the First Party shall pay to the Second Party an Assured Return of Rs.28,040 /- (Rupees Twenty Eight Thousand Forty Only) per month, (hereinafter referred to as the 'Assured Return'). The assured return shall be subject to tax deduction at source, which shall be payable on or before 7th day of every English Calendar month on due basis. The said Assured return shall be paid, via Post Dated Cheque(s), till such time the possession is handed over to the designated operator and not thereafter.

The date of Notice of commencement of operations shall be considered as the date of commencement of Revenue Share.

The Second party will be entitled to a fixed return at the rate of 9 % on the amount paid by it as the basic sale price. The amount calculated at the rate of 9% shall commence to be paid by the First Party to the Second Party from the date on which the First Party hands over possession of the commercial unit to the operator. This rate of return shall commence from the date of commencement of



operations and shall continue for a fixed period of 12 months. Thereafter, 45% of the rooms rent as generated by the operator shall be paid as a return on a monthly basis to be equally shared by and between all unit owners similarly placed like the Second Party. ..."

23. A bare reading of the aforementioned clause makes it evident that the said unit allotted to the complainant was to be handed over to the operator (Best Western Franchise in the present case) and the complainant was entitled to assured returns in the manner as specified under the aforementioned clause and 45 % of the room rent revenue when the operator commences its operations. The said fact was clearly explained to the complainant before the signing of the MOU and the terms thereof were expressly agreed by the complainant. It is also pertinent to state that the complainant had been aware since the inception that the said unit as booked by the complainant is part of a hotel and the petitioner was only to be given permissive/ symbolic possession of the commercial unit and not the actual physical possession.
24. Pursuant to the MOU, in order to secure the investment made by the complainant, a space buyer's agreement dated 05.11.2015 was entered between the parties herein and the same was coterminous with the MOU signed prior to the same. The terms of the space buyers were strictly meant to be read along with the terms of the MOU and the possession of the said unit which was to be granted to the complainant was with the intent that the same shall be handed over to the operator to enable the carrying out of fit-outs and further modifications to make the said unit ready for operations.
25. Thereafter, upon payment of the first two installments by the petitioner of Rs. 3,94,114 /- and 17,97,279 /- the respondent started

paying the assured returns to the complainant as promised under the MOU and the complainant never raised any dispute with respect to the MOU or the space buyer's agreement and continued to enjoy the benefits thereof. Thereafter, in 2018, the petitioner paid the next installment of Rs. 13,31,901 /- and the rate of assured returns was also increased by the respondent as per the terms of the MOU. The entitlement of assured returns was conditional as per the payment plan and the same was not payable by the respondent in case of default in payment by the complainant within the stipulated time as per the MOU. That till date the respondent has made a payment of Rs. Rs. 11,05,969/- to the complainant which is not disputed by the complainant. The payment plan was devised by the respondent in such a way that the petitioner is entitled to maximum gain on its investment as per the payment plan.

26. As per the terms of the space buyer's agreement, the permissive possession for handing over the said unit by the complainant to the best western franchise was to be done on or before 05.05.2019 (36 months + 6 Months Grace Period), however, there was a minor delay on part of the respondent due to a stay order passed by the Hon'ble National Green Tribunal thereby banning any construction activity in the area. The said delay was not deliberate and even otherwise the complainant did not raise any objection as the assured returns as promised under the MOU were being paid to the complainant in the manner as specified under the MOU.
27. That vide email dated 20.04.2019 (before the date of possession), the complainant herein for the first time raised a clarification with respect to the payment of assured returns payable by the respondent

at the rate of 9% for a period of 12 months after receiving the permissive possession for handover to the best western franchise and 45 % room rent revenue post the commencement of the hotel operations. The respondent sent a reply on the even date thereby stating inter alia that since there has been a change in law with respect to payment of assured returns, in the event that the complainant continues the existing payment plan for assured returns any legal/tax implication arising out of the same shall be the liability of the complainant. It is submitted that keeping in mind the good relationship between the complainant and the respondent, the respondent even provided two options to the complainant for making payments towards the said unit, so as to comply with the change in law, however, the same did not appeal to them and hence were not opted by the complainant.

28. That the respondent issued a letter dated 19.10.2019 to the complainant wherein the complainant was offered permissive possession of the said unit, so that the same could be handed over to the hotel operator. As per the terms of the MOU and the space buyer's agreement, only permissive possession of the said unit was to be handed over by the respondent to the complainant as it was expressly agreed between the parties herein that the said Unit shall be part of the best western hotel and the actual physical possession of the same shall vest with the operator. The complainant was further requested to complete the commercial formalities by making payment of Rs. 9,34,888 /- (after deduction of assured return of October, 2019) before taking the permissive possession of the said unit as per the terms agreed under the MOU.



29. That after receipt of demand of the final installment as per the MOU, to the utter shock of the respondent, the complainant started raising frivolous objections in order to avoid making payment under the terms of the MOU. The complainant met with the officials of the respondent at the office of the respondent on 16.11.2019 and the respondent had shown all documents to the complainant with respect to the said unit which was already leased out by the respondent to the best western franchise. The complainant was also shown a copy of the application for occupancy certificate made by the respondent with the directorate of town and country planner which was duly acknowledged by the complainant.
30. Soon after the aforesaid meeting, the complainant on the basis of incorrect legal advice, issued a letter dated 25.11.2019 to the respondent inter alia calling upon the respondent to withdraw the letter for permissive possession dated 19.10.2019 and to get the occupancy certificate issued from the concerned authority. The complainant further sought payment of assured returns without making the payment towards the final installment as per the MOU and confirmed that the payment towards the final installment shall only be paid to the respondent upon issuance of the occupancy certificate. At the end of the communication, the complainant also agreed to make payment towards 50 % of the demand raised by the respondent and the balance 50 % at the time when the actual possession of the said Unit is handed over to the best western hotel.
31. In response to the aforesaid letter, the respondent with a view to move away from the senseless controversy raised by the complainant, once again sent a reminder for the payment of the outstanding due



amount of Rs. 9,34,888 /- from the complainant. It was only the complainant who had raised the needless objection with respect to the payment of the outstanding payment and production of occupancy certificate for receiving the permissive possession and all other unit owners of the hotel had made payments and handed over the possession of their respective units for fit-outs and other works to the operator under best western franchisee.

32. Vide letter dated 08.01.2020, the respondent formally replied to the letter dated 25.11.2019 wherein it was inter alia explained to the complainant that the respondent has offered permissive possession of the said unit for the purposes of handing over the same to operator and the space of the said unit has already been handed over to best western hotel in September 2019. It was further explained to the complainant that since the actual physical possession of the said unit was to be vested with the best western hotel under the terms of the MOU, the complainant was only to be provided with the permissive/deemed possession of the said unit so that the same can be handed over to the hotel operator for carrying out fit-outs and other essential works to commence the operations of the hotel. It was also explained that after handing over the permissive possession of the said unit to the complainant, the complainant is still entitled to fixed returns @ Rs. 28,678 /- for a period of 12 months and 45 % of the room revenue rent after the commencement of the operations of the Hotel.
33. In response to the reply dated 08.01.2020 issued by the respondent, the complainant sent their response dated 29.01.2020 wherein the complainant sought to arbitrarily interpret the terms of the MOU and



the space buyer's agreement and also sought the payment of assured returns without making payment towards the final installment of Rs. 9,34,888 /- to the respondent as per the terms of the MOU. The response by the complainant was completely misconceived and on the basis of incorrect interpretation of the terms of the MOU. It is further submitted that the complainant with the idea of delaying the payment of the outstanding dues, issued the response dated 08.01.2020 and with a sole motive to extort money in the form of assured returns from the respondent without holding up their end of the bargain.

34. In March 2020, nationwide lockdown was announced by the Central Government on account of the outbreak of the COVID - 19 Pandemic in India and the operations of all real estate entities came to a standstill for a period of over 6 months. The Hon'ble Authority has recognized the period starting from March 1, 2020 - September 30, 2020, as moratorium period for the Real Estate Sector in Haryana.
35. Vide letter dated 27.05.2020 issued by the Directorate of Town and Country Planning, the occupation certificate applied by the respondent herein was approved and accordingly, the respondent with the aim to provide uninterrupted and timely services issued an email dated 22.06.2020 to the complainant, calling upon it to take the permissive possession of its respective unit for handing over the same to the operator hotel for carrying out fit-outs and other works to commence operations.
36. After receipt of the email dated 22.06.2020, the complainant once again started raising frivolous objections to the permissive possession which was offered by the respondent and with the sole

motive to delay the payment of the outstanding installment to the respondent, the complainant started writing emails seeking a copy of the occupancy certificate. The complainant once again offered to pay 50 % of the last Installment which was to be paid by the complainant on being offered possession of the said unit however, no amount was paid to the respondent and the complainant arbitrarily sought payment of assured returns along with interest.

37. Thereafter, the respondent was pleased to receive the occupancy certificate dated 04.08.2020 by the Directorate of Town and Country Planning Haryana and the same was duly sent to the complainant. The occupancy certificate was provided to the respondent till the 5th floor and the respondent was required to complete some other procedural compliance in order to get the occupancy certificate for 100 % of the project. The said Project is a Green Building under the Provision 6.5 of the Haryana Building Code, 2017 and had also been awarded a 4-star rating under the Green Rating for Integrated Habit Assessment ("GRIHA") for pre-registration on 14.03.2018. Since, the final GRIHA rating has not yet been received by the respondent, the occupation certificate received by the respondent is till the 5th Floor.
38. Since, the complainant had blatantly refused to make payments towards the final installment and had raised arbitrary and needless objections with respect to the possession of the said unit only to evade from its liability to make payments to the respondent, the respondent having no other option left, was constrained to issue a cancellation notice dated 15.09.2020 as well as 22.10.2020 on account of non - payment of the legitimate outstanding amount due and payable by the complainant.

39. Since the intention of the respondent from the inception of the MOU was to give only permissive possession of the said unit to the complainant, the respondent made several efforts and provided several opportunities to the complainant to make payment towards the final installment in terms of the MOU, however, the mala fide and bad faith intent of the complainant did not make it possible for the parties herein to resolve the present dispute amicably.
40. Without prejudice to the rights and contentions of the respondent to contest the present dispute, the respondent even offered the complainant to take back the entire money paid by the complainant till date to the respondent after deduction of 10 % under the termination/cancellation clause of the space buyer's agreement dated 15.11.2015. However, the complainant with the sole motive to extort money out of the respondent filed the present complaint before the hon'ble authority by raising whimsical and fictitious grounds.

D. Findings on the objections raised by the respondent:

• Objection regarding the reliefs sought by the complainant.

41. Vide order dated 22.11.2022 counsel for the respondent has raised an objection that the complainant has seeking both refund as well as delay possession charges. The authority asked the counsel for complainant to clarify whether the complainant is seeking refund or delay possession charges. The counsel for the complainant requested the authority to grant short adjournment for clarifying the same. Further vide order dated 02.02.2023 the counsel for the complainant has stated at bar that complainant wishes to withdraw from the project and seeking refund of the entire paid-up amount.

D. Jurisdiction of authority

42. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

D. I Territorial jurisdiction

43. 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.

D. II Subject matter jurisdiction

44. 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.

45. 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.

E. Findings on the relief sought by the complainant.

Relief sought by the complainant: The complainant had sought following relief(s):

- i. Direct the respondent to refund the entire amount paid by the complainant along with interest accrued from the originally promised date of possession till the actual delivered date of possession calculated at 18% p.a. on the payments made by the complainant.
46. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by it in respect of subject unit along with interest as per section 18(1) of the Act and the same is reproduced below for ready reference:

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building.-

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case 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 that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

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."

(Emphasis supplied)

47. Clause 2 of the buyer's agreement provides the time period of handing over possession and the same is reproduced below:

2. Possession

"Subject to Force Majeure circumstances, intervention of statutory authorities and Purchaser having timely complied with all its obligations, formalities or documentation, as prescribed by Seller and not being in default under any part hereof and the Agreement, including but not limited to the timely payment of instalments of the Total Sale Consideration and other charges as per the payment plan opted, the seller proposes to offer possession of the said premises to the Purchaser within a period of 36 months from the date of execution of the Agreement (Commitment Period) subject to an extension of 6 months grace period.

48. The complainant had booked the unit in the project named as "New Town Square" situated at Sector 95-A for a total sale consideration of Rs. 41,32,500/-. The MOU for the said unit was executed on 21.08.2015 and the buyer's agreement was executed between the parties on 05.11.2015. As per possession clause 2 of the buyer's agreement, the possession of the unit was to be handed over within 36 months from the date of execution of agreement subject to an extension of 6 months grace period.
49. The occupation certificate/completion certificate of the project where the unit is situated has still not been obtained by the respondent-promoter. 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....."

50. 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. 2021-2022(1) RCR (c), 357** 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 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."

51. The promoter is 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) of the Act. The promoter has 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.

52. 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.

53. **Admissibility of refund along with prescribed rate of interest:** The section 18 of the Act read with rule 15 of the rules provide that in case the allottee intends to withdraw from the project, the respondent shall refund of the amount paid by the allottee in respect of the subject unit with interest at prescribed rate as provided 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.”

54. 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.

55. 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., 19.05.2023 is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.
56. The authority hereby directs the promoter to return the amount received by him i.e., Rs. 35,23,294/- with interest at the rate of 10.70% (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 realization of the amount within the timelines provided in rule 16 of the Haryana Rules 2017 *ibid*. The amount paid on account of assured return i.e., Rs. 11,05,969/- may adjusted from the refundable amount.

F. Directions of the authority


57. 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/promoter is directed to refund the entire amount of Rs. 35,23,294/- paid by the complainant along with prescribed rate of interest @ 10.70% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation & Development) Rules, 2017 from the date of each payment till the date of refund of the deposited amount. The amount paid on account of

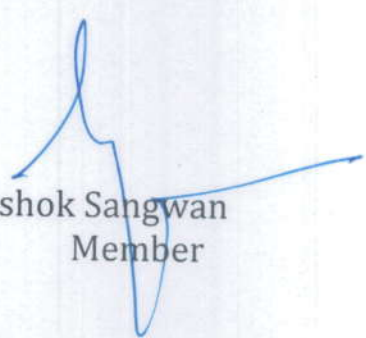
assured return i.e., Rs. 11,05,969/- may be adjusted from the refundable amount.

- ii. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

58. Complaint stands disposed of.

59. File be consigned to registry.


Sanjeev Kumar Arora
Member


Ashok Sangwan
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 19.05.2023


HARERA
GURUGRAM