

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

Complaint no. :	7936 of 2022
Date of filing complaint:	09.01.2023
Order Reserve On:	05.07.2023
Order Pronounced On:	16.08.2023

Sunil Chhabra R/O: D-4/20, DLF-Phase 1, Gurugram	Complainant
Versus	
M/s Imperia Structures Limited Office: A-25, MCIE, Mathura Road, New Delhi-110044	Respondent

CORAM:	
Shri Ashok Sangwan	Member
APPEARANCE:	
None	Complainant
Shri Roopam Singh (Advocate)	Respondent

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 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 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. N.	Particulars	Details
1.	Name and location of the project	"Mindspace" at sector 62, Golf Course Road, Gurgaon, Haryana
2.	Nature of the project	IT Park Colony
3.	Project area	8.35625 acres
4.	DTCP license no.	86 of 2010 dated 23.10.2010 valid upto 22.10.2020
5.	Name of licensee	Baakir Real Estate Pvt. Ltd. and others
6.	RERA Registered/ not registered	240 of 2017 dated 25.09.2017 valid upto 31.12.2020
7.	Unit no.	Virtual Space
8.	Unit area admeasuring (super area)	500 sq. ft. (page no. 24 of reply)
9.	MOU	25.04.2013 (page no. 29 of complaint)
10.	Date of approval of building plan	04.12.2015 (as per project details)
11.	Due date of possession	04.12.2017
12.	Assured return clause	4. That the Developer will pay Rs. 60 per sq. ft. per month on 500 sq. ft. as an



		<p>assured return to the allottee from 17 April 2013 till offer of possession of the space. Thereafter the developer shall pay Rs. 50 per sq. ft. per month on 500 sq. ft. as assured rental till the offered space is leased out to intended lessee. The developer has represented to the Allottee that the said unit shall be handed over by the Developer to the Allottee but in event of Virtual Space the Space will be registered in favor of Allottee and handed over to the lessee within a maximum period of 2 years after approval of building plans of the said project from competent authorities of the Said Project subject to force majeure. That he Allottee hereby agrees accepts and confirms the authority and power of the Developer for any variation or change in the location or area of the Said Unit allotted to him and that the allotment is provisional.</p>
13.	Total sale consideration	Rs. 32,07,000/- (as alleged by complainant)
14.	Amount paid by the complainant	Rs. 33,27,314/- (as alleged by complainant during course of hearing)
15.	Amount paid by respondent as assured return	Rs. 17,24,000/- (as alleged by respondent on page no. 41 of reply)
16.	Offer for possession for fit out	15.07.2019 (page 13 of reply)
17.	Occupation certificate	02.06.2020



		(Page no. 10 of reply but the said is for tower C)
18.	Offer of possession	Not offered

B. Facts of the complaint:

3. That the respondent announced the launch of their project by the name of "byron/mindspace", and thereby, invited applications from prospective buyers for the purchase of unit in the said project. The complainant being lured by the sales representatives of the respondent to buy a unit in their project, booked a virtual space in the said project and made the complete payment in one time.
4. That even after receiving the complete consideration of Rs. 33,27,314/- on 12.04.2013 The respondent issued a Memorandum of Understanding to the complainant on 25.04.2013 for virtual space for a total sale consideration of Rs. 32,07,000/-
5. That the respondent took more than 100% of the total sale consideration prior to the commencement of the builder buyer agreement which is the clear violation of section 13(1) of Real Estate Regulation and Development Act, 2016.
6. That as per clause 4 of the MOU, the respondent was bound to hand over the possession of the said virtual space within 2 years from approval of building plans of the said project.
7. That the respondent on 15.03.2016 issued a letter to the complainant with a subject of change in name of the project. Acknowledging the complainant about change of name of the project from Byron to Mindspace.



8. Thereafter on 01.03.2019 the original allottee left for her heavenly abode and the successor of her property Mr. Sunil Chhabra (brother of late Smt. Kanchan Savaria) got himself endorsed by providing letter of administration to the respondent issued by the Hon'ble court under Indian Succession Act. The complainant gave an indemnity bond in favour of the respondent and an affidavit of legal heir.
9. Therefore, after getting endorsed the said virtual space on his name, the complainant made several requests for clearing the pending assured returns and to offer the possession and getting the assured rental as per clause 4 of the Agreement @50 per sq. ft. As an assured rental after possession.
10. That even after paying more than 100 % of the total sale consideration and after a long wait in the hope to get a unit from their hard earned money. The respondent kept on making false assurances to the complainant.
11. That after losing all hope from the respondent company in terms of getting the interest on the delay in delivery period of more than 10 years from the due date of delivery of possession, and having shattered the dreams of a proper and timely return on investment in the form of assured returns, and also losing considerable amount of money the complainant is constrained to approach this Hon'ble Authority for delay on possession charges as well as for the due amount of assured returns.

C. Relief sought by the complainant:

12. The complainant has sought following relief(s):

(i) Direct the respondent to handover the possession of the said unit with the amenities and specifications as promised in all completeness



without any further delay and not to hold delivery of the possession for certain unwanted reasons.

- (ii) Direct the respondent to pay the interest on the total amount paid by the complainant at the prescribed rate of interest from due date of possession till actual date of physical possession.
- (iii) Direct the respondent to pay the due amounts towards assured returns.

D. Reply by respondent/promoter:

The respondent/promoter by way of written reply made following submissions:

13. That the complainant at their own will, booked a unit admeasuring to 500 sq. ft. on 12.04.2013, in the project 'Imperia Byron', which was subsequently renamed as 'Mindspace', located at sector 62, Gurugram, for a total sale consideration of Rs. 37,59,199/-.
14. That the construction of the said project was completed way back in 2019 and the occupancy certificate was applied for. The occupancy certificate has been received on 02.06.2020 by the respondent company.
15. That the complainant is misleading this hon'ble authority and hiding the fact that the respondent company has time and again issued offers of possession and demand notices to the complainant. it is submitted that an offer of possession for fit- out was issued by the respondent company to the complainant at the time of anticipation of the occupancy certificate. Furthermore, the respondent company had conveyed to the complainant that the assured returns shall be released by the respondent company as a remittance to the payment of the cost of

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- allotted unit and the failure of which shall give the respondent company liberty to forfeit the assured returns.
16. That the respondent company has been duly releasing the assured returns to the complainant. The respondent company has paid a total sum of Rs.17,24,000/- as assured returns to the complainant. The amount that remains unpaid is due to failure to fulfil the obligations of the letter dated 10.08.2019 by the complainant, which gave the respondent company liberty to forfeit the amount.
 17. That the State Government had acquired the land which comprises the said project land and transferred the same to the respondent company, for development of the said project in accordance with its master plan and then it had carved out various sectors and plots therein. In pursuance to this, the respondent company started construction over the said project land, after obtaining all sanctions/approvals/clearances necessary / clearances from different state/central agencies/authorities. The respondent company received initial approval of building plans on 4 of December, 2015, and started the milestone Construction of the present project.
 18. That subsequent to receiving the building plans, as mentioned above, the respondent company started the construction and also began allotting units to the concerned allottees. Furthermore, the respondent company on certain recommendation changed the name of the project from the 'Imperia Byron' to 'Imperia Mindspace'.
 19. That the complainant is investor, who has made investment in the esteemed project namely "Imperia Byron", now "Imperia Mindspace", located at sector 62 Gurgaon Haryana. Accordingly, all parties had executed memorandum of understanding. The complainant had



purchased the said unit on 'investment return plan', for a basic consideration of Rs. 37,59,199/- along with charges of reserved car parking and other charges shall be paid by the complainant at the time of handing over possession of unit.

20. That the respondent company kept making payments to the complainant from April 2013 to January 2018, the respondent company has paid the complainant a total sum of Rs. 17,24,000/- as assured return. That after pandemic, the working protocols of the IT sector has transformed into work-from-home, due to which the real estate has immensely suffered and despite of which, the respondent company is adhering to the payment structure and is still paying assured return & lease rental to the allottees, including that of the complainant.
21. That the respondent company directs all the payments received from the allottees, towards the construction of the undertaken project and thus, default in depositing the payment by the allottees disrupts the construction speed and hinders the completion of the committed project, which eventually affects the delivery of the project to allottees. That despite of several hindrances and certain force majeure, such as recent COVID-19 pandemic, the respondent company has successfully procured the occupancy certificate dated 02.06.2020, which exhibits the bona fide intention of the respondent company to complete the project
22. That owing to unprecedented air pollution levels in Delhi NCR, the Hon'ble Supreme Court issued a ban on construction activities in the region from November 4, 2019 onwards, which was a blow to realty developers in the city. The Air Quality Index (AQI) at the time was running above 900, which is considered severely unsafe for the city



dwellers. In pursuance to the Central Pollution Control Board (CPCB) declaring the AQI levels as not severe, the SC lifted the ban conditionally on December 9, 2019, allowing construction activities to be carried out between 6 a.m. and 6 p.m., and the complete ban was lifted by the Hon'ble Supreme Court on 14th February, 2020.

23. That clause 27 of the said MOU states that if the dispute or difference shall arise between the parties, the same shall be referred for arbitration proceedings.
24. That the respondent company has duly honored its part of the obligations without any delay, however, the complainant is attempting to extort the respondent company to earn unreasonable profit and commercial gain at the cost of the respondent company. No cause of action has arisen in favor of the complainant to file this present complaint.
25. 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 those undisputed documents and written submissions made by the parties and who reiterated their earlier version as set up in the pleadings.

E. Jurisdiction of the authority:

26. The authority has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

27. 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

28. 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.

29. 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 respondent/promoter:

F.I Objection regarding force majeure conditions:

30. The respondent-promoter raised the contention that as per MOU dated 25.04.2013 respondent has to pay assured return from 17.04.2013 till



the offer of possession of space. And the respondent has paid an assured return of Rs. 17,24,000/- till January 2018 and thereafter they have failed to pay due to conditions beyond the control of the respondent/promoter such as such as orders of the High Court and Supreme Court regarding ban on construction activities and Covid -19, but all the pleas advanced in this regard are devoid of merit. First of all, the orders banning construction and extraction of ground water were imposed for a very short duration and thus, a delay of such a long duration cannot be justified by the same. Moreover, some of the events mentioned above are of routine in nature happening annually and the promoter is required to take the same into consideration while launching the project. 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.

31. 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

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

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for the period of delay till handing over possession at the rate prescribed

32. 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).

G. Findings on the relief sought by the complainant:

- (i) Direct the respondent to handover the possession of the said unit with the amenities and specifications as promised in all completeness without any further delay and not to hold delivery of the possession for certain unwanted reasons.
- (ii) Direct the respondent to pay the interest on the total amount paid by the complainant at the prescribed rate of interest from due date of possession till actual date of physical possession.
- (iii) Direct the respondent to pay the due amounts towards assured returns.
33. The complainant booked a virtual space in the project of the respondent namely 'MindSpace' situated at sector-62, Golf Course Road, Gurugram. The MOU in this regard was executed interse the complainant and the respondent on 25.04.2013. The total consideration of the unit was Rs. 32,07,000/- out of which the complainant has paid an amount of Rs. 33,27,314/-.
34. The contention of the complainant is that as per clause 4 of the MOU dated 25.04.2013 the respondent was bound to hand over the possession of the said virtual space within 2 years from approval of building plans of the said project. The building plans was approved on



04.12.2015 therefore, the due date of possession comes out to be 04.12.2017.

35. Further as per clause 4 of the MOU the respondent is liable to pay the assured return @ 60 per sq. ft. per month on 500 sq. ft. from 17.04.2013 till the offer of possession of the space. The respondent/builder in this regard has stated that it has paid an amount of Rs. 17,24,000/- as an assured return from April 2013 to January 2018 which is also shown in the ledger account.
36. An MOU can be considered as an agreement for sale interpreting the definition of the agreement for "agreement for sale" under section 2(c) of the Act and broadly by taking into consideration the objects of the Act. Therefore, the promoter and allottee would be bound by the obligations contained in the memorandum of understanding and the promoter shall be responsible for all obligations, responsibilities, and functions to the allottee as per the agreement for sale executed inter se them under section 11(4)(a) of the Act. An agreement defines the rights and liabilities of both the parties i.e., promoter and the allottee and marks the start of new contractual relationship between them. This contractual relationship gives rise to future agreements and transactions between them. Therefore, different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral parts of this agreement is the transaction of assured return inter-se parties. The "agreement for sale" after coming into force of this Act (i.e., Act of 2016) shall be in the prescribed form as per rules but this Act of 2016 does not rewrite the "agreement" entered between promoter and allottee prior to coming into force of the Act as held by the Hon'ble Bombay High Court in case *Neelkamal Realtors Suburban*



Private Limited and Anr. v/s Union of India & Ors., (Writ Petition No. 2737 of 2017) decided on 06.12.2017. Since the agreement defines the buyer-promoter relationship therefore, it can be said that the agreement for assured return between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate regulatory authority has complete jurisdiction to deal with assured return cases as the contractual relationship arise out of agreement for sale only and between the same parties as per the provisions of section 11(4)(a) of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the agreement for sale till the execution of conveyance deed of the unit in favour of the allottees.

37. It is not disputed that the respondent is a real estate developer, and it had obtained registration under the Act of 2016 for the project in question. The authority under this Act has been regulating the advances received under the project and its various other aspects. So, the amount paid by the complainant to the builder is a regulated deposit accepted by the later from the former against the immovable property to be transferred to the allottee later on. If the project in which the advance has been received by the developer from an allottee is an ongoing project as per section 3(1) of the Act of 2016 then, the same would fall within the jurisdiction of the authority for giving the desired relief to the complainant besides initiating penal proceedings.
38. 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 return. 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.

39. The authority further observes that now, the proposition before the Authority whether an allottee who is getting/entitled for assured return even after expiry of due date of possession, is entitled to both the assured return as well as delayed possession charges?
40. 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 assured return in this case is payable from 17.04.2013 till offer of possession of space. The rate at which assured return has been committed by the promoter is Rs. 60 per sq. ft. per month which is more than reasonable in the present circumstances. If we compare this assured return with delayed possession charges payable under proviso to section 18 (1) of the Real Estate (Regulation and Development) Act, 2016, the assured return is much better i.e., the assured return in this case is payable at the rate of Rs. 60 per sq. ft. per month whereas the delayed possession charges are payable at the rate of 10.75% per annum. By way of assured returns, the promoter has assured the allottee that he will be entitled for this specific amount till offer of possession. Accordingly, the interest of the allottee is protected even after the due date of possession is over as the assured return are payable till offer of possession. The purpose of delayed possession charges after due date of possession is over and payment of assured return after due date of possession is over as the same to safeguard the interest of the allottee as his money is continued to be used by the promoter even after the promised due date and in return, he is paid



either the assured return or delayed possession charges whichever is higher.

41. Accordingly, the authority decides that in cases where assured return is reasonable and comparable with the delayed possession charges, allottee is entitled under section 18 and is payable even after due date of possession is over till offer of possession then after due date of possession is over, the allottee shall be entitled only assured return or delayed possession charges whichever is higher without prejudice to any other remedy including compensation.
42. On consideration of the circumstances, the evidence and other record and submissions made by the parties, the authority is satisfied that the respondent is in contravention of the provisions of the Act. The authority directs the respondent/promoter to pay assured return from the date the payment of assured return was stopped till offer of possession and declines to offer any amount on account of delayed possession charges as his interest has been protected by granting assured returns till the offer of possession of the allotted unit.

H. Directions of the Authority:

43. 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 respondent/builder is directed to pay arrears of assured return to the complainant/allottee from January 2018 @ Rs. 60 per sq. ft. per month till the offer of possession letter sent to the allottee as per

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memorandum of understanding along with prescribed rate of interest @ 10.75% p.a.

- ii) Since the complainant/allottee have been allowed assured return being reasonable and comparable with delayed possession charges, so his interest is protected even after due date of possession is over and the assured return being payable till the offer of possession letter sent to the complainant/allottee as per memorandum of understanding. So, he is not entitled to any delayed possession charges as claimed.
 - iii) The respondent is directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of this order.
 - iv) The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
44. Complaint stands disposed of.
45. File be consigned to the registry.

HARERA
GURUGRAM


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 16.08.2023