



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

Complaint no. :	1838 of 2022
Date of filing complaint:	29.04.2022
Order Reserve On:	26.04.2023
Order Pronounced On:	02.08.2023

Govind Lal Madan R/O: H-121, DLF New Town Heights, Sector-86, Gurugram	Complainant
Versus	
M/s K.S Propmart Pvt. Ltd. Office: A-22, Hill View Apartments, Vasant Vihar, New Delhi-110057	Respondent

CORAM:	
Shri Ashok Sangwan	Member
APPEARANCE:	
Shri Govind Lal Madan	Complainant
Ms. Shriya Thakkar	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	"Park Street" at sector 85, Gurgaon, Haryana
2.	Nature of the project	Commercial Colony
3.	Project area	2.85 acres
4.	DTCP license no.	100 of 2013 dated 02.12.2013 Valid/renewed up to- 01.12.2019
5.	Name of licensee	M/s K.S Propmart Pvt. Ltd.
6.	RERA Registered/ not registered	Registered Vide no. 41 of 2019 dated 30.07.2017 Valid/renewed up to- 31.12.2021
7.	Unit no.	SH-01, 4th Floor (page no. 23 of complaint)
8.	Unit area admeasuring (super area)	663.92 sq. ft. (page no. 23 of complaint)
9.	MOU	13.09.2019 (page no. 19 of complaint)
10.	Assured return clause	3. Lease Rental 3.1.1. Pre-Possession Lease Rental The Developer shall pay to the Allottee prepossession lease rental from 13.09.2019 till the application for offer of



		possession is filed for Retail Block, at the rate of Rs. 36.25/- per sq. ft. of super area of premises per month. 3.1.2. Post Possession Lease Rental After possession, subject to receipt of possession charges by the Developer, the first Lease rental to be paid by the Developer to the Allottee shall be @ Rs. 48.33/- per sq. ft. of super area of premises per month.
11.	Total sale consideration	Rs. 48,13,420/- (page no. 23 of complaint)
12.	Amount paid by the complainant	Rs. 25,51,150/- (as alleged by both parties)
13.	Amount paid by respondent as assured return	Rs. 3,97,104/- (as per ledger of assured return filed by respondent)
14.	Occupation certificate	Not obtained
15.	Offer of possession	Not offered

B. Facts of the complaint:

3. That the respondent is absolute owner of land admeasuring 22 kanals and 16 marlas i.e., 2.85 acres situated in revenue estate of village Badha, Tehsil Manesar District Gurgaon and the company had obtained a license no. 100 of 2013 on 2nd December 2013 for setting up of commercial colony on the said land and company had sold the retail block unit and initially developer had taken amount of Rs. 25,51,150/- .



4. That the said amount of Rs. 25,51,150/- is 50% of the cost of unit without issuance of any allotment letter and buyer agreement till 12.09.2019.
5. That the respondent then executed MoU on 13.09.2019 and stated in Article 1 regarding allotment of unit in retail block, bearing no. SH-01, located on fourth floor as per provisional floor plans tentative super area 663.92 sq. ft. in commercial complex "Park Street" sector-85, Gurgaon.
6. That the complainant was purchaser of the commercial unit in retail block bearing no. SH-01, located on fourth floor, super area 663.92 sq. ft. in commercial complex "Park Street" Sector-85, Gurgaon and there were conditions of lease rentals as per article 3 of MoU, which is mentioned as follows:

3. Lease Rental

3.1.1 Pre-Possession Lease Rental

The Developer shall pay to the Allottee prepossession lease rental from 13.09.2019 till the application for offer of possession is filed for Retail Block, at the rate of Rs. 36.25/- per sq. ft. of super area of premises per month (hereinafter referred to as the Pre-Possession Lease Rental).

7. That as per article 3 respondent agreed to pay for pre- possession lease rental but the same have been stopped w.e.f March 2021.
8. That on 01.03.2021 respondent raised a demand of payment of EDC/IDC for the aforesaid commercial unit of Rs. 3,91,712/- and the same is illegal at this stage before possession of the unit.
9. That even after terms and conditions of MoU dated 13.09.2019, its specifically mentioned that EDC/IDC will be charged at the time of possession only but without offering possession and without executing buyer's agreement they are unnecessary demanding and stopped the pre-possession rental. Whereas complainant is senior citizen and had



hard earned money for purchasing the aforesaid retail unit, for regular income from rental is for his family livelihood.

10. Therefore, complainant is hereby seeking the prepossession lease rental.

C. Relief sought by the complainant:

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

(i) Pre-possession rental is due and same is required to be paid i.e., pay the pending this month prepossession lease rental as per Mou since the month of March 2021 along with interest for every month of delay at prevailing rate of interest @ 9%.

D. Reply by respondent/promoter:

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

12. That the complainant made an application for provisional allotment of a unit bearing no. SH-01 (Food Court) located on fourth floor in the project developed by the respondent known as VSR 85 Avenue which is now known as park street vide an application form.
13. That one of the offers made by the respondent at that point of time was that the respondent will pay pre-possession lease rental at the rate of Rs.36.25/- per sq. ft. of the super area from 13.09.2019 till the application for offer of possession is filed for retail block. It was also mutually agreed that the respondent, will also pay first lease rental at the rate of Rs.48.33/- per sq. ft. of the super area subject to the receipt of possession charges. The complainant accordingly entered into an MOU dated 13.09.2019 with the respondent determining all the rights



and liabilities of the parties. The allotment was also confirmed vide allotment letter dated 17.09.2019.

14. That as per the Memorandum of Understanding (MOU) the price of the unit for an area admeasuring 663.92 sq. ft. was Rs. 48.13.420/- exclusive of EDC, IDC, interest free maintenance security (IFMS) electricity connection charges, firefighting charges, power back up charges, air conditioning charges, interest free capital replacement fund, service tax and such other levies/cessess/VAT as may be imposed by the any statutory Authority.
15. That the complainant has made payments of Rs.25,51,150/- including taxes to the respondent at the time of allotment. However, in addition to the above additional cost the complainant is also supposed to make other payments in the nature of EDC/IDC, interest free maintenance security (ifms), electricity connection charges, power back up charges, air conditioning charges, service tax and such other levies/cessess /VAT as per the demands raised by the respondent.
16. That there was no time limit provided under the MOU for handing over the possession of the unit. Thus, time was not the essence of the contract for delivering the possession, however it was mutually agreed upon that the complainant will be entitled to the benefit of lease rentals as per the terms of the MOU. The very inclusion of such a clause in the MOU goes a step further in illustrating the fact that the complainant very well knew and understood the implication of the terms of the MOU having no date of possession but having a buffer/protection of payment of lease rentals till application for OC. Hence, now it doesn't lie in the mouth of the complainant to allege that there has been undue delay in the handing over of the possession. The present case needs to dealt within the parameters of the clauses contained in the MOU that was



executed between the parties by fully understanding the import of the contents of the MOU without any coercion, influence of undue pressure.

17. That the as per the terms of the MOU, it was also agreed that the respondent will pay pre- possession lease rental at the rate of Rs.36.25/- per sq. ft. of the super area from 13.09.2019 till the application for offer of possession is filed for retail block. However, the payment of assured return was subject to force majeure clause as provided under clause 6.1 of the MOU and other clauses of the MOU. It is submitted that an amount of Rs3,97,104/- for a period of 18 months has been paid by the respondents as assured return to the complainant herein.
18. That as per clause 6 of the MOU in any event of force majeure, the developer without any additional interest shall refund to the allottee all sums received from allottee after deducting the amounts paid towards pre- possession lease rental to the allottee. Thereafter, the allottee shall not have any title or claim over the premises and developer shall be free to deal with the said premises in any manner whatsoever.
19. That from the above clause it becomes quite evident that the complainant was entitled to lease rentals subject to force majeure conditions in developing the said project.
20. That the sudden surge requirement of labour and then sudden removal has created a vacuum for labour in NCR region. the projects of not only the respondent but also of all the other developers/builders have been suffered due to such shortage of labour and has resulted in delays in the project's beyond the control of any of the developers .
21. Moreover, due to active implementation of social schemes like National Rural Employment Guarantee and Jawaharlal Nehru National Urban

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Renewal Mission, there was also more employment available for labours at their hometown despite the fact that the NCR region was itself facing a huge demand for labour to complete the projects.

22. That the said fact of labour shortage can be substantiated by way of newspaper articles elaborating on the abovementioned issues hampering the construction projects in NCR. This was certainly never foreseen or imagined by the opposite party while scheduling the construction activities. Even today in current scenario where innumerable projects are under construction all the developers in the NCR region are suffering from the after-effects of labour shortage on which the whole construction industry so largely depends and on which the respondent has no control whatsoever.
23. That the Ministry of environment and Forest and the Ministry of mines had imposed certain restrictions which resulted in a drastic reduction in the availability of bricks and availability of Sand which is the most basic ingredient of construction activity. That said ministries had barred excavation of topsoil for manufacture of bricks and further directed that no more manufacturing of bricks be done within a radius of 50 km from coal and lignite-based thermal power plants without mixing 25% of ash with soil.
24. That shortage of bricks in region has been continuing ever since and the respondent had to wait many months after placing order with concerned manufacturer who in fact also could not deliver on time resulting in a huge delay in project
25. That sand which is used as a mixture along with cement for the same construction activity was also not available in the abundance as is required since mining Department imposed serious restrictions against



manufacturing of sand from Aravali region. That this acute shortage of sand not only delayed the project of the answering respondent but also shot up the prices of sand by more than hundred percent causing huge losses to respondent.

26. That same further cost huge delay in project and stalling various parts and agencies at work in advanced stages for now the respondent had to redo, the said work causing huge financial burden on opposite part no. 1 which has never been transferred to complainant or any other customers of project.
27. That in addition the current Govt. has on 8 Nov. 2016 declared demonetization which severely impacted the operations and project execution on the site as the labourers in absence of having bank accounts were only being paid via cash by the sub-contractors of the company and on the declaration of the demonetization, there was a huge chaos which ensued and resulted in the labourers not accepting demonetized currency after demonetization
28. It is submitted that in the year, 2012 on the directions of the Hon'ble Supreme Court of India, the mining activities of minor minerals (which includes sand) were regulated. The Hon'ble Supreme Court directed framing of Modern Mineral Concession Rules. Reference in this regard may be had to the judgment of "Deepak Kumar vState of Haryana. (2012) 4 SCC 629". The competent authorities took substantial time in framing the rules and in the process the availability of building materials including sand which was an important raw material for development of the said Project became scarce in the NCR as well as areas around it. Further, Developer was faced with certain other force majeure events including but not limited to non-availability of raw material due to various stay orders of Hon'ble Punjab & Haryana High



Court and National Green Tribunal thereby stopping/regulating the mining activities, brick kilns, regulation of the construction and development activities by the judicial authorities in NCR on account of the environmental conditions, restrictions on usage of water, etc. In addition to above all the projects in Delhi NCR region are also affected by the blanket stay on construction every year during winters on account of AIR pollution which leads to further delay the projects. That such stay orders are passed every year either by Hon'ble Supreme Court, NGT or/and other pollution boards, competent courts. Environment Pollution (Prevention & Control) Authority established under Bhure Lal Committee, which in turn affect the project. That to name few of the orders which affected the construction activity are as follows: (i) Order dated 10.11.2016 and 09.11.2017 passed by the Hon'ble National Green Tribunal.

29. That in July 2017 the Govt. of India further introduced a new regime of taxation under the Goods and Service Tax which further created chaos and confusion owing to lack of clarity in its implementation. Ever since July 2017 since all the materials required for the project of the company were to be taxed under the new regime it was an uphill task of the vendors of building material along with all other necessary materials required for construction of the project wherein the auditors and CA's across the country were advising everyone to wait for clarities to be issued on various unclear subjects of this new regime of taxation which further resulted in delays of procurement of materials required for the completion of the project. That further the construction has also been delayed due to the Covid- 19 pandemic which kicked start in March 2020 and is still ongoing.



30. That the payment of the lease rentals was stopped after the March 2021 solely for the Force Majeure Condition i.e., the wave of covid-19 pandemic which continued and is still continuing.
31. All other averments made in the complaint were denied in toto.
32. 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:

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

E. I Territorial jurisdiction

34. 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

35. 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.

36. 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 Objections regarding non-payment of prepossession lease rental due to force majeure:

37. The respondent-promoter raised the contention that as per MOU dated 13.09.2019 respondent has to pay prepossession lease rental from 13.09.2019 till the application for offer of possession is filed. And the respondent has pre possession rental till 13.09.2021 and thereafter they have failed to pay due to conditions beyond the control of the respondent/promoter such as non-availability, increasing in the cost of construction, non-availability of construction material, orders passed by National Green Tribunal to stop construction to prevent emission of dust in the month of April, 2015 and again in November, 2016 along with demonetization and new tax law i.e., GST, affected the development work of the project. First of all, the orders of High Court in



the year 2012 does not have any impact on the project as the same was passed even before the MOU was executed between the parties. Further, 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. The plea regarding delay due to GST and demonetisation is also devoid of merit and thus, all the pleas stand rejected. 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.

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

39. 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 complainant:



- (i) Pre-possession rental is due and same is required to be paid i.e., pay the pending this month prepossession lease rental as per Mou since the month of March 2021 along with interest for every month of delay at prevailing rate of interest @ 9%.
40. The complainant booked a unit in the project of the respondent namely 'Park Street' situated at sector-85, Gurugram. The MOU in this regard was executed inter se the complainant and the respondent and the unit no. SH-01, on 4th floor admeasuring 663.92 sq. ft. was allotted to the complainant. The total consideration of the unit was Rs. 48,13,420/- out of which the complainant has paid an amount of Rs. 25,51,150/- .
41. The contention of the complainant is that as per clause 3 of the MOU dated 13.09.2019 respondent is liable to pay the prepossession lease rental @ 36.25% from 13.09.2019 till the application for offer of possession is filed for retail block and the respondent/builder has stopped payment from March 2021. The respondent/builder in this regard has stated that it has paid an amount of Rs. 3,97,104/- as a prepossession lease rental for 18 months i.e., till March 2021 which is also shown in the ledger account.
42. 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.

43. 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.

44. 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.
45. The authority observed that the clause 3 of the MOU dated 13.09.2019 is a relevant clause and reproduced hereunder for ready reference:

3. Lease Rental

3.1.1 Pre-Possession Lease Rental

The Developer shall pay to the Allottee pre possession lease rental from 13.09.2019 till the application for offer of possession is filed for Retail Block, at the rate of Rs. 36.25/- per sq. ft. of super area of premises per month (hereinafter referred to as the Pre-Possession Lease Rental).

46. On bare reading of the clause of MOU it can be said that the developer has decided to pay assured return from 13.09.2019 till application for offer of possession is filed. However, the "till application for offer of possession" is ambiguous in language and not clear. As when the project is complete the application is made to the competent authority for obtaining occupation certificate and after obtaining occupation certificate the unit is offered to the allottees. Even making an application for occupation certificate does not in any way prove that building is complete. Therefore, logically this sentence can only be read as offer of possession.



47. 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 the offer of possession of the unit.


H. Directions of the Authority:

48. 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 March 2021 @ 36.25% per sq. ft. per month till the offer of possession of unit as per memorandum of understanding along with prescribed rate of interest @ 10.75% p.a.
- ii) 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.

49. Complaint stands disposed of.

50. File be consigned to the registry.


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 16.08.2023