

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

Complaint no. : 7362 of 2022  
Date of first hearing: 31.03.2023  
Date of decision : 16.02.2024

Monika Devi R/o: Village Sunderpur, PO Siwari, Tehsil Farukhnagar, Gurgaon, Haryana.	<b>Complainant</b>
Versus	
M/S Mascot Buildcon Pvt. Ltd. Office: - 294/1, Vishwakarma Colony, Mehrauli, Badrapur Road, New Delhi- 110044	<b>Respondent</b>
<b>CORAM:</b>	
Shri Sanjeev Kumar Arora	<b>Member</b>
<b>APPEARANCE:</b>	
Shri Attar Singh Kharb	Complainant
Shri Gulshan Sharma	Respondent

**ORDER**

1. The present complaint dated 13.12.2022 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. N.	Particulars	Details
1.	Name of the project	"Oodles Skywalk", Sector-83, Gurugram Haryana
2.	Nature of the project	Commercial Complex
3.	Project area	3.0326 acres
4.	DTCP license no. and validity status	08 of 2013 dated 05.03.2013 valid upto 04.03.2017
5.	Name of Licensee	Dharam Singh
6.	RERA Registered/ not registered	<b>Registered</b> 294 of 2017 dated 13.10.2017 valid upto 31.12.2019
7.	Unit no.	G-61, Ground Floor (page no. 38 of complaint)
8.	Unit area admeasuring	337.13 sq. ft. (page no. 38 of complaint)
9.	MOU date	29.06.2013 (page no. 18 of complaint)

10.	Allotment Letter	18.01.2016 (Page no. 32 of complaint)
11.	Space Buyer agreement	19.03.2016 (page no. 35 of complaint)
12.	Date of start of construction	NA
13.	Possession clause	<b>38.</b> The Company will based on its present plans and estimates, contemplates to offer possession of said unit to the Allottee (s) within 36 months of signing of this Agreement or within 36 months from the date of start of construction of the said Building whichever is later with a grace period of 3 months, subject to force majeure events or Government action/inaction.
14.	Due date of delivery of possession	19.03.2019 (calculated from the date of agreement) Note: Grace period is not allowed.
15.	Assured return clause	<b>3.</b> Assured Return 3.1 Till the notice for offer of possession is issued, the Developer, shall pay to the Allottee an Assured Return at the rate of Rs. 112.45/-.
16.	Legal notice for payment of assured return	19.10.2022 (Page no. 80 of complaint)
17.	Total sale consideration	Rs. 28,65,605/- (page no. 38 of complaint)

18.	Amount paid by the complainant	Rs. 28,23,269/- (as alleged by respondent at page 13 of complaint)
19.	Occupation certificate	26.10.2023 (as stated by respondent during hearing)
20.	Offer of possession	08.11.2023 (as stated by respondent during hearing)

**B. Facts of the complaint**

3. That the complainant booked a shop having a super area of 337.13 sq. ft. at a sale price of Rs. 28,65,605/-. This amount inclusive of External Development charges (EDC), Infrastructural Development charges (IDC).
4. That the complainant deposited an amount of Rs. 28,23,269/- as demanded by them between the period from 03.06.2013 to 10.06.2013.
5. That an MOU was signed between the complainant and the respondent on 29.06.2013. As per MOU the name of the coming commercial project being developed by the developer is "Oodles Skywalk" at Sector-83, Gurgaon, Haryana.
6. That as per MOU the space buyer's agreement for the unit shall be executed at the time of offer of possession of the unit. The respondent started paying the amount of assured return of Rs. 37,910/- after deducting 10% TDS i.e. Rs. 34,119/- w.e.f. 08.08.2013.

7. That subsequently, in the year 2016 a space buyer's agreement was entered between the respondent and complainant on 19.03.2016. The complainant signed this agreement presuming that the respondent is likely to give an offer of possession of the allotted shop G-61 as per the terms of MOU. After the signing of the space buyer's agreement on 19.03.2016, the developer instead of offering letter of possession within a short time of a month or so, stopped crediting of monthly assured return after 14.10.2016.
8. Stopping of payment of monthly assured return before offer of possession is violating the terms & conditions laid and agreed by both parties in MOU dated 29.06.2013.
9. Though, the respondent, has deducted 10% TDS from the amount of monthly assured return, however, never issued a certificate to us at the end of financial year 2013-2014, 2014-2015 and 2015-2016 for our records.
10. That this routine was going on from November 2016 till March 2020 when Covid 19 arrived in India and the process of lock down, imposition of many restrictions on movement of people and stoppage of construction at projects came in by Central Government / State Government. This remained there for more than two and half years.
11. Thereafter, in the month of September 2022, complainant again contacted their office to know the actual situation. The complainant was astonished and worried to know that no responsible person was available at their project site.
12. That on 19.10.2022, a legal notice from N K Associates, on her behalf was sent to Mascot Buildcon Pvt. Ltd. calling upon them to pay the

arrears of monthly assured returns which are pending from October 2016 onwards and till date.

13. That the complainant is praying before HRERA, Gurugram, for the redressal of the problems and difficulties being faced by her.

**C. Relief sought by the complainant:**

14. The complainant has sought following relief(s):
- I. Direct the respondent to pay delay possession charges at prevailing rate of interest.
  - II. Direct the respondent to pay the assured return @Rs. 37,910/- per month from 19.10.2016 till up to date of filing i.e. 18.11.2022 amounting to Rs. 27,67,430/-.

**D. Reply by the respondent**

15. That the present complaint is not maintainable in the eyes of law as this Hon'ble Authority has no jurisdiction to entertain the issue related with "assured return". Hence, the present complaint qua the relief seeking is liable to be dismissed at this sole ground only.
16. That the present complaint deserves to be dismissed as the same has been filed by the complainant with an intention to harass the respondent and to gain unjust enrichment.
17. That the complainant herself, after hearing the prospective project at Gurgaon, from different-different sources, herself reached at the marketing office and appraised her willingness to go with the project. The complainant herself enquired about the project from the representatives/officials of the respondent and it is only on her request for booking regarding one commercial unit after seeing the market viability by the complainant and seeing other lucrative offers attached

- with the project, she understood each and everything about the project and then only proceeded with booking of the unit with the respondent and paid the booking amount.
18. That the MOU is the tentative document, followed by the space buyer agreement, which is the final binding agreement between any developer and Allottee as per RERA approved, which, admittedly, has been executed between the complainant and the respondent in the present case. Thus, to say and interpreted that the said agreement shall be executed at the time of completion / offer of possession of the unit.
  19. After MOU, both the parties fulfilled certain documentation and procedures and after fulfilling the same, allotment letter was issued in favour of complainant allotting retail space/shop. Thereafter, immediately on 19.3.2016, finally, SBA was executed between the complainant and the respondent.
  20. That as per clause 79 and 83 of the buyer's agreement dated 19.3.2016, the "assured return" is not payable to the complainant as the MOU stands extinguished, which is clear from the language of the terms and conditions contained in the SBA.
  21. Moreover, it has been held in numerous judgments rendered by the Hon'ble High Court of Delhi, Punjab and Haryana as well as Hon'ble Supreme Court that the contract superseding previous MOU shall stand and prevail and if the terms of the SBA executed between the parties is not denied (which is admitted in the present case), the terms of SBA would supersede the MOU, according to which, the possession shall be given from the date of execution of SBA and not from the date of execution of MOU. The law is well settled on this aspect, which shall be dealt with at the time of argument of the present case.

22. That the complainant is not an illiterate person as she had signed/executed the SBA, only after reading and understanding the terms and conditions as well as covenants of SBA, clearly specifying each and every details of the unit concerned (project in question) since its inception till the execution of final document i.e. sale deed; Secondly, assuming without conceding, if it is believed that complainant had signed/executed SBA under any coercion / duress, then why immediately after execution of SBA, she has not lodged any complaint with any Police Station regarding this and/or written any mail/letter to this effect to the respondent company, saying that the SBA was signed under coercion/duress and same is not binding on her, being apparently containing one-sided clauses in favour of respondent builder.
23. Thus, after signing/executing the SBA in the year 2016, the complainant at this belated stage, after six (6) years, cannot approbate and reprobate and take this stand, which is not feasible and practical and not maintainable before this Hon'ble Authority. Moreover, the contents asserted are vague, which have no relevance, after passing of various dictums by the Hon'ble Courts, which declared the payment of "assured return" as invalid and illegal in the eyes of law. The Court including SEBI, declared the "assured return" payment by the promoter/builder to allottee "illegal" and directed them not to proceed or adopt such practice in future by the promoter/builder and thus specifically, in lieu of such directions, the promoter has to abide by the guidelines of the SEBI and the Courts and has to stop the "assured return" payment.
24. That under clause 38 of the agreement, it was clearly stipulated by the respondent no. 1, that the company, based on its present plans and estimates, contemplates to offer possession of said unit to the allottee



within 36 months of signing of this agreement or within 36 months from the date of start of construction of the said building, whichever is later with a grace period of 3 months, subject to force majeure events or Governmental action/inaction.

25. That if the completion of the said building is delayed by reason of slow down, strike or due to a dispute with the construction agency employed by the "company", lock out or departmental delay or civil commotion or by reason of war or enemy action or terrorist action or earthquake or any act of God or any other reason beyond the control of the "company", the "company" shall be entitled to extension of time for delivery of possession of the said premises. It was further stipulated that the "company" as a result of such a contingency arising, reserves the right to alter or vary the terms and conditions of this agreement or if the circumstances beyond the control of the "company" so warrant, the "company" may suspend the scheme for such period as it might consider expedient. It was further stipulated that if the company is unable to complete the project on account of law passed by the legislature or any other govt agency, in that event, the company, if so advised shall be entitled to challenge the validity, applicability can challenge the efficacy of such law and the amount paid by the allottees shall remain with the company. In fact there existed other stipulations also, which if required shall be dealt with at the time of hearing the present complaint.
26. Copies of all the relevant documents have been duly filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

#### **E. Jurisdiction of the authority**

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

**E.I Territorial jurisdiction**

28. 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**

29. The 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 promoter, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

30. 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 relief sought by the complainant.**

**F. I** Direct the respondent to pay delay possession charges at prevailing rate of interest.

**F.II** Direct the respondent to pay the assured return @Rs. 37,910/- per month from 19.10.2016 till up to date of filing i.e. 18.11.2022 amounting to Rs. 27,67,430/-.

31. All the above-mentioned reliefs are interrelated accordingly, the same are being taken up together for adjudication. The complainant has sought delay possession charges and has also sought assured returns on monthly basis as per the MOU dated 29.06.2013.

32. The complainant booked a unit in the project of respondent and the MOU was executed between the complainant and the respondent on 29.06.2013 w.r.t the assured return. Clause 3 of the MOU dated 29.06.2013 is reiterated as under:

**3. Assured Return**

*3.1 Till the Notice for offer of possession is issue, the Developer shall pay to the Allottee an assured return at the rate of Rs. 112.45/- per sq. ft. of super area of premises per month.*

33. Thereafter the space buyer's agreement for the said unit was executed on 19.03.2016. The total sale consideration of the unit is Rs. 28,65,605/- out of which the complainant has made a payment of Rs. 28,23,269/-.

34. It is pleaded on behalf of the complainant that the respondent has not complied with the terms and conditions of the MOU. Though for some time, the amount of assured returns was paid but later on, the respondent refused to pay the same. The complainant has sought assured return on monthly basis as per the MOU dated 29.06.2013.
35. Further, the complainant intends to continue with the project and is seeking delay possession charges as per the provisions under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under: -

***"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, —*

*.....*

*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."*

36. Clause 38 of the space buyer's agreement provides the time period of handing over possession and the same is reproduced below:

*38. The Company will based on its present plans and estimates, contemplates to offer possession of said unit to the Allottee (s) within 36 months of signing of this Agreement or within 36 months from the date of start of construction of the said Building whichever is later with a grace period of 3 months, subject to force majeure events or Government action/inaction.*

37. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainant not being in default under any provision of this agreement and in compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions is not only

vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning.

38. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builder/promoter and buyer/allottee are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residential, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment buyer's agreement which would thereby protect the rights of both the builders and buyers in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the rights of the buyer/allottees in case of delay in possession of the unit.
39. By virtue of clause 38 of the space buyer's agreement executed between the parties, the possession of the subject unit was to be delivered within a period of 36 months of the agreement or within 36 months from the date of start of construction of the said building whichever is later with a grace period of another 3 months, which is not allowed in the present case. The date of construction of the said building is not available on records so the due date is calculated from the date of agreement which comes out to be 19.03.2019. However now, the proposition before it is as to whether the allottee who is getting/entitled for assured return even after expiry of due

date of possession, can claim both the assured return as well as delayed possession charges?

40. To answer the above proposition, it is worthwhile to consider that the MOU was executed between the parties on 29.06.2013 and as per clause 3 of the MOU the respondent is liable to pay assured return till the date of offer of possession, but subsequently on 19.03.2016 the space buyer's agreement was executed. It is a matter of fact that the complainant has signed the buyer's agreement with his own free will and consent and as per clause 79 and 83 of the buyer's agreement dated 19.3.2016, the "assured return" is not payable to the complainant as the MOU stands extinguished. Clause 79 and clause 83 of the space buyer's agreement is reproduced hereunder for ready reference:

*79. It is specifically understood by the Allottee(s) that upon execution, the terms and conditions as set out in the Agreement shall supersede the terms and conditions as set out in the application and/or any other document, mail or correspondence in this regard.*

*83. That this Agreement which has been titled as "Space Buyer's Agreement" constitutes the entire Agreement between the parties and revokes and supersedes all previous discussions/correspondence, application and agreement between the parties, if any, concerning the matters covered herein whether written, oral or implied. This Agreement shall not be changed or modified except by written amendments duly agreed by the parties. The terms and conditions and various provisions embodied in this Agreement shall be incorporated in the sale deed and shall form part thereof.*

41. Further section 62 of the Indian Contract Act, 1872 is reproduced hereunder:

*62. Effect of novation, rescission, and alteration of contract  
If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract, need not be performed.*

42. Therefore, as per clause 79 and clause 83 of the space buyer's agreement and section 62 of the Indian contract Act, 1872 the complainant is not

liable to receive the amount on account of assured return as agreed in the MOU dated 29.06.2013, as the space buyer's agreement dated 19.03.2016 supersedes all previous documents and agreements executed between the parties.

43. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, she shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed 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.

44. 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.
45. 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., 16.02.2023 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.

46. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

*"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*

*Explanation. —For the purpose of this clause—  
the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*

*the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

47. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.85% p.a. by the respondent/promoter which is the same as is being granted to the complainant in case of delay possession charges.
48. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 38 of the space buyer's agreement executed between the parties, the possession of the subject unit was to be delivered within a period of 36 months of the agreement or within 36 months from the date of start of construction of the said building whichever is later with a grace period of another 3 months, which is not allowed in the present



case. The date of construction of the said building is not available on records so the due date is calculated from the date of agreement which comes out to be 19.03.2019.

49. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 26.10.2023. The respondent has offered the possession of the subject unit(s) to the respective complainant after obtaining occupation certificate from competent authority. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. This 2 months' of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e., 19.03.2019 till the expiry of 2 months from the date of offer of possession (08.11.2023) plus two months (i.e., 08.01.2024).
50. Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the space buyer's agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such, the allottees shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 19.03.2019 till offer of possession plus

two months (i.e., 08.01.2024), at the prescribed rate i.e., 10.85 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

#### **H. Directions of the authority**

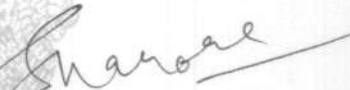
51. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent is directed to handover physical possession of the subject unit within 30 days from the date of this order as occupation certificate of the project has already been obtained by it from the competent authority.
- ii. The respondent is directed to pay delayed possession charges at the prescribed rate of interest i.e., 10.85% p.a. for every month of delay on the amount paid by the complainant to the respondent from the due date of possession 19.03.2019 till offer of possession plus two months i.e., 08.01.2024 as per proviso to section 18(1) of the Act read with rule 15 of the rules.
- iii. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement.
- iv. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.85% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- v. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

vi. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order of this order as per rule 16(2) of the rules.

52. Complaint stands disposed of.

53. File be consigned to registry.

  
(Sanjeev Kumar Arora)  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 16.02.2024

**HARERA**  
**GURUGRAM**