BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**2909 of 2024**
Date of complaint	:	**10.07.2024**
Date of order	:	**14.05.2025**

1. Naresh Sharma **2.** Pratima Kaushik, **Both R/o:** H. No. 920A, Sector 40, Gurugram, Haryana-122001.	**Complainants**
Versus	
1. KS Propmart Private Limited, **Having Regd. Office at:** A-22, Hill View Apartments, Vasant Vihar, New Delhi-110057. **2.** Sheetal, **R/o** T 24 & 25, 3rd Floor, D-Block, Baani Square, Sector-50, Gurugram. **3.** Devendra Pandey **R/o** Plot No. 14, Ground Floor, Sector 44, Industrial Area, Gurugram.	**Respondents**

CORAM:

Ashok Sangwan — **Member**

APPEARANCE:

Maninder Kaur (Advocate)	Complainants
Jagdeep Yadav (Advocate)	Respondent no. 1
None	Respondent no. 2 & 3

ORDER

1. The present complaint has been filed by the complainant/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 as provided 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. Project and unit related details

2. The particulars of the project, the amount of 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. No.	Heads	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 project	Commercial
4.	RERA registered/not registered	**Registered** **Vide no.** 41 of 2019 dated 30.07.2017 **Valid/renewed up to-** 31.12.2021
5.	DTCP license no. & validity status	100 of 2013 dated 02.12.2013 **Valid/renewed up to-** 01.12.2019 **Licensee-** M/s K.S Propmart Pvt. Ltd.
6.	Date of Allotment	24.12.2019 (page no. 56 of complaint)
7.	Unit No.	G-49, Ground Floor (page no. 56 of complaint)
8.	Unit admeasuring area	219.91 sq. ft. (super area) (page no. 56 of complaint) Increase in area 456.30 sq.ft. (page 55 of reply)
9.	MoU dated	27.12.2019 (page 37 of complaint)

10.	Due date of possession	27.06.2023 **[Calculated as per *Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018]*** + 6 months as per HARERA notification no. 9/3-2020 dated 26.05.2020 for the projects having completion date on or after 25.03.2020.
11.	Total sale consideration	Rs.25,05,755/- (excluding applicable taxes and charges) (page no. 56 of complaint) Increased cost due to increase in area: Rs.40,97,585/- (page 55 of reply)
12.	Amount paid by complainants	Rs.23,27,750/- (as per page 51-55 & page 100 of complaint)
13.	Revised building plan	18.01.2023 (page 47 of reply)
14.	Occupation certificate	Not obtained
15.	Date of offer of possession to the complainant	Not offered

B. Facts of the complaint:

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

I. That the respondent through its marketing executives and advertisement through various medium and means approached the complainants with an offer to buy a commercial shop in the project being launched by the respondent under the name and style of "Park Street" situated at Sector 85, Gurugram. The respondent further represented that in case, the complainants buy a unit/shop in the said project, then respondent shall deliver the possession of unit/shop within 36 months from the date of MoU. The respondent also assured

the complainants that it has already secured all the necessary sanctions and approvals from the appropriate and concerned government authorities for the development and completion of said project on time with the promised quality and specification.

II. That, relying upon those assurances and promises to be true, the complainants booked a unit/shop/space having tentative super area of 219.91 sq. ft. at the basic sale price of Rs.10,864.46/- per sq. ft. for a total sale consideration of Rs.25,05,755/- excluding applicable charges. The complainants had purchased the said unit/space on the assured return scheme for which an MoU was executed between the parties on 27.12.2019 according to which the respondent/builder was bound to pay an assured return of initial 36 months and the amount of assured return of initial 36 months was adjusted at the time of signing of MoU. After adjusting the assured return amount, the complainants were liable to pay an amount of Rs.21,98,004/- inclusive of taxes. It was also agreed between the parties that after completion of initial 36 months, the builder/respondent is liable to pay lease rent as per article 3 of the MoU dated 27.12.2019.

III. That at the time of signing of MoU, the complainant paid an amount of Rs.21,98,004/- through various cheques as agreed by the respondent as mentioned in article 1 of the MoU dated 27.12.2019. In this regard, the respondent/builder issued allotment letter dated 24.12.2019 to the complainant in respect of aforesaid unit/space.

IV. That initially, the respondent builder had allotted the size of unit/space bearing no. G-49 measuring 219.91 sq. ft. on Ground Floor in their aforesaid project, but the complainants received an illegal demand letter through email dated 03.05.2024 for Rs.40,97,585/-

from the respondent for an additional amount and the reason given to the complainant being the area/shop increased to 456.36 sq. ft. This is highly unjustified demand as the area has increased more than double of the initial and original booking. The complainant never received any letter/information regarding increase of area from the respondent/builder and this is absolute disregard to the MoU signed between the parties. It is pertinent to mention here that the respondent/builder has changed the location of the booked shop/space at its own and changed the layout plan which was originally given to the complainants.

V. That the complainants had booked the above said unit/ space on 27.12.2019 and the possession of the said unit was to be delivered to the complainants within 36 months i.e. upto 26.12.2022, but till date no occupation certificate has been issued by the competent authority in respect of the aforesaid project to respondent.

VI. That the complainants have paid an amount of Rs.21,98,004/- plus after adjusted assured return amount in advance for 36 months. The complainant had also paid an amount of Rs.1,29,746/- on account of PDC, EDC, IDC as per demand by the respondent/builder.

VII. That till today the complainants had not received any satisfactory reply from the respondent regarding the completion of the project as well as lease rent amount and to compensate the complainants by paying delay possession charges on account of delayed possession. The complainants have been suffering a lot of mental, physical and financial agony and harassment.

VIII. That the respondent was also under legal obligation to pay lease rent of the booked unit as mentioned in the article 3 of the MoU and it was

assured by the respondent that it would pay the lease rent to the complainants at the time of possession.

IX. That now the respondent has sent an email dated 03.05.2024 directing the complainants to deposit an amount of Rs.40,97,585/- on account of increase of area, which is totally wrong, illegal and the same is not binding on the complainants.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s):

i. Direct the respondent to execute BBA and conveyance deed, handover possession of the unit and to pay delay possession charges.
ii. Direct the respondent to pay lease rent as per MoU.
iii. Direct the respondent to keep the original location and size of unit as per MoU and to declare the email dated 03.05.2024 as null and void.

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:

i. That the complainant made an application for provisional allotment of a unit bearing number G-49 located on the Ground floor admeasuring area 219.91 sq.ft in the project developed by the respondent wide application form. That as per the memorandum of understanding, the total sale consideration amount of the unit amounting to Rs.25,05,755/- /- for an admeasuring area of 219.91 sq. ft exclusive of EDC, IDC, interest-free maintenance security, electricity connection

charges, power backup charges, air conditioning charges, service taxes and such other levies/cesses/VAT as may be imposed by any statutory authority.

ii. That at the time of executing the Memorandum of Understanding dated 27.12.2019, it was mutually agreed between the parties that as per clause 1.1 of the MoU, the respondent company would not be liable to pay any assured return to the complainant for a period of 36 months from the date of execution of the MoU. It was further agreed that the assured return for the said period of 36 months would be adjusted against the balance sale consideration payable by the complainant towards the unit in question. This understanding was a critical component of the financial arrangement between the parties, duly agreed upon and binding. As per the agreed terms, the respondent company was obligated to commence the payment of assured returns to the complainant from the 37th month onwards, subject to the complainant's compliance with all obligations under the MoU, including payment of the balance sale consideration. In light of the foregoing, the respondent submits that any claim by the complainant for assured returns during the initial 36-month period is contrary to the terms of the MoU and is therefore untenable. The respondent company has acted in accordance with the agreed terms and conditions, and no breach of any obligation has occurred on its part.

iii. That the complainant has made a payment of Rs.21,98,004/- including the GST and EDC/IDC amount of Rs.1,16,552/- to the respondent at the time of allotment. The answering respondent respectfully submits that prior to the COVID-19 pandemic, the respondent company was undertaking the development of the project in accordance with the

Non-TOD (Transit-Oriented Development) Policy, 2016. However, due to significant regulatory changes introduced after the COVID-19 pandemic, the applicable policy was revised from Non-TOD to TOD by the competent authority, i.e., the Directorate of Town and Country Planning (DTCP), Haryana. In compliance with the regulatory shift, the respondent company duly revised the building construction plan as per the guidelines and approval from DTCP, Haryana. This revision necessitated changes in the layout and areas of all units within the project, including the unit provisionally allotted to the complainant. The respondent company, acting in good faith and in adherence to transparency, communicated a proposal to the complainant regarding the potential increase in the area of his unit. However, it is pertinent to note that no formal acceptance of the proposed change was received from the complainant.

iv. That in the absence of any written acceptance or agreement from the complainant, the respondent company refrained from making any changes to the area of the complainant's unit. As such, the unit's area remains unchanged and is consistent with the specifications outlined in the Memorandum of Understanding executed between the parties. The respondent submits that there has been no unilateral alteration to the complainant's unit, and the respondent has acted in strict compliance with contractual obligations and applicable regulations. The complainant is estopped from alleging any unauthorized change in the unit area, as no acceptance or consideration was furnished to effectuate the proposed modification. The respondent's actions have been in accordance with the regulatory framework and the mutually agreed terms of the MoU.

v. That there was no time limit provided under the MoU for handing over the possession of the unit. Thus, time was not the essence of the contract for delivering the possession, however, it was mutually agreed upon that the complainant would be entitled to the benefit of an assured return as per the terms of the MoU.

vi. That the construction and development of the project was affected due to force majeure conditions. However, the payment of the assured return was subject to the force major clause as provided under clause 6 of the MoU. It is submitted that the construction and development of the project were affected due to the force majeure conditions such as shortage of labour, stay on construction due to orders passed by NGT, lack of infrastructure facilities, implementation of social schemes like NREGA and JNNURM, shortage of sand and bricks, demonetization, implementation of GST, COVID-19 pandemic.

vii. That only symbolic/constructive possession is to be handed over to the complainant and no physical possession is supposed to be given to the complainant since the unit booked by the complainant is for leasing purposes.

viii. That due to the unprecedented and unforeseen financial challenges arising from the Covid-19 pandemic, the respondent is currently unable to fulfill the obligation of paying the monthly assured returns to the complainant as previously agreed. Due to the prevailing financial constraints and market downturn, the answering respondent company is facing significant difficulties in managing both the project execution and the assured return payments simultaneously. That in light of the above circumstances, and in adherence to the applicable provisions of the Act, 2016, the respondent is willing to refund the

complainant's invested amount, along with interest as stipulated under RERA guidelines, in a fair and reasonable manner.

ix. That the complainant is praying for the relief of "assured returns/lease rental" which is beyond the jurisdiction of this authority. The enforcement of the memorandum of understanding entered into between the parties on the same date with regard to assured return/ pre-possession leases rental before and after the offer of possession is a matter of civil nature, only to be dealt with by a civil court/consumer court as the case may be.

x. That the complainant had willfully agreed to the terms and the conditions of the MOU and the agreement for sale and is now at the belated stage has raised issues and concerns regarding her contractual obligations.

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.

E. Jurisdiction of the authority

8. The respondents have raised a preliminary submission/objection that the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. 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

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.

E. 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.

F. Findings on the objections raised by the respondent.

F.I. Objection regarding force majeure conditions.

12. The respondent has raised the contention that the construction of the project has been delayed due to force majeure circumstances such as shortage of labour, demonetization and implementation of social schemes like NREGA and JNNURM etc, demonetization, delay on part of

govt. authorities in granting approvals and other formalities, shortage of labour force in the NCR region, ban on the use of underground water for construction purposes, stay on construction due to orders passed by NGT, Covid 19 pandemic etc. The authority observes that the due date of possession was 27.12.2022. Further, an extension of 6 months is granted to the respondent in view of notification no. 9/3-2020 dated 26.05.2020, on account of outbreak of Covid-19 pandemic. Therefore, the due date of possession comes out to be 27.06.2023. As far as other contentions of the respondent w.r.t delay in construction of the project is concerned, the same are disallowed as firstly the orders passed by NGT banning construction in the NCR region was for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. Moreover, some of the events mentioned above are of routine in nature happening annually and the promoter is required to take the same into consideration while launching the project. Thus, the promoter cannot be granted any leniency on based of aforesaid reasons and it is a well settled principle that a person cannot take benefit of his own wrong.

G. Findings on the relief sought by the complainants.

G.I Direct the respondent to execute BBA and conveyance deed, handover possession of the unit and to pay delay possession charges.

13. The complainants have submitted that despite receipt of an amount of Rs.23,27,750/- from them against the sale consideration of Rs.25,05,755/-, the respondent has failed to enter into a registered buyer's agreement against the unit allotted to them till date. Thus, seeking the relief of execution of buyer's agreement against the booked unit/space in their favour. The authority observes that despite receipt of considerable amount against the booked unit back in 2019 from the

complainants, the respondent-promoter has failed to enter into a written agreement for sale against the unit in question and has failed to get the unit registered in their name till date. Hence, it is violation of the provisions of the Act, and shows its unlawful conduct. As per Section 13(1) of the Act, 2016, the promoter is obligated to not to accept more than 10% of the cost of the apartment, plot or building as the case may be, as an advance from a person without entering into a written agreement for sale with such person and register the said agreement for sale. Thus, in view of Section 13 of the Act of 2016, the respondent-promoter is directed to enter into a registered buyer's agreement with the complainants as per the 'agreement for sale' annexed with the Haryana Real Estate (Regulation and Development) Rules, 2017 within a period of 60 days from the date of this order.

14. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided 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."*

15. **Due date of possession:** The Hon'ble Supreme Court in the case of ***Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU /SC /0253 /2018*** 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.

16. In view of the above-mentioned reasoning, the date of execution of MoU i.e. 27.12.2019 is ought to be taken as the date for calculating due date of possession. Further, an extension of 6 months is granted to the respondent in view of notification no. 9/3-2020 dated 26.05.2020, on account of outbreak of Covid-19 pandemic. Therefore, the due date of possession comes out to be 27.06.2023.

17. **Admissibility of delay possession charges at prescribed rate of interest:** 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.*

18. 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.

19. 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., 14.05.2025 is **9.10%.** Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **11.10%.**

20. 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;"*

21. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., **11.10%** by the respondent/promoter which is the same as is being granted to them in case of delay possession charges.

22. On consideration of the documents available on record and submissions made by both the parties, 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. The authority observes that the due date of handing over of possession was 27.06.2023. However, the respondent has failed to offer possession of the subject unit to the complainant till the date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Moreover, the authority observes that there is no

document on record from which it can be ascertained as to whether the respondent has applied for occupation/completion certificate or what is the status of construction of the project. Hence, this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the promoter as well as allottees.

23. 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 allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 27.06.2023 till valid offer of possession plus 2 months after obtaining occupation/completion certificate from the competent authority or actual handing over of possession whichever is earlier, as per Section 18(1) of the Act of 2016 read with Rule 15 of the Rules.

24. Further, as per Section 11(4)(f) and Section 17(1) of the Act of 2016, the promoter is under an obligation to get the conveyance deed executed in favour of the allottees. Whereas as per Section 19(11) of the Act of 2016, the allottees are also obligated to participate towards registration of the conveyance deed of the unit in question. However, there is nothing on the record to show that the respondent has applied for occupation/completion certificate or what is the status of the development of the above-mentioned project. In view of the above, the respondent is liable to handover possession of the unit to the complainants in terms of the MoU dated 27.12.2019 and execute conveyance deed in their favour as per Section 17(1) of the Act of 2016 on payment of stamp duty and registration charges as applicable, within three months after obtaining occupation/completion certificate from the competent authority.

G. II. Direct the respondent to pay lease rent as per MoU.

25. The complainants in the present complaint are seeking additional relief w.r.t payment of lease rental/assured return as per the terms of the MoU dated 27.12.2019. The complainants have submitted that the respondent was also under legal obligation to pay lease rent of the booked unit as mentioned in the article 3 of the MoU and it was assured by the respondent that it would pay the lease rent to the complainants at the time of possession. The complainants are seeking unpaid lease rental/assured returns on monthly basis as per the MoU dated 27.12.2019. It is pleaded by the complainants that the respondent has not complied with the terms and conditions of the said MoU.

26. The respondent has submitted that the relief of "assured returns/lease rental" is beyond the jurisdiction of this authority. The enforcement of the memorandum of understanding entered into between the parties on the same date with regard to assured return/pre-possession leases rental before and after the offer of possession is a matter of civil nature, only to be dealt with by a civil court/consumer court as the case may be.

27. The authority observes that the MoU dated 27.12.2019 can be considered as an agreement for sale interpreting the definition of the agreement for "agreement for sale" under Section 2(c) of the Act and broadly by taking into consideration the objects of the Act. Therefore, the promoter and allottee would be bound by the obligations contained in the memorandum of understandings and the promoter shall be responsible for all obligations, responsibilities, and functions to the allottee as per the agreement for sale executed inter-se them under Section 11(4)(a) of the Act. An agreement defines the rights and liabilities of both the parties i.e., promoter and the allottee and marks

the start of new contractual relationship between them. This contractual relationship gives rise to future agreements and transactions between them. The "agreement for sale" after coming into force of this Act (i.e., Act of 2016) shall be in the prescribed form as per rules but this Act of 2016 does not rewrite the "agreement" entered between promoter and allottee prior to coming into force of the Act as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.,*** (Writ Petition No. 2737 of 2017) decided on 06.12.2017.

28. The money was taken by the promoter as 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 promoter promised certain amount by way of lease rental/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. If the project in which the advance has been received by the developer from an allottee is an ongoing project as per Section 3(1) of the Act of 2016 then, the same would fall within the jurisdiction of the authority for giving the desired relief to the complainants besides initiating penal proceedings. The promoter 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 allottees arises out of the same relationship and is marked by the said memorandum of understanding.

29. The complainants are seeking relief w.r.t payment of lease rental/assured return in terms of Article 3 of MoU dated 27.12.2019.

Article 3 of the MoU dated 27.12.2019 provides for payment of "Pre-Possession Lease Rental', the same is reproduced as under for ready reference:

> ***ARTICLE 3***
>
> ***3.1.1.PRE-POSSESSION LEASE RENTAL:***
>
> *"No Pre-Possession Lease Rental is payable to the Allottee for the period of first 36 months from the date of this MOU.* ***If the filing of application for Occupation Certificate is delayed beyond 36 months from the date of this MOU for any reason other than force majeure as defined herein then the Developer shall pay Pre Possession Lease Rental per month to be calculated after taking into account received consideration (hereinafter referred to as the 'Pre-Possession Lease Rental') to the Allottee on pro-rata basis from 37th month till the application for Occupation Certificate is filed for Retail Block of the Building.***
>
> *If the application for Occupation Certificate is filed before 36 months, then the NPV (Net Present Value) discount offered to the Allottee shall be adjusted/ reversed proportionately for the remaining term out of 36 months."*

30. After considering the above, the authority observes that vide clause 3.1.1 of the MoU dated 27.12.2019, it was agreed between the parties that if the application for occupation certificate is delayed beyond 36 months from the date of the MoU for any reason other than force majeure, then the respondent shall pay 'pre-possession lease rental' per month (to be calculated after taking into account received consideration) to the allottee on pro-rata basis from 37th month till filing of the application of occupation certificate.

31. Thus, 'pre-possession lease rental' amount at the agreed rate per month was payable w.e.f. 28.12.2022, till filing of application of occupation certificate.

32. In light of the reasons mentioned above, the authority is of the view that as per the MoU dated 27.12.2019, it was obligation on part of the respondent to pay the pre-possession lease rental/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 27.12.2019. Further, no document with regard to filing of application for grant of occupation/completion certificate with the competent authority has been filed by the respondent till date. Accordingly, the liability of the respondent to pay pre-possession lease rental/assured return as per MoU is still continuing. Hence, the respondent/promoter is liable to pay pre-possession lease rental/assured return at the agreed rate per month from the date i.e., 28.12.2022 till filing of application of occupation certificate as per the memorandum of understanding dated 27.12.2019.

33. The authority observes that now, the proposition before the Authority whether an allottee who is getting/entitled for pre-possession lease rental/assured return even after expiry of due date of possession, is entitled to both the pre-possession lease rental as well as delay possession charges?

To answer the above proposition, it is worthwhile to consider that the pre-possession lease rental is payable to the allottees on account of a provision in the MoU. The authority observes that the purpose of 'pre-possession lease rental' and delay possession charges is similar and the same is to be provided to the allottees to safeguard their interest as the money of the allottees is continued to be used by the promoter even after the promised due date and in return, they are to be paid either the pre-possession lease rental or delay possession charges whichever is higher as the purpose of 'pre-possession lease rental' is to compensate the allottees for the amount paid by them in upfront and which is continued to be used by the promoter for the period specified in the agreement/MOU and the payment of pre-possession lease rental

as well as the delay possession charges would result in double benefit to the complainants and would not balance the equities between the parties. However, the rate at which 'pre-possession lease rental' has to be paid to the allottees by the promoter cannot be determined from clause 3.1.1 of the MoU dated 27.12.2019, as it does not define the amount to be paid as pre-possession lease rental in this regard.

34. Therefore, considering the facts of the present case, the respondent/promoter is directed to pay interest to the complainants against the paid-up amount at the prescribed rate of 11.10% p.a. for every month of delay from the due date of possession i.e., 27.06.2023 till valid offer of possession plus two months after obtaining occupation/completion certificate from the competent authority or actual handing over of possession, whichever is earlier, as per Section 18(1) of the Act of 2016 read with Rule 15 of the Rules.

G.III Direct the respondent to keep the original location and size of unit as per MoU and to declare the email dated 03.05.2024 as null and void.

35. The complainants have submitted that they have booked a unit/shop/space bearing no. G-49 having tentative super area of 219.91 sq. ft. for a total sale consideration of Rs.25,05,755/- excluding applicable charges. Initially, the respondent had allotted the size of unit/space as 219.91 sq. ft. on Ground Floor in the said project, but the complainants received an illegal demand letter through email dated 03.05.2024 for Rs.40,97,585/- from the respondent for an additional amount and the reason given to the complainant being the area/shop increased to 456.36 sq. ft. which is highly unjustified demand as the area has increased more than double of the initial and the complainants never received any letter/information regarding increase of area from

the respondent. The respondent has submitted that the increase in area was not arbitrary but arose due to finalization of the layout plan for the project. The respondent further submits that such changes in the area were in line with the terms of the MoU, which allows variations in the area, subject to the final approved layout plan. Relevant clause pertaining to the modification of super area of unit in the MoU dated 27.12.2019 is reproduced as under for ready reference:

> ***1.3*** *"It is hereby clarified to the Allottee that Super Area of Unit as mentioned herein above is subject to modification, final confirmation of the same shall be made once the building plan is revised/ the structure is complete/ at the time of offer of possession of Unit."*

36. The authority observes that the MoU has been executed between the parties on 27.12.2019 i.e. post coming into force of the Act, 2016 as well as Rules, 2017. However, the said MoU is not in conformity with Section 13(2) of the Act. Further, the above said clause is in strict violation of Section 14(2)(i) of the Act of 2016, which provides that:

> ***14.(2)*** *"Notwithstanding anything contained in any law, contract or agreement, after the sanctioned plans, layout plans and specifications and the nature of the fixtures, fittings, amenities and common areas, of the apartment, plot or building, as the case may be, as approved by the competent authority, are disclosed or furnished to the person who agree to take one or more of the said apartment, plot or building, as the case may be, the promoter shall not make—*
> ***(i)*** *any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous consent of that person."*

37. After, considering the documents available on record as well as submissions made by the parties, it is determined that the respondent has increased the super area of the unit from 219.91 sq.ft. to 456.30 sq. ft. i.e. 107.494% without any prior intimation and justification to the complainants. The authority has already decided this issue in the complaint bearing no. ***4031 of 2019*** *titled as* ***Varun Gupta V/s Emaar MGF Land Ltd.*** wherein, the authority holds that the demand for extra

payment on account of increase in the super area by the respondent-promoter from the allottee(s) is legal but subject to condition that before raising such demand, details have to be given to the allottee(s) and without justification of increase in super area, any demand raised in this regard is liable to be quashed. However, this remains subject to the condition that the flats/units and other components of the super area on the project have been constructed in accordance with the plans approved by the competent authorities. In view of the above, the demand w.r.t increase in super area without any prior intimation and justification to the complainants is bad in the eyes of law and the same is hereby set aside as it is a well settled principle that no one can take benefit of his own wrong.

H. Directions of the authority

38. 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 demand with respect to increased area is set aside.

ii. The respondent/promoter is directed to enter into a registered buyer's agreement with the complainants as per the 'agreement for sale' annexed with the Haryana Real Estate (Regulation and Development) Rules, 2017 within a period of 60 days from the date of this order.

iii. The respondent/promoter is directed to pay interest to the complainants against the paid-up amount at the prescribed rate of 11.10% p.a. for every month of delay from the due date of possession i.e., 27.06.2023 till valid offer of possession plus two months after obtaining occupation/completion certificate from the competent authority or actual handing over of possession, whichever is earlier, as per Section 18(1) of the Act of 2016 read

with Rule 15 of the Rules.

iv. The arrears of such interest accrued from the due date of possession i.e., 27.06.2023 till the date of order by the authority shall be paid by the promoter to the allottees within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules.

v. The respondent/promoter is directed to supply a copy of the updated statement of account after adjusting delay possession charges within a period of 30 days to the complainants.

vi. The complainants are directed to pay outstanding dues, if any, after adjustment of delay possession charges within a period of 60 days from the date of receipt of updated statement of account.

vii. The respondent/promoter shall handover possession of the unit to the complainants in terms of the MoU dated 27.12.2019 and execute conveyance deed in their favour as per Section 17(1) of the Act of 2016.

viii. The respondent shall not charge anything from the complainants which is not the part of the MoU dated 27.12.2019.

ix. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 11.10% 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 delay possession charges as per Section 2(za) of the Act.

39. The complaint stands disposed of.

40. File be consigned to registry.

Dated: 14.05.2024

(Ashok Sangwan)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram