



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

Complaint no. : 6943 of 2022
Date of complaint : 07.11.2022
Date of decision : 10.04.2024

1. Poonam Bhutani
2. Bhupinder Bhutani
Both R/o: -C-46, Kunj Vihar Apartments, Plot
no.-9, Sector-12, Dwarka, New Delhi-110078

Complainants

Versus

M/s Ninaniya Estates Ltd.
Office at: Prism Tower, Tower-A, Floor-6th,
Sector-2, Gawal Pahari, Gurgaon Faridabad
Road, Haryana-122003.

Respondent

CORAM:
Ashok Sangwan

Member

APPEARANCE:
Medhya Ahluwalia
None

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint has been filed by the complainants/allottees 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 allottees 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 complainants, 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	"Prism Portico", Sector-89, Gurugram.
2.	Nature of the project	Commercial
3.	RERA Registered/ registered	not registered
4.	Allotment letter	28.04.2015 (As on page no. 37 of complaint)
5.	Unit no.	PPRS-GC-03, Ground Floor (As on page no. 39 of complaint)
6.	Unit area admeasuring	450 sq.ft. [super-area] (As on page no. 39 of complaint)
7.	Builder Buyer's Agreement	14.05.2015 (As on page no. 42 of complaint)
8.	Mou	01.05.2015 (As on page no. 38 of complaint)
9..	Possession clause	Clause 5 COMPLETION AND POSSESSION <i>5.1 That the Company shall complete the construction of the said Unit within 40 months from the date of execution of this Agreement and/or from the start of construction whichever is later and offer of possession will be snt to the Allottee subject to</i>



		<p><i>the condition that all the amounts due and payable by the Allottee by the stipulated date as stated in Annexure-II attached with this agreement including sale price, maintenance charges, security deposit, stamp duty and other charges etc. have been paid to the Company. The Company on completion of the construction shall apply for completion certificate and upon grant of same shall issue final letters to the Allottee(s) who shall within 30 (thirty) days, thereof remit all dues.</i></p> <p>[Emphasis supplied] (As on page no. 51 of complaint)</p>
10.	Due date of possession	14.09.2018 [Calculated 40 months from date of execution of agreement]
11.	Basic sale consideration	Rs. 23,15,250/- (As on Page no. 39 of complaint)
12.	Amount paid by the complainants	Rs. 20,83,725/- (As on Page no. 39 of complaint)
13.	Assured return clause	Clause 5 <i>The developer shall pay the Assured Investment Return @Rs.39591/- (Rs. Thirty nine thousand five hundred ninty one only) (after deduction of 10%TDS) per month on or before First day of every subsequent month after the expiry of the month for which it shall fall due w.e.f 01.05.2015, till the possession of the said unit (retail shop) is handed over to the Buyer.</i> [Emphasis supplied] (As on page no. 40 of complaint)
14.	Legal notice to the respondent seeking assured return	08.08.2022 (As on page no. 76 of complaint)



15.	Occupation certificate /Completion certificate	Not obtained
16.	Offer of Possession	Not offered

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint: -

- I. That the representatives of the promoter made utterly false representations and thereby induced the complainants to book a retail shop for commercial purpose in the project "Prism Portico", Sector 89, Gurgaon Pataudi Road, Gurgaon, Haryana by showcasing a fancy brochure which depicted that the project will be developed and constructed as state of the art and one of its kinds, with all modern amenities and facilities.
- II. That the respondent allotted a retail shop no. GC-03, in the project admeasuring 450 sq. ft in the said project. in favor of the complainants. The complainants were induced to sign a MoU on 01.05.2015. The total sale consideration of the retail unit was Rs. 23,15,250/- out of which it is admitted that complainants have paid an amount of Rs. 20,83,725/-
- III. The respondent have taken a part of majority of the sale consideration even before signing of the buyer's agreement at the pretext that assured returns @Rs. 43,991/- per month out of which 10% shall be deducted towards TDS, so an amount of Rs. 39,591/- per month would be paid to the complainants w.e.f. 01.05.2015.



- IV. Further on 14.05.2015 the buyer's agreement was signed between the parties. It is stated that the said buyer's agreement was a pre-printed format where complainants were required to sign the dotted lines. Further, the agreement was completely one-sided and arbitrary document containing terms which are only suitable to the respondent.
- V. That as per clause 5.1 of the builder buyer agreement clearly states that the construction of the unit shall be completed within 40 months from the date of execution of the agreement. However, the respondent miserably failed to complete the construction and it is not complete even till date.
- VI. That, assured returns were paid till June 2019 as opposed to the promises and assurances given by the respondent. Being aggrieved by the acts and omissions of the respondent, the complainants issued a legal notice on 08.08.2022. The respondent did not even both to respond back to the said legal notice. Hence the present complaint.

C. Relief sought by the complainants

4. The complainants have sought following relief(s).
- I. To direct the respondent to pay the assured return of Rs.39,541/- per month from the month of June, 2019 till the date of actual handover of unit.
- II. To direct the respondent to pay delayed possession charges for every month of delay, from the due date of possession till the actual handing over of possession.



- III. Direct the respondent to provide the complete status report and sanctions/approvals letters issued by the concerned government offices.
- IV. Direct the respondent to pay a sum of Rs.5,00,000- to the complainants towards the cost of litigation.
5. The respondent failed to comply the orders of the Authority dated 09.08.2023, 08.11.2023 and did not file reply in the present complaint. Thus, the defence of the respondent was struck off vide order dated 08.11.2023.
6. Copies of all the relevant documents have been filed and placed on record. The authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents.

D. Jurisdiction of the authority

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

D.I Territorial jurisdiction

8. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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.

D.II Subject-matter jurisdiction



9. 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;

10. 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 complainants at a later stage.

E. Findings on the relief sought by the complainants.

E. I. Assured Return

11. The complainants are seeking unpaid assured returns on monthly basis as per the MOU dated 01.05.2015 at the rates mentioned therein. It is pleaded by the complainants that the respondent has not complied with the terms and conditions of the said MOU. Though for some time, the amount of assured returns was paid but later on, the respondent refused to pay the same. In **Gaurav Kaushik and anr. Vs. Vatika Ltd.** the authority has held that when the payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum, memorandum of understanding or terms and conditions of the allotment of a unit), then the promoter is liable to pay that amount as agreed upon.



12. The money was taken by the builder as deposit in advance against allotment of immovable property and its possession was to be offered within a certain period. However, in view of taking sale consideration by way of advance, the builder promised certain amount by way of assured returns for a certain period. So, on his failure to fulfil that commitment, the allottee has a right to approach the authority for redressal of his grievances by way of filing a complaint.
13. The builder is liable to pay that amount as agreed upon. Moreover, an agreement/MoU defines the builder/buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allottee arises out of the same relationship and is marked by the said memorandum of understanding.
14. In the present complaint, the assured return was payable as per clause 5 of MOU, the assured return was payable @ Rs.39,591 per month w.e.f. 01.05.2015, till the possession of the said unit is handed over to the complainants.
15. In light of the reasons mentioned above, this authority is of the view that as per the MoU dated 01.05.2015, it was obligation on the part of the respondent to pay the assured return. It is necessary to mention here that the respondent has failed to fulfil its obligation as agreed inter se both the parties in MoU dated 01.05.2015. Accordingly, in the interest of natural justice, the liability of the respondent to pay assured return as per MOU is still continuing. The respondent has paid assured return to the complainants till May 2019. Therefore, considering the facts of the present case, the respondent is directed to pay the amount of assured return in terms of clause 5 of MoU dated 01.05.2015 at the agreed rate i.e., @ Rs.39,541/-per month from the date the payment of



assured return has not been paid i.e., June 2019 till the handing over of possession after obtaining the occupation certificate..

E.II Delayed Possession Charges

16. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges however, proviso to section 18 provides 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 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.

17. 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.
18. 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., 10.04.2024 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.
19. 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—

- (i) 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;*
- (ii) 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;"*

20. The authority further observes that now, the proposition before the Authority whether an allottee who is getting/entitled for assured return even after expiry of the due date of possession, is entitled to both the assured return as well as delayed possession charges?
21. To answer the above proposition, it is worthwhile to consider that the assured return is payable to the allottee on account of a provision in the BBA or in a MoU having reference of the BBA or an addendum to the BBA/MoU or allotment letter. The assured return in this case is payable from the date i.e., 01.05.2015 till possession is handed over to the allottees. If we compare this assured return with delayed possession charges payable under proviso to section 18 (1) of the Real Estate (Regulation and Development) Act, 2016, the assured return is much higher. By way of assured returns, the promoter has assured the allottees that they will be entitled for this specific amount till handing over of possession. Accordingly, the interest of the allottee is protected even after the due date of possession is over as the assured return are payable till offer of possession. The purpose of delayed possession



charges after due date of possession is over and payment of assured return after due date of possession is over as the same to safeguard the interest of the allottee as his money is continued to be used by the promoter even after the promised due date and in return, he is paid either the assured return or delayed possession charges whichever is higher.

22. Accordingly, the authority decides that in cases where assured return is reasonable and comparable with the delayed possession charges under section 18 and assured return is payable even after due date of possession till the handing over of possession of the said unit. The allottee shall be entitled to assured return or delayed possession charges, whichever is higher without prejudice to any other remedy including compensation. In the present case, the assured return was payable till the possession of the unit is handed over to the complainants. The project is considered habitable or fit for occupation only after the grant of occupation certificate by the competent authority. However, the respondent has not received occupation certificate from the competent authority till the date of passing of this order. Hence, the said building cannot be presumed to be fit for occupation. In view of the above, the assured return shall be payable till the possession of the unit is handed over to the complainants after obtaining the occupation certificate from the concerned authorities.
23. Hence, the authority directs the respondent/promoter to pay assured return to the complainants at the rate of Rs.39,591/- per month from the date when the payment of the assured returns was stopped i.e.,



01.06.2019 till the possession is handed over to the complainants after obtaining the occupation certificate.

F.III. Direct the respondent to provide complete status report and sanctions/ approvals issued by the concerned government offices.

24. Under Section 19(1) and 19(2) of the Act, 2016 the allottee is entitled to obtain information regarding sanctioned plans, layout plans approved by the competent Authority and also know the stage wise time schedule of completion of the project. Relevant sections are produced below:

" Section 19 Rights and duties of allottees-

- (1) *The allottee shall be entitled to obtain the information relating to sanctioned plans, layout plans along with the specifications, approved by the competent authority and such other information as provided in this Act r the rules and regulations made thereunder or the agreement for sale signed with the promoter.*
- (2) *The allottee shall be entitled to know stage-wise time schedule of completion of the project, including the provisions for water, sanitation, electricity and other amenties and services as agreed to between the promoter and the allottee in accordance with the terms and conditions of the agreement to sale.*

25. Under Section 11 (3) of the Act, 2016 the promoter is duty bound to make available to the allottee, the sanctioned plans, layout plans and the stage wise time schedule of completion of the project. Relevant section is produced herein:

" Section-11 Functions and duties of promoter.-

- (3) *the promoter at the time of the booking and issue of allotment letter shall be responsible to make available to the allottee, the following information, namely:-*
- (a) *sanctioned plans, layout plans, alongwith specifications, approved by the competent authority, by display at the site or such other place as may be specified by the regulations made by the Authority;*
- (b) *the stage-wise time schedule of completion of the project, including the provisions for civic infrastructure like water, sanitation and electricity.*



26. Thus, the authority directs the respondent/promoter to provide to the complainants information regarding sanctioned plans, layout plans alongwith specifications approved by the competent authority and also stage wise schedule of completion of the project.

F.IV. Direct the respondent to pay a sum of Rs.5,00,000/- to the complainants towards cost of litigation.

27. The complainants are seeking relief w.r.t compensation in the above mentioned relief. Hon'ble Supreme Court of india in case titled as M/s Newtech Promoters and Developers pvt. Ltd. v/s State of U.P & Ors. (2021-2022(1) RCR© 357), has held that an allottee is entitled to claim compensation & litigation charges under sections 12, 14, 18 and section 19 which is to decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation and legal expenses.

H. Directions of the authority

28. 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. Since assured returns being on higher side than DPC, the respondent is directed to pay the arrears of amount of assured return at the rate i.e., Rs.39,591/- per month from the date i.e., 01.06.2019 till the handing over of possession, after obtaining the occupation certificate.
 - ii. The respondent is directed to pay arrears of accrued assured return as per MoU dated 01.05.2015 till date at the agreed rate

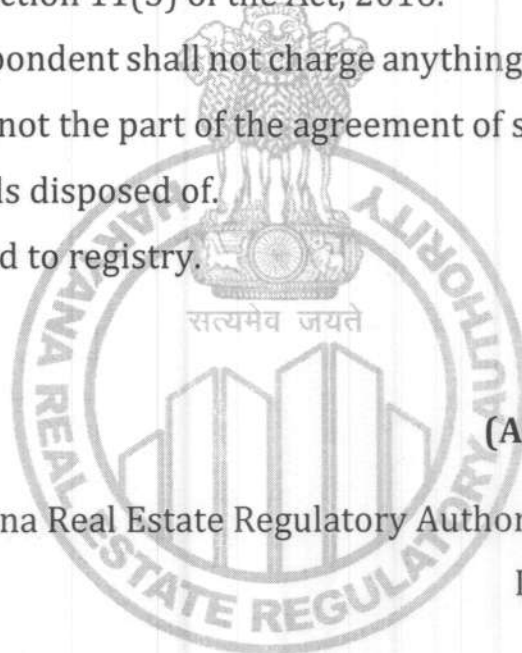


within 90 days from the date of this order after adjustment of outstanding dues, if any, from the complainants and failing which that amount would be payable with interest @8.85% p.a. till the date of actual realization.

- iii. The respondent is directed to provide the allottee/complainant, sanctioned plans, layout plans approved by the competent authority and also provide the stage wise completion of project as per Section 11(3) of the Act, 2016.
- iv. The respondent shall not charge anything from the complainant which is not the part of the agreement of sale

29. Complaint stands disposed of.

30. File be consigned to registry.



(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.04.2024