

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

Complaint no.	:	1560 of 2023
Date of filing:		05.04.2023
Date of decision:		25.04.2024

Mrs. Rinki R/o 5322, Galin no. 67, Reghar Pura, Karol Bagh, Central Delhi, New Delhi-110005.	Complainant
Versus	
M/s VSR Infratech Private Limited Office address: Ground Floor, Plot No. 14, Sector-44, Industrial Area, Gurugram.	Respondent no.1
M/s KS Propmart Private Limited Office address: Ground Floor, Plot No. 14, Sector-44, Industrial Area, Gurugram.	Respondent no.2

CORAM:

Shri Vijay Kumar Goyal

Member**APPEARANCE:**

Shri Bhajan Lal Jangra (Advocate)	Complainant
Ms. Shriya Takkar (Advocate)	Respondent no. 1
Shri Jagdeep Yadav (Advocate)	Respondent no. 2

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

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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 as provided under the provision of the Act or the rules and regulations made there under or to the allottees as per the memorandum of understanding executed *inter se*.

A. Project and unit related details

2. The particulars of the project, the amount of 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 and location of the project	"Park Street" formerly known as "85 Avenue" Sector -85, Gurugram
2.	Project area	2.85 Acres
3.	Nature of the project	Commercial
4.	DTCP license	100 of 2013 dated 02.12.2013 Valid upto 01.12.2019
5.	Name of Licensee	M/s KS Propmart Private Limited
6.	RERA Registered & validity status	Registered 41 of 2019 dated 30.07.2019 Valid upto 31.12.2021
7.	RERA Extension	Extension No. 7 of 2023 dated 10.04.2023 Extension granted upto 30.06.2023
8.	Unit no.	F-100 (as per MOU page 102 of reply by respondent no.2)
9.	Application form	16.04.2015 (page 113 of reply by respondent no.2)
10.	MOU	25.04.2015 (page 40 of complaint)



11.	Assured Return clause	<p>3.</p> <p>a. From the date of this MOU till the date of receipt of Rs. 9,77,348/- plus applicable taxes that has to be paid by the Allottee on or before 25.04.2016, the Developer shall pay to the Allottee an Assured Return at the rate of Rs. 41.93 per sq. ft. of super area of premises per month.</p> <p>b. From the date of receipt of Rs. 9,77,348/- plus applicable taxes that has to be paid by the Allottee on or before 25.04.2016 till the notice for offer of possession is issued, the Developer shall pay to the Allottee an Assured Return at the rate of Rs. 84/- per sq. ft. of super area of premises per month.</p>
12.	Builder buyer agreement	Not executed
13.	Due date of possession	<p>25.04.2018</p> <p><i>"Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018-SC); MANU/SC/0253/2018 Hon'ble Apex Court observed that "a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract."</i></p> <p>In view of the above-mentioned reasoning, the date of the execution of MoU dated 25.04.2015 ought to be taken</p>

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		as the date for calculating the due date of possession. Therefore, the due date for handing over the possession of the unit comes out to be 25.04.2018.
14.	Sale Consideration	Rs. 19,51,236/- (The sale price is exclusive of EDC, IDC, ECC, PLC, IFMS, power backup charges, service tax, VAT and such other levies/cess as imposed by any statutory authority).
15.	Amount paid by complainant	Rs. 15,17,000/- (as confirmed by both the parties during the proceedings dated 25.04.2024)
16.	Assured return paid to the complainant	Rs.3,94,362/- (as confirmed by the respondent no.2 during the proceedings dated 25.04.2024)
17.	Occupation Certificate	Not obtained
18.	Offer of possession	Not offered

B. Facts of the complaint:

3. The complainant has made the following submissions in the complaint:
- That the complainant was allotted a commercial unit no. F-100, located on first floor having super area 232.29 sq. ft. falling in commercial colony known as "85 Avenue" located at sector -85, Gurugram, Village Badha, Tehsil - Manesar, Distt. Gurugram (Haryana). That despite huge sale consideration from the complainant no agreement executed and the respondents neglected to make assured payment even not refund sale consideration paid by the complainant. The respondents playing hide and seek with the complainant and for the reason stated in the complaint the present complaint is being filed by the complainant to seek intervention of this RERA authority for direction the respondents

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- to refund the sale consideration with interest accrued on principal amount from date of deposit of sale consideration.
- b. That initially the complainant filed a complaint bearing no. 6775/2022 for seeking refund sum of Rs.15,17,000/- with interest and assured return as per MOU dated 25.04.2015 signed by the respondent no. 1 i.e. VSR Infratech Pvt. Ltd, who was supposed to pay the assured return to the complainant and pursuant to the notice issued by RERA, Gurugram, the respondent no.1 took stand that a deed of cancellation dated 01.04.2015 had been signed between the respondent no.1 and respondent no.2, however no deed of cancellation was provided to the complainant by the advocates who appeared on behalf the respondent no.1, despite instruction given by RERA Authority. The respondent no.1 claimed that as per the deed of cancellation the respondent no.1 (developer) had surrendered the development rights and subsequent thereto the respondent no.2 is under contractual obligation to full fill all the claims and develop the project. That the license was also in the name of respondent no.2, therefore, Hon`ble RERA, Gurugram disposed of the complainant bearing no.6775/2022 directing the complainant to file a fresh complaint by arraying the respondent no.2 as party in the complaint.
- c. That the respondents no.1 and 2 are registered under the provisions of Company Act and are engaged in the business of construction & development of real estate project in the NCR Region i.e., Gurugram. The respondent no.1 lured the complainant to sign a MOU and took sale consideration without having title of the project land and approached the complainant and represented that a commercial project is

- proposed to be launched and the same will be constructed soon and respondent no.1 shall pay handsome assured return to the complainant.
- d. That upon representation, assurance and promises given by the respondents, the complainant had booked a unit no. F-100, located on first floor having super area 232.29 sq. ft. falling in commercial colony known as "85 Avenue" located at sector -85, in Gurugram, more particular Village Badha, Tehsil -Manesar, Distt. Gurugram against basic sale consideration of Rs.19,51,236/- out of which sum of Rs.15,17,000/- paid by the complainant through NEFT/RTGS/Cheques.
- e. That the respondents signed a memorandum of understanding dated 25.04.2015 with the complainant in respect of the unit no. F-100 without putting the possession clause of the unit in the MOU and took the sale consideration from the complainant.
- f. That in terms of the article no.3 of the MOU dated 24.04.2015 the respondents were under contractual obligation to pay assured return @Rs.84 /- per sq. ft. to the complainant till actual offer of possession of the unit no. F-100. It was also agreed upon by the respondents that after issuance of offer of possession the allottee shall be free to use the unit for his own use.
- g. That the respondents had received huge sale consideration but no agreement was signed and as per the MOU the respondents were required to sign the space buyer agreement as mentioned in the article no.1 of the MOU.

- h. The detailed terms and condition of the allotment will be more particularly described in a separate document being "space buyer's agreement" for the premises and shall be executed between the parties subsequently.
- i. That the complainant was lured by such false representation and false assurance by the respondents to invest money in purchasing the said unit but till date no space buyer's agreement was signed and executed by the respondents despite huge payment and after some time the respondents stopped the assured return as per MOU. That the respondents failed to complete the construction of the project and the respondents also committed defaulting making assured return amount sum of Rs.6,70,412/- which is due and payable by the respondent as on 02.10.2022.
- j. The complainant visited many times and inspected the project site where no construction activity undertaken by the respondents and it is well settled by plethora of authorities that a buyer cannot be made to wait for possession of unit or his/her dream home, indefinitely or for such a long period.
- k. That respondents defaulted in making payments to the complainant towards assured returns, as contained in the MoU. The complainant submits that the respondents has stopped making payments to the complainant in derogation to the terms and conditions stipulated in the MoU.
- l. That it is evident from the act and omission on the part of the respondents that the respondents had failed to start the construction work of the project and it is evidence on the face of the record that



- amount paid by the complainant invested by the respondents in other business purpose.
- m. The complainant is the one who had invested her life saving in the said project but the respondents have not only cheated and betrayed the complainant but also used hard earned money of the complainant.
- n. That the respondents played fraud upon the complainant by investing the hard money of the complainant and the respondents by its acts and omission had violated the provision of section 11 & 18 of the RERA Act therefore the respondents are liable to pay delayed interest and refund the principal amount.
- o. That despite regular follow up, the respondents had refused to refund sale consideration on one pretext or the other pretext.
- p. It is evident of the irresponsible and desultory attitude and conduct of the respondents, consequently injuring the interest of the buyers who have spent hard earned money in purchasing the said unit in the project, thus, caused the complainant great monetary loss and harassment to the complainant thus the complainant has no efficacious remedy except to file the present complaint hence the present complaint is being filed before the Hon`ble Court.
- q. That the respondent no.1 who took the sale consideration from the complainant and respondent no.2 who has taken License from DTCP and development rights has been transferred to the respondents no.2 without returning the assured return and principal amount with interest and respondents no. 1 & 2 are enjoying on the cost of complainant hence both are liable to be prosecuted.

- r. That despite regular follow up by the complainant the respondents refused to refund sale consideration on one pretext or other.
- s. That on account of the irresponsible and desultory conduct of the respondent, the complainant suffered monetary loss and harassment for the reason as stated, thus no efficacious remedy except to file complaint before the Hon`ble Authority.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s):
 - i. The respondent may kindly be directed to refund the entire sale consideration sum of Rs.15,17,000/- to the complainant along with interest as per the rules.
 - ii. The respondent is liable to pay assured return sum of Rs.6,70,412/- in terms of clause no.3 of article of MOU dated 25th April, 2015.
5. On the date of hearing, the authority explained to the respondent/ promoters about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent no.1.

6. The respondent no.1 by way of written reply made the following submissions:
 - a. That the captioned case is pending adjudication before this Ld. Authority and is listed for further proceedings on 09.11.2023.
 - b. At the outset, respondent no.1 denies each and every statement, submission, and allegation in the complaint to the extent the same are contrary to and/or inconsistent with the true and complete facts of the case, and/or the submissions made on behalf of the respondent no.1 in

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the present application. The respondent no.1 further humbly submits that the allegations in the complaint may not be taken to be deemed to have been admitted by respondent no.1, save and except what is expressly and specifically admitted, and the rest may be read as a travesty of facts.

- c. That without prejudice to the present application for dismissal/short reply on behalf of respondent no.1. However, respondent no.1 hereby reserves its right to file a detailed reply to the present complaint, if so required.
- d. That the present complaint is framed and filed before this authority is liable to be dismissed in limine solely on the ground of misjoinder of the necessary party. It is humbly submitted that the present complaint has been filed by the complainant who has deliberately chosen to make M/s. VSR Infratech Pvt. Ltd. a party to the present complaint being well aware that respondent no.1 is neither the promoter nor the developer of the project. Thus, the complaint is clearly defective in nature and is liable to be dismissed on the grounds of misjoinder of the parties.
- e. That the complainant had previously also filed a complaint before this authority vide complaint bearing no.6775 of 2022, and the same was dismissed as withdrawn vide order dated 16.02.2023. this authority, while dismissing the complaint recorded that the project in question "Park Street" is a Rera registered project of respondent no.2 company (bearing registration no.41 of 2019 dated 30.07.2019). It is relevant to mention here that the complainant accepted the assured return cheques given by respondent no.2 and accepted the transfer of allotment from respondent no.1. to respondent no.2. the hon'ble

authority was pleased to observe that a complaint should have been filed against M/s. K. S. Propmart. the relevant extract of the order dated 16.02.2023 is reproduced hereinbelow for ready reference:

"RERA registration was also got done by K.S. Prop Mart under the project of Park Street and since the complainant was accepting the assured return cheques given by K.S. Prop Mart and had accepted a transfer of allotment from VSR Infratech Pvt Ltd. to K.S. Prop Mart. The case should have been filed against K.S. Prop Mart. The counsel for the complainant states that he is ready to withdraw this complaint subject to the light to file a fresh for the same cause of action against, K.S. Prop Mart. The request is allowed Matter stands disposed off."

- f. The true and correct facts of the present case are that respondent no.2 is the land-owning company that has obtained license no.100 of 2013 for setting up of commercial colony. It is submitted that initially, respondent no.1 M/s. VSR Infratech had entered into an agreement dated 18.09.2013 with respondent No.2 M/s K S Propmart Pvt. Ltd. by virtue of which respondent no.1 had purchased the development rights of the project in question from respondent no.2. That the Government of Haryana vide its notification dated 18.02.2015 mandated that the original license holder only must develop the project. Accordingly, considering the above facts the agreement dated 18.09.2013 entered between respondent No.1 i.e., VSR Infratech and respondent No.2 i.e., K S Propmart was cancelled vide a deed of cancellation. That post cancellation respondent no.2 is the developer and the same is being entirely developed and managed by respondent no.2 and accordingly post the cancellation all amounts paid by the allottees including the complainant herein were transferred to respondent no.2 and respondent no.1 had no role to play thereafter whatsoever. It is submitted that as per the license bearing no.100/2013 granted to

- respondent no.2, the developer is M/s. K S Propmart. Thus, as such there is no change in developer nor there is assignment of marketing rights therefore there is no requirement to get registered under the BIP Policy. Pertinently the complainant herein was duly informed about all the above developments and the complainant is fully aware that the project is being developed by respondent no.2 and not by respondent no.1. It is submitted that the cheques for assured return were also issued to the complainant herein by respondent no.2 only. It is submitted that the complainant herself never used to come forward to collect the cheques for the assured return and rather used to send her authorized representative i.e., her *husband* Mr. Hemant Kumar for the same, who used to collect the cheques for assured return on her behalf.
- g. Similarly, the authorized representative Mr. Hemant Kumar also acknowledged the acceptance of the transfer of allotment from respondent no.1 to respondent no.2. The signature of the authorized representative on the acceptance of the transfer of allotment from respondent no.1 to respondent no.2 and those acknowledging the receipt of the assured return cheques are the same.
- h. That since the project is being solely developed by respondent no.2 and the amount paid by the allottees including the complainant stood transferred to respondent no.2. Thus, the complainant has no privity of contract with respondent no.1 company.
- i. That as per Section 31 of RERA Act, 2016, a complaint can only be filed against the promoter, allottee or real estate agent. Section 31 of RERA Act, 2016 is reproduced hereinbelow for ready reference:

"31. (1) Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of this Act or the rules and regulations made thereunder against any promoter allottee or real estate agent, as the case may be.

Explanation—For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

(2) The form, manner and fees for filing complaint under sub-section (1) shall be such as may be specified by regulations."

Thus, the complaint is any can only be filed against the promoter i.e. respondent no.2 herein. The name of respondent no.1 is liable to be deleted from the array of parties.

- j. That the complainant is wasting precious judicial time by filing the frivolous, baseless, vexatious, and bogus complaint against respondent no.1. That the complainant is aware of the fact that respondent no.1 merely had any rights and responsibilities pursuant to the notification, dated 18.02.2015 issued by the Government of Haryana. That the complainant being aware of the facts and circumstances mentioned hereinabove the complaint withdrew the complainant bearing no.6775 of 2022 against the respondent no.1 only after understanding the factual matrix and now again had filed a complainant against the respondent no.1 without any basis or reasonable justification.
- k. Thus, from the averments made hereinabove it is clear that respondent no.1 is neither a proper nor a necessary party and has wrongly been impleaded in the array of parties. Thus, its name is liable to be deleted from the array of parties.

E. Reply by the respondent no.2.



- a. That the complainant is praying for the relief of pre-possession lease rental which is beyond the jurisdiction that this Id. authority has been dressed with. That from the bare perusal of the rera act, the said act provides for three kinds of remedies in case of any dispute between a builder and buyer with respect to the development of the project as per the agreement. That such remedies are provided under section 18 of the RERA Act, 2016 for violation of any provision of the act. that the said remedies are of "refund in case the allottee wants to withdraw from the project and the other being interest for delay of every month in case the allottee wants to continue in the project and the last one is for compensation for the loss occurred by the allottees that it is pertinent to note herein, that nowhere in the said provision the Id. authority has been dressed with jurisdiction to grant "assured returns/pre-possession lease rental."
- b. The compensation for assured returns/pre-possession lease rental and other relief, if any cannot be awarded by this hon'ble authority, as this authority does not have the jurisdiction to award any reliefs qua assured return as provided under section 18 of the Act and in accordance with the rules, framed there under.
- c. The enforcement of memorandum of understanding entered between the parties on the same date regarding assured return/pre-possession lease rental before and after offer of possession is a matter of civil nature, only to be dealt with by a civil court/consumer court as the case maybe.
- d. That the legislature passed a legislation titled as 'The Banning of Unregulated Deposit Schemes Act, 2019' (hereinafter referred to as

"BUDS Act"), with the aim and objective to provide for a comprehensive mechanism to ban the unregulated deposit schemes. other than deposits taken in the ordinary course of business, and to protect the interest of depositors and for matters connected therewith or incidental thereto. With the enactment of the BUDS Act, the investment return plan/ assured return/assured rental linked fell within the ambit of "deposit" and "Unregulated Deposit Scheme" under the BUDS Act. Thus, in pursuant to the provisions of Section 3 of the BUDS Act, all the "Unregulated Deposit Schemes" were barred and all the deposit takers including the respondent dealing in "Unregulated Deposit Schemes" were stopped from operating such schemes. It is further submitted that in terms of Clause 6.10 of the MOU and all such provisions of the said MOU were void, illegal and unenforceable under the BUDS Act. In view of the above, the respondent is under no obligation to pay the assured returns to the complainant.

- e. That the definition of "deposit", as provided in the BUDS Act, bars the respondent from making any payment towards assured return or assured rental linked with sale consideration of an immovable property to its allottees after the enactment of the BUDS Act, it is stated that the assured returns or assured rentals paid by the respondent to its allottees, which is linked with sale consideration of an immovable property under the said agreement, clearly attracts the definition of "deposit" and falls under the ambit of "Unregulated Deposit Scheme". Thus, the respondent was barred under Section 3 of BUDS Act from making any payment towards assured return in pursuance to an "unregulated deposit scheme",



"Section 2(17) defines "Unregulated Deposit", which are not a regulated deposit scheme as specified under Column 3 of the First Schedule and as such the scheme, which has been entered between the Complainant and the Respondent is on Unregulated Deposit Scheme, known as investment Return Plan, and has not been regulated or approved by the Authorities as defined in the Third Column of First Schedule, hence, is banned in law. The Claimant cannot under the garb of said MOU seeks enforcement or specific performance of an Investment Return Scheme before this Hon'ble Arbitral Tribunal, which is specifically barred and banned under Section 3 of the BUDS Act. hence the present claim deems dismissal and the only clause which can be read under the said MOU is the payment plan and nothing else."

- f. That the present complaint qua enforcement of the terms of the said MOU qua assured returns/ returns/pre-possession lease rental deems dismissal for the reason that this authority cannot adjudicate over the subject matter of the assured returns/rentals in as much as the same is an aspect/facet out of the many related/incidental aspects covered under the BUDS Act. As a necessary corollary, an order/decision on the subject matter falling within the realms of the BUDS Act, would not only amount to exercise of arbitrary and excessive jurisdiction by the authority but such action would also be unsustainable in the eyes of law it is imperative to mention here that Section 8 of the BUDS Act provides that the appropriate government shall, with the concurrence of the Chief Justice of the concerned High Court by notification, constitute one or more courts known as the designated Courts for such area or areas or such case or cases, as may be specified in such notification, which shall be presided over by a Judge not below the rank of a District and Sessions Judge or Additional District and Sessions Judge. Pertinently, Section 8(2) of the BUDS Act provides that no court

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other than the designated court shall have jurisdiction in respect of any matter to which the provisions of the BUDS Act apply.

- g. That that the complainant made an application for provisional allotment of a retail unit bearing no. F-100, located on the first floor having super area 232.29 Sq. feet falling in commercial colony in the project being developed by the respondent known as VSR "85 Avenue" which is now known as "Park Street" (hereinafter referred to as the "project") located at sector-85, Gurugram, village Badha, Tehsil-Manesar Distt. Gurugram.
- h. That post the application form and the welcome letter, the respondent company had initially allotted unit no. F-100 to the complainant herein. That the complainant has specifically opted for investment linked plan and hence, was given assured return to the tune of Rs.1,92,772/- for a period of 20 Months.
- i. That the complainant had specifically opted for an investment return plan and in pursuant thereto a memorandum of understanding was executed on 25.04.2015 with the complainant herein in regarding assured return of the said unit (herein after referred to as the said MOU). That the consideration paid by the complainant on the application of booking has may early been reiterated in the said MOU and thus, no separate consideration has been paid by the complainant under the said MOU. It is stated that accordingly the basic sale price of Rs.19,51,236/-as agreed under the said MOU.
- j. 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.84/- per sq. ft. of the super area from 25.04.2015 till the application for



occupation certificate is filed for the retail block. However, the payment of assured return was subject to force majeure clause as provided under clause & of the MOU and the relevant extracts of clause. That the complainant was entitled to pre-possession lease rental subject to force majeure conditions in developing the said project. That the construction and development of the project was affected due to force majeure conditions and the same are enumerated herein below:

- The respondent faced the problem of sub soil water which persisted for a period of 6 months and hampered excavation and construction work.
- The respondent is facing the labour problem for last 3 years continuously which slowed down the overall progress of the project.
- The infrastructure facilities are yet to be created by competent authority in this sector.
- Ban by Hon'ble NGT on construction.
- 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 in addition the current Govt. has on 8th 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.
- 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.

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- That it is further submitted that there was a delay in the project also on account of violations of the terms of the agreement by several allottees.
- It is further submitted that the Government of India declared nationwide lockdown due to COVID 19 Pandemic effective from 24th March 2020 midnight.

That without prejudice to the above, it is in the humble submission of the answering respondent that the banning of Unregulated Deposit Scheme Act, 2019 (the "BUDS Act") was notified by the Government of India. As a consequence of the above, the assured return linked to sale consideration and the assured rental linked to leasing arrangement as contemplated under the said MOU falls under the ambit of deposit and the same falls under the ambit of Unregulated Deposit Scheme. In pursuant to the provisions of Section 3 of the BUDS Act, all unregulated deposit schemes have been barred and all such transactions which falls under the ambit of unregulated deposit schemes have to be stopped, that as such, in terms of clause 6.10 of the said MOU, all such provisions of the said MOU are void, illegal and unenforceable under the BUDS Act. Accordingly, clauses of the MOU related to pre-possession lease rental, to the extent inconsistent with the provisions of the sold Act, have become void, illegal and unenforceable and shall be deemed to be deleted so as to conform to applicable laws, without any liability on either party.

- k. That as per schedule 1 of the MOU dated 25.04.2015, The complainant was supposed to make payment towards EDC/IDC as and when demanded by the respondent.





- i. That the complainant did not come forward to clear her dues. It is submitted that though the respondent acceded to the request of the complainant, but the complainant failed to come forward to clear her dues.
 - m. That as per the MOU dated 25.04.2015 That the cheques for assured return were also issued to the complainant here in by respondent no.2. That complainant herself never used to come forward to collect the cheques for the assured return and rather used through send her authorised representative that is her husband Mr. Hemant Kumar for the same, who used to collect the cheques for the assured return on her behalf.
 - n. That the complainant had specifically opted for investment return plan and in pursuant thereto a memorandum of understanding was executed with the complainant herein regarding prepossession lease rental and leasing to this head unit hereinafter referred to as the said MOU dated 25.04.2015. That the consideration paid by the complainant under the said MOU has merely retreated in the said MOU and thus no separate consideration has been paid by the complainant under the said MOU it is further stated that various terms of this add MOU have since been declared against law and fresh enactment such close of this add me you have been redundant.
7. Copies of all relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided based on these undisputed documents and submissions made by parties.

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F. Jurisdiction of the authority

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

F. I Territorial jurisdiction

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by the 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 completed territorial jurisdiction to deal with the present complaint.

F. II Subject matter jurisdiction

10. 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.

11. 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.

G. Findings on the objections raised by the respondent no.2.

G.1 Objection regarding delay in project due to force majeure circumstances.

12. The respondent no.2 has raised the contention that the construction of the project was delayed due to force majeure conditions such as order of NGT in NCR regions on account of the environmental conditions, demonetization, GST, adverse effects of Covid-19 and others force majeure circumstances and non-payment of instalment by different allottees of the project. All the pleas advanced in this regard are devoid of merit. Firstly, the events taking place such as orders of NGT in NCR on account of the environmental conditions is for a short duration, and thus, cannot be said to impact the respondent leading to such a delay in the completion. Secondly, the events of demonetization and the implementation of GST are in accordance with government policy and guidelines. Therefore, the respondent cannot categorize them as force majeure events. Thus, the same is devoid on merits. Thirdly, the respondent is claiming benefit of lockdown in lieu of Covid-19, which came into effect on 23.03.2020 whereas the due date of completion was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself. Lastly, due to default by some allottees for not being regular in paying the amount due but the interest of all the stakeholders concerned in the said project cannot be put on hold due to

the fault of some of the allottees. Thus, the respondent cannot be given any leniency on based of aforesaid reasons and it is a well settled principle that a person cannot take benefit of his own wrongs.

H. Findings on the relief sought by the complainant.

H.I. The respondent may kindly be directed to refund the entire sale consideration sum of Rs.15,17,000/- to the complainant along with interest as per the rules.

H.II. The respondent is liable to pay assured return sum of Rs.6,70,412/- in terms of clause no.3 of article of MOU dated 25th April, 2015.

13. On the above-mentioned reliefs sought by the complainant are being taken together as the findings in one relief will definitely affect the result of other relief and the same being interconnected.

14. In the present complaint, the complainant intends to withdraw from the project and is seeking return of the amount paid by her in respect of subject unit along with interest as per section 18(1) of the Act and the same is reproduced below for ready reference:

"Section 18: - Return of amount and compensation

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

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

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

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

(Emphasis supplied)

15. On 16.04.2015, the complainant had applied for a retail space bearing no. F-100 at first floor ad measuring 232.290 sq. ft. super area, in project

"Park Street" formerly known as "85 Avenue" of the respondents and the same was allotted to the complainant vide memorandum of understanding dated 25.04.2015 executed between complainant and respondent no.1 (i.e., M/s VSR Infratech Private Limited) for the sale consideration of Rs.19,51,236/- (exclusive of EDC, IDC, Electricity connection, PLC, etc.) as per the clause 1.1 of memorandum of understanding against which the complainant has paid an amount of Rs.15,17,000/-. Moreover, pursuant to clause 2.1 of memorandum of understanding, it is explicitly stated that the retail space shall only be utilized for leasing purposes subsequent to the complex's completion and the issuance of offer of possession by the developer. However, till date no occupation certificate has been obtained and no offer for possession has been made to the complainant-allottee. Furthermore, till date the retail space has not been leased out by the respondents.

16. The authority observes that in the present case in hand the license bearing no. 100 of 2013 dated 02.12.2013 was granted by the Directorate of Town and Country Planning, Haryana, Chandigarh to M/s K S Propmart Private Limited. The respondents i.e., M/s VSR Infratech Private Limited and M/s K S Propmart Private Limited had entered into an agreement, in which M/s K S Propmart Private Limited agrees to transfer his right to exclusively develop, construct and build commercial building on the permissible area ad measuring 2.85 acres being licensed area in favor of M/s VSR Infratech Private Limited. However, during the proceedings dated 25.04.2024, the counsel for the complainant has stated that respondents has been already entered into the deed of cancellation on 01.04.2015.



17. Also, during the proceedings, the respondent no.2 submitted an affidavit dated 18.01.2024 of Mr. Devendra Pandey (Director of Respondent no.2 i.e., M/s KS Propmart Private Limited) stating that the liabilities of all the claims are to be borne by M/s KS Propmart Private Limited and not by M/s VSR Infratech Private Limited. Relevant points of affidavit reproduced here below: -

"7. I say that since the amount received by the M/s VSR Infratech Pvt. Ltd. from the third parties is duly transferred by the VSR to the M/s KS Propmart Pvt. Ltd. in terms of the Deed of Cancellation, therefore the M/s VSR Infratech Pvt. Ltd. has no rights or liabilities whatsoever qua the project that was been developed on the said land.

8. I say that pursuant to the Deed of Cancellation dated 01.04.2015, M/s VSR Infratech Pvt. Ltd. has no right or liability whatsoever qua the project that was been developed on the said land and all the rights and liabilities are solely with the M/s KS Propmart Pvt. Ltd., having to the extent detailed above, stepped into the shoes of M/s VSR Infratech Pvt. Ltd. and M/s VSR Infratech Pvt. Ltd. is left with no interest or control of any kind in the project proposed to be developed on the said land.

9. I say that in view of thereof all the rights, claims, liabilities etc. are solely to be borne and controlled by M/s KS Propmart Pvt. Ltd."

18. Pursuant to point no. 7 of the affidavit of respondent no.2, it is asserted that although respondent no. 1 duly transferred the amount received by him from the third party to respondent no. 2, but the respondents does not furnish any document pertaining the transfer of said amount to respondent no.2. Consequently, both the respondents bear the responsibility for the consequences arose out from the present complaint.

19. However, as per clause 2.1 of the memorandum of understanding dated 25.04.2015, the unit was to be offered after completion of the complex and as per clause 3.1 the respondent was also obligated to pay the assured return to the allottee. The occupation certificate/completion certificate of the project where the unit is situated has still not been

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obtained by the respondent-promoter. The authority is of the view that the allottee cannot be expected to wait endlessly for taking possession of the allotted unit and for which she has paid a considerable amount towards the sale consideration and as observed by Hon'ble Supreme Court of India in **Ireo Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors.**, civil appeal no. 5785 of 2019, decided on 11.01.2021.

".....The occupation certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project....."

20. Further in the judgement of the Hon'ble Supreme Court of India in the cases of **Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2021-2022(1) RCR (c), 357** reiterated in case of **M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020** decided on 12.05.2022, it was observed as under:

"25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed."

21. The respondents are responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and

regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a) of the Act. The respondents have failed to complete or unable to give possession of the unit in accordance with the terms of memorandum of understanding. Accordingly, the respondents are liable to the allottee, as the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of the unit with interest at such rate as may be prescribed.

22. This is without prejudice to any other remedy available to the allottee including compensation for which allottee may file an application for adjudging compensation with the adjudicating officer under sections 71 & 72 read with section 31(1) of the Act of 2016.
23. **Admissibility of refund along with prescribed rate of interest:** The section 18 of the Act read with rule 15 of the rules provide that in case the allottee intends to withdraw from the project, the respondent shall refund of the amount paid by the allottee in respect of the subject unit with interest at prescribed rate as provided under rule 15 of the rules. Rule 15 has been reproduced as under:

"Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public."

24. 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.

25. 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., 25.04.2024 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.
26. The purpose of assured return is to compensate the allottee for the amount paid by the allottee in upfront and which is continued to be used by the promoter for the period specified in the memorandum of understanding. In the present matter, the complainant is entitled to refund of the total paid-up amount from the date of deposit along with interest at the prescribed rate i.e. MCLR + 2%. In view of the above, the payment of assured return as well as the prescribed interest on the amount paid up would result in double benefit to the complainant and would not balance the equities between the parties. In view of the above, the complainant is entitled to refund of the total paid up amount along with interest at the prescribed rate of interest after deducting the amount paid on the account of assured return by the respondent.
27. The authority hereby directs the respondents jointly or severally to return the amount received by them i.e., Rs.15,17,000/- with interest at the rate of 10.85% (the State Bank of India highest marginal cost of lending rate (MCLR) applicable as on date +2%) as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the amount within the timelines provided in rule 16 of the Rules *ibid*.

28. That during the proceedings dated the respondent no.2 submitted that the respondents have already paid an amount of Rs.3,94,362/- on account of assured return upto July 2018 to the complainant-allottee. The said amount shall be adjusted while making the payment of refund amount.

I. Directions of the authority

29. 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):

- a. The respondents are directed to refund the paid-up amount received by them from the complainant along with interest at the rate of 10.85% p.a. as prescribed under rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the date of each payment till the actual date of refund of the deposited amount.
- b. The amount of assured return paid shall be adjusted/deducted from the payable amount.
- c. 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.

30. The complaint stands disposed of.

31. File be consigned to registry.

Dated:25.04.2024


(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram