



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

Complaint no. :	3307 of 2021
Date of filing complaint:	01.09.2021
Order Reserve On:	31.03.2023
Order Pronounced On:	26.05.2023

Satwant Yadav R/O: H. No. 239, Sector-10, Gurugram, Haryana	Complainant
Versus	
M/s KPDK Buildtech Pvt. Ltd. Office: 2 nd Floor, A-8, Paryavaran Complex, IGNOU Road, New Delhi-110030	Respondent

CORAM:	
Shri Sanjeev Kumar Arora	Member
APPEARANCE:	
Sh. Shivjeet Yadav (Advocate)	Complainant
Sh. Himanshu 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	"Newtown Square" at Sector 95-A Gurugram
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 licensee	Mahender Kumar Gupta
6.	RERA Registered/ not registered	192 of 2017 dated 14.09.2017 valid upto 30.11.2018
7.	Unit no.	SH/G/047A, Ground floor (page no. 32 of complaint)
8.	Unit area admeasuring (super area)	365 sq. ft. (page no. 32 of complaint)
9.	Date of application	27.09.2019 (page no. 26 of complaint)
10.	Date of allotment letter	30.09.2019 (page no. 27 of complaint)
11.	Date of agreement for sale	05.10.2019 (page no. 30 of complaint)



12.	Date of MOU	05.10.2019 (page no. 64 of complaint)
13.	Date of endorsement by way of affidavit	18.02.2021 (annexure R-4 on page no. 35 of reply)
14.	Possession clause	10.1 Schedule for possession of the said commercial unit <i>The Seller agrees and understands that timely delivery of possession of the commercial Unit to the Allottee and the Common Areas to the association of allottees or the competent authority, as the case may be, provided under Rule 2(1)(f) of the Rules, is the essence of the Agreement. The Seller assures to handover possession of the Commercial Unit by November 2019 unless there is delay or failure due to 'force majeure', court orders, government policy/guidelines, decisions affecting the regular development of the real estate project.</i> (Emphasis Supplied)
15.	Due date of possession	30.11.2019 (As per possession clause 10.1 of the agreement dated 05.10.2019)
16.	Assured Return Clause	3.Return on Investment From the date of receiving of Rs. 36,23,625/- + GST till the offer of possession, the First Party shall pay to the Purchaser the Return on investment at the rate of Rs. 33,217/-. From the date of offer of possession till next 3 years the developer shall pay to the Purchaser an investment return of Rs. 26,842/- per



		month subject to full and final payment by second party due on offer of possession.
17.	Assured return paid by the respondent	October 2019-December 2019 (3months) @ Rs. 33,217/- January 2020- March 2020 (2 months) @ 26,842/- October 2020- March 2021 (6 months) @ Rs. 26,842/-
18.	Total sale consideration	Rs. 43,00,000/- [as per payment plan on page no. 63 of complaint]
19.	Amount paid by the complainant	Rs. 47,83,154/- [as per receipt annexed on page no. 28, 74 to 76 of complaint]
20.	Notice of permissive possession	09.12.2019 (annexure R-2 on page no. 25 of reply)
21.	Occupation certificate	04.08.2020 (Document annexed with written submission filed by respondent)
22.	Cancellation Letter	13.09.2021 (annexure R-7 on page no. 47 of reply)
23.	Offer of possession	Not offered

B. Facts of the complaint:

3. That Ms. Richa Yadav (previous allottee) applied for the booking of a commercial unit of project named "Newtown Square" at Sector 95A, Pataudi road, Gurugram, being developed by KPDK Buildtech Pvt. Ltd. The marketing staff of the developer represented that the project will



be fully developed and will be ready for the delivery of possession by November 2019. Also, it was represented to Ms. Richa Yadav (previous allottee) that an assured return will also be given to the allottee of the commercial Unit as a lease rent from the date of purchase.

4. That the complainant is the mother of the previous allottee i.e., Ms. Richa Yadav. She on 18.02.2021 transferred the purchased commercial unit in the favour of her mother Smt. Satwant Yadav (complainant).
5. That Ms. Richa Yadav (previous allottee) was allotted the above said unit admeasuring 365 sq. ft. on the ground floor in block-A and paid Rs. 4,50,000/- as the booking amount including the GST. The total sale consideration of the unit is Rs. 43,00,000/-.
6. That pre-printed, arbitrary, one-sided, and ex-facie agreement for sale/ builder buyer agreement was executed between Ms. Richa Yadav and the respondent. As per clause 10.1 of the buyer's agreement, it has been stated that "The seller assures to hand over possession of the commercial unit by November 2019".
7. That thereafter a pre-printed, arbitrary, one-sided and ex-facie MOU (Memorandum of Understanding) was signed between Ms. Richa and the respondent wherein the total amount paid by Ms. Richa has been mentioned which amounts to the total of Rs. 40,58,463/- as of 5th October 2021. As per the MOU, it was also agreed between the parties that the said unit will be leased by the respondent to a third party for the period of 3 years. It was also agreed as per clause 3.1 of the MOU that an assured return of Rs. 33,217/- per month will be paid to the allottee from the date of payment of 36,23,625 + GST and after the offer of possession this amount will be reduced to Rs. 26,842/- per month.



On 5th October 2019, Ms. Richa Yadav paid the total amount of Rs. 40,58,463/-.

8. That Ms. Richa Yadav (previous allottee) started to receive the lease rent as per MOU from the respondent. However, the lease rent as per the agreement 11% ROI (return on investment) i.e., Rs. 33,217/- was received only for the period of 3 months i.e., October to December 2019. In December 2019, it was informed that the lease rent will later be reduced to 8% ROI by the respondent stating that the OC (Occupation Certificate) has been obtained for the project and the process to deliver the possession start soon. Reduced lease rent i.e., Rs. 26,842/- was given to Ms. Richa Yadav from January 2020. This reduced lease was given only for the period of two months i.e., January and February 2020.
9. However, during the period of six months i.e., April to October 2020, no lease rent was paid on the account of Covid Lockdown. The respondent without any consultation from the allottee imposed a moratorium period and stopped paying the lease rent that was due to the allottee.
10. That the respondent in June 2020 sent an email to Ms. Richa Yadav (previous allottee) saying that the occupation certificate has been obtained for the project. It was informed that the process of possession will be commenced very soon. It was also informed that the respondent will not be able to pay for the lease rent on the pretext of covid-19 lockdown.
11. That the lease rent for the period of April 2020 to September 2020 has been not paid till now. The reasoning for not paying the rent as per the respondent has been given to be the financial incapacity of the respondent. This amount has not been paid even after repeated requests by the complainant. This has led to the mental harassment of



the complainant as this lease rent is amounts to a substantial value and there is no other source of income of the complainant at this old age.

12. That after the period of six months i.e., April to September the respondent started to pay for the lease rent again at the rate of 26,842/- per month. This payment of lease rent continued till the period of March 2021. Again, the respondent stopped paying the lease rent to the complainant on the account of lockdown.
13. That the complainant has been repeatedly asking from the respondent to initiate the process of delivering the possession, but the respondent has been demanding from the complainant a total sum of Rs. 10,73,748/- in addition to the sum already paid i.e., Rs. 47,83,154/- This amount of Rs. 10,73,748/- includes the sum of Rs. 6,46,050/- on the account of fit-out cost, development cost of Rs. 68062/-, augmentation charges for electricity supply of Rs. 66605/-, power backup charges of Rs. 18,816/-.
14. That the lease rent was reduced from Rs. 33217/- to Rs. 26,842/- after December 2019. The lease rent was reduced on the pretext of obtaining the OC and on the promise of delivery of possession of the unit. However, it is to be noted that that the offer of possession was not given to the complainant as of June 2021. The complainant has demanded from the respondent to pay the same via email, but the respondent has outrightly denied fulfilling this obligation.

C. Relief sought by the complainant:

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



- (i) Direct the respondent to pay the delayed possession with interest at the rate of 24% from the due date of possession till actual handover of the unit, with all amenities as specified in the buyer's agreement.
- (ii) Direct the respondent not to charge the additional development charges as the development charges are included in the total cost of the unit.
- (iii) Direct the respondent not to charge the augmentation charges for electricity as the augmentation charges are included in the total cost of the unit.
- (iv) Direct the respondent to provide the copy of occupation certificate to the complainant.
- (v) Direct the respondent to pay the due lease rent that has been withheld by the respondent along with interest.

D. Reply by respondent:

The respondent by way of written reply made following submissions:

16. That in 2019, one Ms. Richa Yadav applied for commercial unit in the said project which was subsequently approved by the respondent and unit no. SH/G47A admeasuring 365 sq. ft. on the ground floor in block A of the said project was allotted to Ms. Richa Yadav on 30.09.2019.
17. Thereafter, an agreement to sell as well as a memorandum of understanding dated 05.10.2019 ("MOU") were executed between the respondent and Ms. Richa Yadav with respect to the said unit.
18. That the respondent offered permissive possession of the impugned shop to the complainant after making application of occupancy certificate vide letter dated 09.12.2019 and thereafter affidavit cum



undertaking for permissive possession was submitted by the complainant.

19. By way of the above MOU, it was mutually decided by both parties that after offer of possession by the respondent, the complainant would be eligible to receive a sum of Rs. 26,842 /- per month as return on investment. However, owing to the worldwide pandemic situation due to the outbreak of novel Covid – 19 virus, the respondent was forced to apply moratorium on the return of investment and accordingly two options were provided to Ms. Richa Yadav and other similarly placed purchasers on the ground floor. Ms. Richa Yadav, vide email dated 11.08.2020 opted for the first option which is as follow –
20. “(Option A) payment of monthly return on investment suspended for 6 months from April 2020 to September 2020 and for the subsequent 6 months i.e., October 2020 to March 2021 return on investment to be paid @ 50 % of the return amount.”
21. That after meeting with the representative of the complainant, Shri. Ajay Kumar Yadav, the respondent decided to make an exception for the complainant and paid 100 percent return on investment to the complainant from October 2020 – March 2021 to avoid any doubts of the complainant.
22. The complainant later stepped into the shoes of Ms. Richa Yadav by way of an affidavit cum undertaking dated 18 February 2021 and accordingly the unit was transferred in the name of complainant.
23. That as agreed between both parties, the respondent with prior consent of the complainant entered into a lease contract with M/s Via Retail Pvt. Ltd. which was duly shown to the representative of the complainant. That pursuant to the aforesaid lease contract with M/s Via Retail Pvt.



Ltd., the respondent issued a demand note dated 26.06.2021 seeking a sum of Rs. 8,18,948 /- excluding GST and taxes towards fit out costs and other charges such as difference in development charges and electricity charges payable to the statutory authorities.

24. That instead of making payment in terms of the demand letter issued by the respondent, the complainant issued an email dated 29.06.2021 to the respondent thereby raising frivolous issues to evade from his liability to pay the legit amount due and payable by the complainant towards the unit.
25. Thereafter, the complainant started threatening the respondent that he shall take legal actions against the respondent and got issued a legal notice dated 23.07.2021 wherein it was arbitrarily sought by the complainant that delivery of possession be given to the complainant. The complainant since the inception of the present transaction was aware that the complainant would only be entitled to virtual/symbolic/permissive possession of the unit which would then be leased out by the respondent with consent from the complainant.
26. The respondent was left with no option but to respond to the whimsical averments made on behalf of the complainant's advocate against the respondent and hence a response dated 09.08.2021 was issued to the complainant's advocate reiterating the facts which were already explained to the complainant on various occasions.
27. Due to the conduct of the complainant of non-payment of the legitimate dues towards the unit, the respondent was constrained to issue a notice of cancellation dated 13.09.2021 to the complainant wherein it was made clear to the complainant that he has no right left over the



impugned shop and that the refund towards the money paid by the complainant shall be initiated as per the MOU and the agreement to sell.

28. That the complainant has filed the present petition after receiving the cancellation letter issued by the respondent and the present petition is nothing but a pressuring tactic to harass the respondent herein.
29. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority:

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

E. I Territorial jurisdiction

31. 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

32. 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.

33. 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. Entitlement of the complainant for refund:

- (i) Direct the respondent to pay the delayed possession with interest at the rate of 24% from the due date of possession till actual handover of the unit, with all amenities as specified in the buyer's agreement.
 - (ii) Direct the respondent not to charge the additional development charges as the development charges are included in the total cost of the unit.
 - (iii) Direct the respondent not to charge the augmentation charges for electricity as the augmentation charges are included in the total cost of the unit.
 - (iv) Direct the respondent to provide the copy of occupation certificate to the complainant.
 - (v) Direct the respondent to pay the due lease rent that has been withheld by the respondent along with interest.
34. That Ms. Richa Yadav previous allottee booked a unit in the project of the respondent namely, Newtown Square situated at sector-95 A, Gurgaon for a total sale consideration of Rs. 43,00,000/- out of which

she has paid an amount of Rs. 47,83,154/-. The allotment of the said unit was made on 30.09.2019. Further the agreement to sell and MOU was executed between the previous allottee and the respondent on 05.10.2019. As per the clause 10.1 the possession of the unit was to be handed over by November 2019. Thereafter, on 08.02.2021 the previous allottee i.e., Ms. Richa Yadav transferred her rights and liabilities in favour of her mother i.e., Mrs. Satwant Yadav (complainant) by way of affidavit.

35. As per clause 3.1 of the MOU the respondent-builder has paid an amount of Rs. 3,41,229/- as lease rent to the allottee from a period of October 2019 till March 2021.
36. That on 09.12.2019 the respondent has sent the notice for permissive possession to the previous allottee and demanded an amount of Rs. 10,73,748/- on account of fit out of possession or development and augmentation charges. And due to non-payment of such charge's respondent cancelled the unit on 13.09.2021. Now the question before the authority is whether this cancellation is valid?
37. As per clause 3.6 of the MOU dated 05.10.2019, the allottee was liable to pay the amount on account of fitting and fixture which was already paid by the developer. In this regard clause 3.6 of the MOU is reproduced under for ready reference:

The Developer at the request of the Lessee, may provide the lease of the premises along with the fitouts, i.e., fitting and fixtures the cost of which shall initially be borne by the developer without obtaining prior consent of the allottee(s) and the purchaser agrees that the same shall be fully reimbursed by it to the developer without any delay or demur. The hire charges receivable from the lessee for such fitting and fixtures shall be directly received by the purchaser.

38. The OC for the unit of the complainant was obtained on 03.07.2020 from the competent authority. Thereafter, the respondent had issue various reminders dated 08.06.2021, 26.06.2021, 03.07.2021, 13.07.2021 and 28.07.2021 for clearing the outstanding dues of the allotted unit. The complainant has failed to pay the outstanding amount as per the MOU. Further clause 1.4 of the said MOU stated that If the purchaser fails to make payment of the balance amount due within a maximum period of 60 days along with interest as stated herein in this clause to the developer, the developer shall be entitled to terminate this MOU and forfeit the earnest money after deducting outstanding interest, holding charges, maintenance charges etc. Further, the respondent has cancelled the unit vide cancellation letter dated 13.09.2021. The respondent cancelled the unit of the complainant with adequate notices. Thus, the cancellation of unit is valid.
39. The Hon'ble Apex court of the land in cases of ***Maula Bux Vs. Union of India (1973) 1 SCR 928 and Sirdar K.B Ram Chandra Raj Urs Vs. Sarah C. Urs, (2015) 4 SCC 136***, and followed by the National Consumer Dispute Redressal Commission, New Delhi in consumer case no. 2766/2017 titled as ***Jayant Singhal and Anr. Vs. M/s M3M India Ltd.*** decided on 26.07.2022, took a view that forfeiture of the amount in case of breach of contract must be reasonable and if forfeiture is in nature of penalty, then provisions of Section 74 of Contract Act, 1872 are attracted and the party so forfeiting must prove actual damages. After cancellation of allotment, the flat remains with the builder as such there is hardly any actual damage. So, it was held that 10% of the basic sale price is reasonable amount to be forfeited in the name of earnest money. Keeping in view, the principles laid down by the Hon'ble Apex court in the above mentioned two cases, rules with regard to forfeiture of

earnest money were framed and known as Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, which provides as under-

"5. AMOUNT OF EARNEST MONEY

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment /plot /building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer.

40. Keeping in view the aforesaid legal provisions, the respondent is directed to refund the deposited amount i.e., Rs. 47,83,154/- after deducting 10% of the basic sale price of the unit within a period of 90 days from the date of this order along with interest @ 10.70% p.a. on the balance amount from the date of cancellation i.e., 13.09.2021 till the date of actual realization.

G. Directions of the Authority:

41. 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 is directed to refund the paid-up amount of Rs. 47,83,154/- after deducting 10% of the basic sale price of the unit along with interest at the prescribed rate i.e., 10.70% on the

balance amount, from the date of cancellation i.e., 13.09.2021 till date of actual realization. The amount paid on account of assured return i.e., Rs. 3,41,229/- shall 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.

42. Complaint stands disposed of.

43. File be consigned to the registry.




(Sanjeev Kumar Arora)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 26.05.2023

HARERA
GURUGRAM