

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

Complaint no.: 3319 of 2023
Date of complaint: 17.07.2023
Order reserved on: 24.01.2025
Order pronounced on: 28.03.2025

1. Sumit Dudha

2. Puja Walia

Both R/o: - F-1201, Plot no. 12A, Apex Athena,
Sector-75, Noida

Complainants

Versus

M/s Ninaniya Estates Ltd.

Regd. Office at: - Prism Portico, Sector-89,
Gurugram-Pataudi Road, Hayatpur, Adjacent to
NBCC Heights, Haryana-122004

Respondent

CORAM:

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Shri Vijay M Chauhan (Advocate)

None

Complainants
Respondent

EXPARTE- ORDER

1. This complaint has been filed by the complainants/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act

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or the Rules and regulations made thereunder or to the allottee as per the agreement for sale executed *inter se*.

A. Project and unit related details.

2. The particulars of the project, the details of sale consideration, the amount paid by the complainant(s), date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

Sr. No.	Particulars	Details
1.	Name of the project	"Prism Portico", Sector 89, Pataudi Road, Gurugram
2.	Project area	5.05 acres
3.	Nature of project	Commercial Complex
4.	DTCP license	179 of 2008 dated 11.10.2008 valid upto 10.10.2018
5.	License	Ninaniya Estates Ltd.
6.	RERA Registration	Not Registered
7.	Unit no./shop	GB-06, Ground (page no. 15 of complaint)
8.	Unit admeasuring (super area)	500 sq. ft. (page no. 15 of complaint)
9.	Buyer's agreement	11.05.2013 (page no. 12 of complaint)
10.	Possession clause	5. Completion and Possession 5.1 That the Company shall complete the construction of the said Unit within 36 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 sent to the Allottee subject to the condition that all the

		<p>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 Allottees(s) who shall within 30 days, thereof remit all dues.</p> <p>5.2 If there is any delay due to any force majeure reasons as explain hereinafter then the period of delay shall commence 6(six) months after the due date, as this 6 (six) months period shall be grace period available with the company to complete the said complex.</p> <p>(page no. 18 of complaint)</p>
11.	Due date of possession	<p>11.11.2016</p> <p>(calculated from the date of buyer's agreement as date of construction is not on record plus grace period of 6 month is allowed being unqualified.)</p> <p>Note: Vide proceedings dated 24.01.2025 the due date of possession is inadvertently mentioned as 11.05.2017</p>
12.	Memorandum of Understanding	<p>10.04.2017</p> <p>(page no. 33 of compliant)</p>
13.	Assured return clause	<p>2. the Buyer has paid to the Developer an amount of Rs. 33,75,000/- on which the developer shall give an investment assured return of Rs. 48,125/- per month w.e.f.</p>

		10.04.2017 in arrears, till on offer of possession of said unit GB-06 on ground floor.
14.	Total sale consideration	Rs. 37,50,000/- (page no. 34 of complaint)
15.	Amount paid by the complainants	Rs. 37,50,000/- (as alleged by complainants at page 5 of complaint)
16.	Occupation certificate	Not obtained
17.	Offer of possession	Not offered
18.	Assured return paid	till 01.04.2020 (as alleged by complainants at page 05 of complaint)

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint: -
4. That the respondent approached the complainants in March, 2017 and emphasized the complainants to buy a retail shop unit in its project namely "Prism Portico" at Sector-89, Gurugram-Patuadi Road, Haryana.
5. That the complainants vide provisional application dated 09.04.2013 made a payment of Rs.7,77,810/- in favour of the respondent for allotment of one retail shop.
6. That the builder buyer agreement dated 11.05.2013 was executed between the parties. The complainants under the BBA dated 11.05.2013 were jointly allotted a retail shop no. GB-06, ground floor, admeasuring 500 sq. ft. in the complex.
7. That the respondent has received the entire amount of Rs. 37,50,000/- as per the payment plan till 01.04.2017. Therefore, the respondent offered the



complainants for assured returns on the same to the tune of Rs.48,125/- per month w.e.f. 10.04.2017.

8. That the complainants during these years several times made inquiry about the possession of the said shop as the possession of the unit was to be handed over within 36 months from the date of execution of agreement, i.e. 01.08.2016.
9. That illegal and fraudulent acts of the respondent came into light when the respondent stopped making payment of the assured return w.e.f. 01.04.2020 despite the fact the respondent had not handed over the physical possession of the said shop.
10. That the complainants made several oral and telephonic requests for giving possession of the said shop and for pending assured returns till offer of possession but till date the complainants did not get anything.
11. That the respondent has failed to provide services in accordance with the BBA & MOU and under various laws in regard thereto and further misrepresented, misguided and cheated the complainants.

C. Relief sought by the complainants: -

12. The complainants have sought following relief(s):
 - (i) Direct the respondent to pay the balance amount due to the complainants till the handing over of possession of the unit on account of the assured return as per MOU dated 11.04.2017 before signing the sale deed.
 - (ii) Direct the respondent to kindly handover the entire possession of the unit of the complainants, once it is ready, in all respects and not to force an incomplete unit without proper road, electrification of the roads, etc. as mentioned under BBA.

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- (iii) Direct the respondent to pay interest @18% p.a. for delay in handing over possession of the commercial unit from 1.8.2016 till actual date of handing over the unit to the complainants.

13. The present complaint was filed on 17.07.2023. The counsel for the respondent neither appeared nor filed the reply in the complaint. Despite multiple opportunities for filing reply on 01.12.2023, 29.03.2024, 27.09.2024, 24.01.2025, it failed to comply with the orders of the authority. It shows that the respondent was intentionally delaying the procedure of the court by avoiding to file written reply. Therefore, the authority assumes/ observes that the respondent has nothing to say in the present matter and accordingly the authority proceeds with the case exparte.
14. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the complainants.

D. Jurisdiction of the authority

15. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

D.I Territorial jurisdiction

16. 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

17. 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) The promoter shall-

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

18. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the case mentioned above, the authority has the jurisdiction to entertain a complaint seeking delay possession charges.

E. Findings on the relief sought by the complainants.

E.I. Direct the respondent to pay the balance amount due to the complainants till the handing over of possession of the unit on account of the assured return as per MOU dated 11.04.2017 before signing the sale deed.

E.II Direct the respondent to kindly handover the entire possession of the unit of the complainants, once it is ready, in all respects and not to force an incomplete unit without proper road, electrification of the roads, etc. as mentioned under BBA.

E.III. Direct the respondent to pay interest @18% p.a. for delay in handing over possession of the commercial unit from 01.08.2016 till actual date of handing over the unit to the complainants.

19. The complainants in the present complaint has booked a unit/shop in the project of the respondent namely 'Prism Portico' situated at sector-89



Pataudi Road, Gurugram, Haryana. The complainants were allotted a unit bearing no. GB-06 situated at ground floor, admeasuring 500 sq. ft. the buyer's agreement for the said unit was executed between the complainants and respondent on 11.05.2013. The total sale consideration of the unit was Rs. 37,50,000/- and the complainants have paid the entire amount of Rs. 37,50,000/-. As per the possession clause 5 of the agreement the possession was to be handed over within 36 months including grace period of 6 months which comes out to be 11.11.2016. The respondent on dated 10.04.2017 executed a Memorandum of Understanding with the complainants and as per the clause 2 of the MOU dated 10.04.2017 the respondent is obligated to pay the Assured return of Rs. 48,125/- w.e.f. 10.04.2017 till offer of possession of the said unit.

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

Assured return

21. The complainants are seeking unpaid assured returns on monthly basis as per memorandum of understanding dated 10.04.2017 at the rates mentioned therein. It is pleaded that the respondent has not complied with the terms and conditions of the agreement. Though for some time, the amount of assured returns was paid till 01.04.2020 but later on, the respondent has stopped the payment of assured return.
22. 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.

23. The builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement 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 original agreement for sale.
24. It is not disputed that the respondent is a real estate developer, and it had not obtained registration under the Act of 2016 for the project in question. However, the project in which the advance has been received by the developer from the allottee is an ongoing project as per section 3(1) of the Act of 2016 and, the same would fall within the jurisdiction of the authority for giving the desired relief to the complainants besides initiating penal proceedings. So, the amount paid by the complainants to the builder is a regulated deposit accepted by the later from the former against the immovable property to be transferred to the allottee later on. That this Authority has also deliberated the issue of assured return in number of case including ***Prateek Srivastava & Namita Mehta VS M/s Vatika Limited (RERA-GRG-660-2021)***.
25. In the present complaint, the assured return was payable as per clause 2 of MoU, which is reproduced below for the ready reference:

Clause 2.

"The Buyer has paid to the Developer an amount of Rs. 33,75,000/- on which the developer shall give an investment assured return of Rs. 48,125/- per month w.e.f. 10.04.2017 in arrears, till on offer of possession of said unit GB-06 on ground floor."



Thus, the assured return was payable @Rs.48,125/- per month w.e.f. 10.04.2017 till offer of possession.

26. In light of the reasons mentioned above, the authority is of the view that as per the MoU dated 10.04.2017, 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 10.04.2017. The occupation certificate for the unit has not been obtained till date. Accordingly, the liability of the respondent to pay assured return as per MoU is still continuing. Therefore, the authority directs the respondent/promoter to pay assured return to the complainants at the agreed rate i.e., @Rs.48,125/- per month from the date i.e., 10.04.2017 till offer of possession, after deducting the amount already paid on account of assured return against the unit in question to the complainants.

Delay possession charge.

27. In the present complaint, the complainants intend to continue with the project and are seeking possession of the subject unit and delay possession charges as provided under the provisions of section 18(1) of the Act which 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."

28. A builder buyer agreement dated 11.05.2013 was executed between the parties. The due date to handover the possession of unit is calculated as per clause 5 of BBA. The relevant clause is reproduced below:



"5.1 That the Company shall complete the construction of the said Unit within 36 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 sent to the Allottee subject to 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 Allottees(s) who shall within 30 days, thereof remit all dues.

5.2 If there is any delay due to any force majeure reasons as explain hereinafter then the period of delay shall commence 6 (six) months after the due date, as this 6 (six) months period shall be grace period available with the company to complete the said complex....

29. **Due date of handing over of possession:** As per possession clause 5.1 of the agreement dated 11.05.2013 the possession of the unit was to be handed over within 36 months from the date of execution of agreement or from start of construction whichever is later. The date of start of construction is not available on records so, the due date is calculated from the date of agreement i.e., 11.05.2013 which comes out to be 11.05.2016. Further clause 5.2 of the agreement mentions that the respondent is entitled to a grace period of 6 months. The said grace period of 6 month is allowed as it is unqualified. Hence, the due date of possession comes out to be 11.11.2016.
30. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges. 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]

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."

31. The legislature in its wisdom in the subordinate legislation under the rule 15 of the rules has determined the prescribed rate of interest. 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., 28.03.2025 is 9.10%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 11.10%.
32. On consideration of documents available on record and submissions made by the complainants and the respondent, the authority is satisfied that the respondent is in contravention of the provisions of the Act by not handing over possession by the due date as per the agreement dated 11.05.2013 executed between the parties.
33. However now, the proposition before it is as to whether the allottee who is getting/entitled for assured return even after expiry of due date of possession, can claim both the assured return as well as delayed possession charges?
34. The Authority observes that due date of handing over of possession was 11.11.2016 and the respondent has not obtained the occupation certificate till date. So in such case, in terms of Section 18 of the Act, 2016, the respondent is obligated to pay delay possession charges at the prescribed rate from the due date of possession till offer of possession plus two months after obtaining occupation certificate or actual handing over of possession,



whichever is earlier. However, it is to be noted that vide clause 2 of the MoU dated 10.04.2017, it has been mutually agreed between the parties that the respondent shall pay an amount of Rs.48,125/- per month to the complainants-allottee from the date of execution of MoU i.e. 10.04.2017 till offer of possession. The Authority is of considered view that for the period 10.04.2017 till offer of possession, the respondent-promoter cannot be double burdened for the same cause of action and for that period, the amount whichever is higher, shall be payable to the complainants.

35. If we compare this assured return with delay possession charges payable under proviso to section 18(1) of the Act, 2016, the assured return is much better i.e., assured return in this case is payable at Rs. 48,125/- per month whereas the delayed possession charges are payable approximately Rs.34,212/- per month. By way of assured return, the promoter has assured the allottee that he would be entitled for this specific amount till issuance of offer of possession. The purpose of delayed possession charges after due date of possession is served on payment of assured return after due date of possession as the same is to safeguard the interest of the allottees as their money is continued to be used by the promoter even after the promised due date and in return, they are to be paid either the assured return or delayed possession charges whichever is higher.
36. So, in such eventuality, the respondent is directed to pay delay possession charges at prescribed rate from the due date of possession i.e. 11.11.2016 till the date of execution of MoU i.e. 10.04.2017 and thereafter the respondent shall pay assured return to the complainants in terms of Clause 2 of the memorandum of understanding executed between the parties i.e.



from 10.04.2017 till valid offer of possession after receipt of occupation certificate.

F. Directions of the authority

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

- i. The respondent/promoter is directed to pay interest to the complainant(s) against the paid-up amount of Rs. 37,50,000/- at the prescribed rate i.e., 11.10% p.a. for every month of delay from the due date of possession i.e., 11.11.2016 till the date of execution of MoU i.e. 10.04.2017.
- ii. The respondent is directed to pay pending assured return to the complainants in terms of Clause 2 of the memorandum of understanding executed between the parties i.e. from 10.04.2017 till valid offer of possession after receipt of occupation certificate. The amount which is already paid on account of assured return shall be deducted.
- iii. The respondent is directed to offer possession of the unit after completing the unit in all respect as per sanctioned plans & after obtaining of occupation certificate.
- iv. The respondent is directed to pay the outstanding accrued amount of delay possession charges as well as assured return, till date 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 @9.10% p.a. till the date of actual realization.
- v. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e. 11.10% p.a. by the



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respondent which is the same rate of interest which the builder shall be liable to pay the allottees, in case of default of making payment as per section 2(za) of the Act.

vi. The respondent shall not charge anything from the complainants which is not the part of the builder buyer agreement.

38. Complaint stands disposed of.

39. File be consigned to registry.

Dated: 28.03.2025


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