BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**2827 of 2021**
Date of filing complaint:	**23.07.2021**
First date of hearing:	**10.11.2021**
Date of decision :	**12.07.2022**

1. 2.	Sh. Suresh Kumar S/o Sh. Sunder Dass Smt. Raj Rani W/o Sh. Suresh Kumar **Both R/O**: 71, 2nd Floor, M2K, Sector-57, Gurugram	**Complainants**
	Versus	
	M/s Advance India Projects Limited **Regd. office:** 232B, 4th Floor, Okhla Industrial Estate, Phase-III, New delhi-110020	**Respondent**

CORAM:	
Dr. KK Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Complainant-in-person & Ms. Shriti (Advocate)	Complainants
Sh. Harshit Batra (Advocate)	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 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the

rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. n.	Particulars	Details	
1.	Name of the project	"AIPL Joy Street", Sector-66, Gurgaon	
2.	Nature of project	Commercial colony	
3.	**RERA registered/not registered**	157 of 2017 dated 28.08.2017	
		Valid up to	31.12.2020
4.	**DTPC License no.**	7 of 2008 dated 21.01.2008	152 of 2008 dated 30.07.2008
	Validity status	20.01.2022	01.08.2016
	Licensed area	2.8875 acres	13.55
	Name of licensee	Landmark Apartments Private Limited	Ananya Land Holdings
5.	Application letter dated	14.09.2016 [As per page no. 18 of complaint]	
6.	Unit no.	29 on ground floor [As per page no. 26 of complaint]	
7.	Unit area admeasuring	402.96 sq. ft. [Super area]	

		[As per page no. 26 of complaint]
8.	Revised unit area admeasuring	394.82 sq. ft. [Super area] [As per offer of constructive possession on page no. 92 of reply]
9.	Date of builder buyer agreement	30.12.2016 [As per page no. 24 of complaint]
10.	Total sale consideration	Rs. 80,23,532.04/- [BSP] Rs. 82,99,906.04 [TSC] [As per statement of account dated 02.10.2020 on page no. 89-90 of reply]
11.	Amount paid by the complainant	Rs. 92,83,592.59/- [As per statement of account dated 02.10.2020 on page no. 89-90 of reply]
12.	Possession clause	**Clause 38 as per application form** *Subject to the aforesaid and subject to the Applicant not being in default under any part of this Agreement including but not limited to the timely payment of the total Price and also subject to the Applicant having complied with all formalities of documentations prescribed by the Company, the Company endeavours to hand over the possession of the Unit to the Applicant* ***within a period of 42 (forty two) months, with a further grace period of 6 (six) months, from 1 January 2016.***
13.	Assured clause	**Clause 32** Where the Allottee has opted for Payment Plan as per Annexure A attached herewith

		and accordingly, the Company has agreed ***to pay Rs. 37,536.00/- (Rupees Thirty-Seven Thousand Five Hundred Thirty-Six Only) per month by way of assured return to the Allottee from 03.12.2016 or the date of execution it this Agreements to the date of offer of possession of the Unit.*** The return shall be inclusive of all taxes whatsoever payable or due on the return
14.	Due date of possession	**01.01.2020** Calculated as 42 months from 01.01.2016 + grace period of 6 months [As per clause 38 of application form] ***Grace period of 6 months is allowed***
15.	Occupation certificate	28.09.2020 [As per page no. 96 of reply]
16.	Offer of constructive possession	03.10.2020 [As per page no. 92 of reply]

B. Facts of the complaint:

3. That the respondent has launched the project namely "AIPL Joy Street" at Sector 66, Gurugram without any approvals and sold majority of the units to the general public on "assured return" basis.

4. That the complainants' booked a unit bearing no. GF-029 in the project under the assured return scheme and made payments of Rs. 2,00,000/- on 14.9.2016 and has paid Rs. 42,00,000/- approx. in November/December 2016. As per terms mentioned in the said

application form, the respondent was committed to make payment of assured returns to the complainants till offer of possession.

5. That the complainants were allotted unit bearing no. GF-029, admeasuring 402.96 sq. ft. of super area and 216 sq. ft. clear internal usable carpet area for a total sale consideration of Rs. 83,00,000/- payable on booking and within 18 months of booking.

6. That at the time of applying for the unit, it was informed to them that the respondent has all the rights, title and authorization on the project, land and also had the requisite sanctions and approvals from the relevant authorities to undertake such construction. It was further informed that the project would be completed within a period of 48 months from 01.01.2016 and the complainant would be handed over the physical possession of the unit within the said time period and till such time offer of possession is made, the respondent would make payment of assured return. It was on the basis of such representations that they booked the said unit and paid the booking amount.

7. That after the booking of the unit, no buyer's agreement was executed, though earlier, it was assured that buyers agreement will be executed within 15 days of booking.

8. That after expiry of more than 3 months from the date of booking, the respondent executed the buyers' agreement in favour of the complainants on 30.12.2016 and issued demand letter payable within 18 months of booking. The complainants made the payments in

advance and in respect of the same receipts were issued during the contemporary period without sensing any fraud and wrongdoings.

9. That till date, they have approximately made a payment of Rs. 90,00,000/- towards the sale consideration i.e. already more than the total agreed sale consideration of the above stated booked unit.

10. That in the year 2018, the respondent reduced the areas of the unit. The complainants sent a letter requesting various documents to analyse the areas of the unit, but as usual the respondent did not accept to their requests.

11. That in the month of November 2019, the complainants received a letter from respondent whereby illegally and wrongfully stopped payment of amounts of assured returns for 2 months i.e.; November and December 2019 on the pretext of ban on construction as ordered by Hon'ble Supreme Court. Further, the respondent again stopped payment of assured return for the period 21.3.2020 till 15.6.2020 on account of lockdown. It is quite strange that the amount of assured return was treated as "interest" by respondent while deducting TDS, on the amount of advance total sale consideration paid by the complainants being used/utilized by the respondent since November 2016, and further, the respondent has been depositing the TDS under Section 194A of Income Tax Act which is related to payment of interest. Hence, neither ban on construction nor lock down is relevant in the present case. It is not the case of the respondent that it returned

the total sale consideration amounts for 2/4 months and then again received it. Hence, the respondent is liable to make payment of assured returns for the said period of 2 & 3 months of ban on construction and lockdown respectively.

12. That the respondent issued fraudulent constructive offer of possession vide letter dated 03.10.2020. It was mentioned in the said letter that it has received the occupation certificate for the project and intimation regarding "constructive possession" of the unit. It was further mentioned that "It is made clear that as per terms of buyers agreement, physical possession of unit shall never be given to you". After receiving the said intimation of constructive possession, the complainant visited the site and were shocked to see the state of affairs of the site. The complainants had taken the pictures of their unit and project on 18.10.2020 and sent a letter dt. 19.10.2020 along with pictures and requested the respondent to withdraw the said fraudulent offer of possession. Rather, the bare perusal of the buyers' agreement would reveal that the respondent has to deliver the physical possession of the unit to the complainants. Further, at the time of booking, it was told to the respondent by the complainants that they have been running business of stationery and books for last more than 2 decades and wish to open a stationery shop in the said unit. Hence, in absence of physical possession, the very purpose of the complainants' purchasing the shop would get defeated. Further for this very purpose only, the complainants have chosen the corner shop

with specifications of two side open glass as captured in the annexure-"A" of buyers' agreement. But on the site, the respondent has not provided any glass and provided only walls. The branding, look and feel of the shop has been defeated and respondent cannot go against the agreed specifications.

13. That further, the respondent charged frivolous charges along with said constructive offer of possession and all such charges were never agreed upon between the parties. The said charges include:

a) Infrastructure Augmentation Charges: These IAC are levied upon developers who do not want to get their books of accounts audited from DTCP with regard to the extent of profit made being less than or exceeding 15% from a particular project and to avoid that one IAC is payable by Developer to DTCP and in no way, such IAC are payable by allottee.

b) Labour Cess: The said charge is levied upon the developer for the welfare of labour class and the said charge is levied upon the cost of construction and same is in the knowledge of developer from day and hence, such charge cannot be passed upon to the allottee.

c) Electric Switch Station /Sewerage /storm water connection /Electric meter - These kinds of charges are included in the sale consideration from day one of the booking. Further, the said project is registered under HRERA and no extra/additional charge can be levied

on the allottee apart from the agreed sale consideration. Hence, all the above charges are to be refunded to the complainants.

14. That the complainants made excess payments way back and the said so called intimation of constructive possession also depicts the balance payable in negative, implying no payment was due on their part. The physical possession of the allotted unit was to be offered and delivered to them which has not been done by the respondent till date. The complainants are ready and willing to take the physical possession of the unit as on date. As per agreed terms of the said agreement, the respondent has to deliver physical possession of the unit and also make payment of assured returns till actual delivery of possession and not till date of occupation certificate as wrongly alleged by it.

15. That the said project is not complete as on date. The complainants visited the site on several occasions and clicked pictures of the site. They adhered to all the terms and conditions agreed between the parties and the promoter has been in default thereof. The respondent promoter has failed to adhere to various directions/ provisions of HRERA and respondent has till date neither filed any Form A to H nor filed any quarterly compliance report as the same is not available online. The respondent has neither uploaded the requisition details on its website.

C. Relief sought by the complainants:

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

i. Direct the respondent to make payment of arrears of assured returns as mentioned in the complaint and also to make payment of assured returns till date of delivery of actual physical possession, not constructive possession after completing the project in all respects and payment of compensation for delay in offer of actual physical possession as per prescribed rates till the date of actual receipt.

ii. Direct the respondent to adhere to the agreed specifications as per buyer's agreement and deliver the physical possession of the unit with two sides open glass.

iii. Direct the respondent to make payment of Rs. 25,00,000/- towards the compensation for the fraud, cheating, defect in title, lack of approvals loss of opportunity, for harassment, for mental trauma etc. along with litigation costs suffered by the complainant.

D. Reply by respondent:

The respondent by way of written reply made following submissions

17. That the complainants being interested in the real estate development, known under the name and style of "AIPL Joy Street" at Sector 66, Gurgaon, Haryana ("hereinafter "the project") tentatively applied for allotment of the unit vide application form dated 14.09.2016. Subsequently, they were allotted unit no. GF-029 on ground floor, having super area of 402.96 sq. ft. ("hereinafter, "unit"") vide allotment letter dated 15.11.2016. The unit buyer's agreement dated 30.12.2016 ("hereinafter, "agreement") was executed between the parties.

18. That the total sale consideration of the unit was Rs. 84,71,025/- exclusive of the other charges (registration charges, legal/miscellaneous and other charges) as evident form annexure A, payment plan of the agreement. Consequently, the total demand raised by the respondent towards the allotted unit was Rs. 96,03,069.68/- and the complainants have only made the payment of Rs. 92,83,592.59/- as is evident from the account statement dated 03.10.2020.

19. That the relationship between the parties is contractual in nature and is governed by the agreement executed between them. The rights and obligations of the parties flow directly from such agreement. At the outset, it must be noted that the complainants willingly, consciously and voluntarily entered into the agreement after reading and understanding the contents thereof to their full satisfaction. Hence, they agreed to be bound by the terms and conditions in the application form and the agreement. Moreover, the amount payable to the respondent was agreed upon by the parties via mutual agreement, and hence, the respondent is entitled to the payments in accordance with the agreed terms and conditions.

20. That the complainants were responsible to make timely payments for the unit to the respondent, according to the terms and conditions of the agreement. However, they have failed to make the payment of total demand raised by the respondent as is evident from the account

statement annexed herewith. Thus, the complainants cannot be allowed to take benefit of their own wrong. Hence, the complaint is liable to be dismissed with costs.

21. That the respondent fulfilled all of its obligations as per the terms and conditions of the agreement, applied for occupancy certificate on 16.07.2020 and offered the possession of the unit vide a notice of offer of possession dated 03.10.2020 after obtaining the occupancy certificate on 28.09.2020.

22. That the compliance of the terms and conditions of the agreement are subject to force majeure circumstances, as per clause 45 of the agreement. It is pertinent to highlight that it has responsibly intimated the complainants about the delay in project caused due to construction bans vide the letter dated 30.11.2019. The project got delayed due to circumstances beyond the control of the respondent, inter alia, due to the complete ban imposed on the construction activities in National Capital Region as per the orders of Hon'ble Supreme Court, Environment Pollution (Prevention & Control) Authority for the National Capital Region and National Green Tribunal since 2016 which continued till 2019, from time to time. These circumstances fall within the ambit of clause 45 of the agreement. It highlighted that a construction ban for 1 day results in delay in project between 3 to 10 days, due to various factors like demobilisation of labour, delay in

delivery of goods, etc and further, post lifting of the ban, it takes time to get the momentum for construction geared up to its earlier levels.

23. That, as was mutually agreed between the parties, the respondent would pay Rs. 37,536/- per month by way of assured return to the allottee in accordance with clause 32 of the agreement. It must be categorically noted that the clause 32 was subject to clause 45 of the agreement and according to which, "..the compliance of the terms and conditions of this agreement and the project by the company shall be subject at all times to "force majeure" conditions...".

24. That the authority has no jurisdiction to entertain matters pertaining to assured return and yet, the complainants in blatant disregard to the same attempt to invoke the jurisdiction.

25. That the respondent has followed its obligations of payments of assured returns, as per the terms and conditions of the agreement. The payment of assured returns has been rightly made from December 2016 to June 2019. That upon the ban on the construction activities, the development activities were stopped and consequently, the payment of assured returns were stopped due to reasons beyond the control of the respondent, as per clause 45 of the agreement. The same was also communicated to the complainants vide letter dated 30.11.2019.

26. That on 21.02.2019, the Central Government passed an ordinance, Banning of Unregulated Deposits, 2019, to stop the functioning of

unregulated deposits. The assured returns scheme given to the complainants fell under the scope of that ordinance and the payment of such returns became wholly illegal. Later, an act by the name The Banning of Unregulated Deposits Schemes Act, 2019 (hereinafter, "the BUDS Act") was notified on 31.07.2019 and the same came into force. Under the said Act, all the unregulated deposit schemes such as assured returns have been banned and made punishable with strict penal provisions. The assured returns being a deposit under the meaning of section 2(4)(g) of the BUDS Act, falls within the category of unregulated deposit scheme as under section 2(17) of the BUDS Act and is banned under section 3 of the BUDS Act. Being a law-abiding company, by no stretch of imagination, the respondent could continue to make the payments of the assured returns in violation of the BUDS Act. Until the implementation of the said Act, the assured returns have been rightly paid by the respondent.

27. That any orders with respect to continuation of payment of any assured return or any directions thereof for any payment with respect to assured returns may be completely contrary to the subsequent BUDS Act passed post the RERA Act, which, is not violating the obligations or provisions of the RERA Act. Therefore, enforcing an obligation on the respondent-promoter against a Central Act specifically banning assured return schemes, would be contrary to the central legislation (BUDS Act).

28. That the project underwent revision and has been developed as per the approved plans and the respondent was within its contractual rights under clause 9, 10 & 27 of agreement in revising the said plans.

29. That the complainants were rightly given intimation of the revision of building plans vide letter dated 16.11.2019. The objections and suggestions with respect to the same were invited, and the complainants submitted no such objection/suggestion and amounts to absolute consent of the complainants.

30. That upon such revision, the super area of the unit was reduced from 402.96 sq. ft. to 394.82 sq. ft., i.e., a reduction of 2.02%. It must be noted that the same is within the permissible limits of 10% as per the agreement. The super area of 402.96 sq. ft was tentative and subject to change. It was categorically agreed between the parties that the final super area would be as mentioned in the notice of offer of possession, after undergoing revisions. The respondent fulfilled its obligation and rightly offered the possession on 03.10.2020. However, the allottees failed to take the possession of the unit, till date and thus, they stand in violation of clause 11 of the agreement.

31. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority:

32. The plea 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

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

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 allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee or the competent authority, as the case may be;

The provision of assured returns is part of the builder buyer's agreement, as per clause 32 of the BBA dated 30.12.2016. Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

Section 34-Functions of the Authority:

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

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.

F. Findings on objections raised by the respondent

F.I Objection regarding passing of various force majeure conditions such as NGT orders, EPCA orders.

33. The respondent-promoter has raised a contention that the construction of the project was delayed due to force majeure conditions such as various orders passed by the National Green Tribunal & Environment Pollution (Prevention & Control) Authority, thereafter, shortage of labour due to stoppage of work. Since there were circumstances beyond the control of respondent, so taking into consideration the above-mentioned facts, the respondent be allowed the period during which his construction activities came to stand still, and the said period be excluded while calculating the due date. But the plea taken in this regard is not tenable. Though there has been various orders issued to curb the environment pollution. But these were for a short period of time and therefore, no period over and above grace period of 6 months mentioned under possession clause can be allowed to the respondent- builder.

F.II Objection regarding jurisdiction of authority with regards to assured return.

34. It is pleaded on behalf of the complainants 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 but later on, the respondent refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019 (herein after referred to as the Act of 2019). But that Act does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act. However, the plea of respondent is otherwise and who took a stand that though it paid the amount of assured returns up to the year June 2019 but did not pay the same amount after coming into force of the Act of 2019 as it was declared illegal.

35. The Act of 2016 defines "agreement for sale" means an agreement entered into between the promoter and the allottee [Section 2(c)]. An agreement for sale is defined as an arrangement entered between the promoter and allottee with freewill and consent of both the parties. 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 different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral part of this agreement is the

transaction of assured return inter-se parties. 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. Since the agreement defines the buyer-promoter relationship therefore, it can be said that the agreement for assured returns between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate regulatory authority has complete jurisdiction to deal with assured return cases as the contractual relationship arises out of agreement for sale only and between the same parties as per the provisions of section 11(4)(a) of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the agreement for sale till the execution of conveyance deed of the unit in favour of the allottees. Now, three issues arise for consideration as to:

a. Whether authority is within the jurisdiction to vary its earlier stand regarding assured returns due to changed facts and circumstances.

b. Whether the authority is competent to allow assured returns to the allottees in pre-RERA cases, after the Act of 2016 came into operation,

c. Whether the Act of 2019 bars payment of assured returns to the allottees in pre-RERA cases

36. While taking up the cases ***of Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd. (complaint no 141 of 2018),*** and ***Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP" (complaint no 175 of 2018)*** decided on 07.08.2018 and 27.11.2018 respectively, it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the issue of assured returns was involved to be paid by the builder to an allottee but at that time, neither the full facts were brought before the authority nor it was argued on behalf of the allottees that on the basis of contractual obligations, the builder is obligated to pay that amount. However, there is no bar to take a different view from the earlier one if new facts and law have been brought before an adjudicating authority or the court. There is a doctrine of "prospective overruling" and which provides that the law declared by the court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. A reference in this regard can be made to the case of ***Sarwan Kumar & Anr Vs. Madan Lal Aggarwal Appeal (civil) 1058 of 2003*** decided on 06.02.2003 and wherein the hon'ble apex court observed as mentioned above. So, now the plea raised with regard to maintainability of the complaint in the face of earlier orders of the authority in not tenable. The authority can

take a different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. It is now well settled preposition of law that when 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 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 for sale 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. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arises out of the agreement for sale only and between the same contracting parties to agreement for sale. In the case in hand, the issue of assured returns is on the basis of contractual obligations arising between the parties. Then in case of ***Pioneer Urban Land and Infrastructure Limited & Anr. v/s Union of India & Ors. (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019,*** it was observed by the Hon'ble Apex Court of the land that "...allottees who had entered into "assured return/committed returns' agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the developer undertook to pay a certain amount to

allottees on a monthly basis from the date of execution of agreement till the date of handing over of possession to the allottees". It was further held that 'amounts raised by developers under assured return schemes had the "commercial effect of a borrowing' which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code" including its treatment in books of accounts of the promoter and for the purposes of income tax. Then, in the latest pronouncement on this aspect in case ***Jaypee Kensington Boulevard Apartments Welfare Association and Ors. vs. NBCC (India) Ltd. and Ors.*** (24.03.2021-SC): MANU/ SC/0206 /2021, the same view was followed as taken earlier in the case of ***Pioneer Urban Land Infrastructure Ld & Anr.*** with regard to the allottees of assured returns to be financial creditors within the meaning of section 5(7) of the Code. Moreover, after coming into force the Act of 2016 w.e.f. 01.05.2017, the builder is obligated to register the project with the authority being an ongoing project as per proviso to section 3(1) of the Act of 2017 read with rule 2(o) of the Rules, 2017. The Act of 2016 has no provision for re-writing of contractual obligations between the parties as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.,*** (supra) as quoted earlier. So, the respondent/builder can't take a plea that there was no contractual obligation to pay the amount of

assured returns to the allottee after the Act of 2016 came into force or that a new agreement is being executed with regard to that fact. When there is an obligation of the promoter against an allottee to pay the amount of assured returns, then he can't wriggle out from that situation by taking a plea of the enforcement of Act of 2016, BUDS Act 2019 or any other law.

37. It is pleaded on behalf of respondent/builder that after the Banning of Unregulated Deposit Schemes Act of 2019 came into force, there is bar for payment of assured returns to an allottee. But again, the plea taken in this regard is devoid of merit. Section 2(4) of the above mentioned Act defines the word ' deposit' as *an amount of money received by way of an advance or loan or in any other form, by any deposit taker with a promise to return whether after a specified period* or otherwise, either in cash or in kind or in the form of a specified service, *with or without any benefit in the form of interest, bonus, profit or in any other form, but does not include*

a. *an amount received in the course of, or for the purpose of, business and bearing a genuine connection to such business including—*

b. *advance received in connection with consideration of an immovable property under an agreement or arrangement subject to the condition that such advance is adjusted against such immovable property as specified in terms of the agreement or arrangement.*

38. A perusal of the above-mentioned definition of the term 'deposit' shows that it has been given the same meaning as assigned to it under the Companies Act, 2013 and the same provides under section 2(31) includes any receipt by way of deposit or loan or in any other form by a company but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India. Similarly rule 2(c) of the Companies (Acceptance of Deposits) Rules, 2014 defines the meaning of deposit which includes any receipt of money by way of deposit or loan or in any other form by a company but does not include.

   a. *as an advance, accounted for in any manner whatsoever, received in connection with consideration for an immovable property*

   b. *as an advance received and as allowed by any sectoral regulator or in accordance with directions of Central or State Government;*

39. So, keeping in view the above-mentioned provisions of the Act of 2019 and the Companies Act 2013, it is to be seen as to whether an allottee is entitled to assured returns in a case where he has deposited substantial amount of sale consideration against the allotment of a unit with the builder at the time of booking or immediately thereafter and as agreed upon between them.

40. The Government of India enacted the Banning of Unregulated Deposit Schemes Act, 2019 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 as defined in section 2 (4) of the BUDS Act 2019 mentioned above.

41. It is evident from the perusal of section 2(4)(l)(ii) of the above-mentioned Act that the advances received in connection with consideration of an immovable property under an agreement or arrangement subject to the condition that such advances are adjusted against such immovable property as specified in terms of the agreement or arrangement do not fall within the term of deposit, which have been banned by the Act of 2019.

42. Moreover, the developer is also bound by promissory estoppel. As per this doctrine, the view is that if any person has made a promise and the promisee has acted on such promise and altered his position, then the person/promisor is bound to comply with his or her promise. When the builder failed to honour their commitments, a number of cases were filed by the creditors at different forums such *as* ***Nikhil Mehta, Pioneer Urban Land and Infrastructure*** which ultimately led the central government to enact the Banning of Unregulated Deposit Scheme Act, 2019 on 31.07.2019 in pursuant to the Banning of Unregulated Deposit Scheme Ordinance, 2018. However, the moot question to be decided is as to whether the schemes floated earlier by the builders and promising as assured returns on the basis of allotment of units are covered by the abovementioned Act or not. A

similar issue for consideration arose before Hon'ble RERA Panchkula in case ***Baldev Gautam VS Rise Projects Private Limited*** (*RERA-PKL-2068-2019*) where in it was held on 11.03.2020 that a builder is liable to pay monthly assured returns to the complainant till possession of apartments stands handed over and there is no illegality in this regard.

43. The definition of term 'deposit' as given in the BUDS Act 2019, has the same meaning as assigned to it under the Companies Act 2013, as per section 2(4)(iv)(i) i.e., explanation to sub-clause (iv). In pursuant to powers conferred by clause 31 of section 2, section 73 and 76 read with sub-section 1 and 2 of section 469 of the Companies Act 2013, the Rules with regard to acceptance of deposits by the companies were framed in the year 2014 and the same came into force on 01.04.2014. The definition of deposit has been given under section 2 (c) of the above-mentioned Rules and as per clause xii (b), as advance, accounted for in any manner whatsoever received in connection with consideration for an immovable property under an agreement or arrangement, provided such advance is adjusted against such property in accordance with the terms of agreement or arrangement shall not be a deposit. Though there is proviso to this provision as well as to the amounts received under heading 'a' and 'd' and the amount becoming refundable with or without interest due to the reasons that the company accepting the money does not have necessary permission or approval whenever required to deal in the goods or properties or services for which the money is taken, then the amount received shall

be deemed to be a deposit under these rules however, the same are not applicable in the case in hand. Though it is contended that there is no necessary permission or approval to take the sale consideration as advance and would be considered as deposit as per sub-clause 2(xv)(b) but the plea advanced in this regard is devoid of merit. First of all, there is exclusion clause to section 2 (xiv)(b) which provides that unless specifically excluded under this clause. Earlier, the deposits received by the companies or the builders as advance were considered as deposits but w.e.f. 29.06.2016, it was provided that the money received as such would not be deposit unless specifically excluded under this clause. A reference in this regard may be given to clause 2 of the First schedule of Regulated Deposit Schemes framed under section 2 (xv) of the Act of 2019 which provides as under:-

> *(2) The following shall also be treated as Regulated Deposit Schemes under this Act namely:-*
>
> *a. deposits accepted under any scheme, or an arrangement registered with any regulatory body in India constituted or established under a statute; and*
>
> *b. any other scheme as may be notified by the Central Government under this Act.*

44. 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.

G. Findings on the relief sought by the complainants:

G.I Direct the respondent to make payment of arrears of assured returns as mentioned in this petition and also to make payment of assured returns till date of delivery of actual physical possession not constructive possession after completing the project in all respects and payment of compensation for delay in offer of actual physical possession as per prescribed rates till the date of actual receipt.

G.II Direct the respondent to adhere to the agreed specifications as per buyer's agreement and deliver the physical possession of the unit with two side open glass.

45. The complainants are seeking relief of handing over of possession and assured return in the above-mentioned heads. The complainants made an application dated 14.09.2016 for allotment of commercial unit in the project of the respondent. As per application form, the said unit was booked under assured return scheme and clause 38 deals with handing over of possession of the subject unit stating that the possession of the same would be handed over by the respondent-builder within a period of 42 months, with a further grace period of 6 months, from 01.01.2016. Therefore, in view of said clause, due date of handing over of possession along with grace period of 6 months comes out to be 01.01.2020. Subsequently, a buyer's agreement was executed between the parties on 30.12.2016 containing provision of assured return under clause 32 of said agreement.

46. The complainants submitted that the respondent has made a constructive offer of possession on 03.10.2020 after obtaining occupation certificate from competent authority on 28.09.2020. The respondent took a plea that it was never agreed between the parties that the physical possession of unit would be handed over to them. The authority observes that under clause 12 of agreement dated 30.12.2016, it clearly specified that the allottee would be handed over the possession of the unit and the same is reproduced hereunder: -

> *12. HANDING OVER POSSESSION:*
>
> *That the Allottee shall be handed over possession of the Unit from the Company only after the Allottee has fully discharged all his obligations and entire Total Price (including interest due, if any, thereon) against the Unit has been paid and all other applicable charges/dues/taxes of the Allottee have been paid and Conveyance Deed has been executed and registered in his favour, The Company shall hand over possession of the Unit to the Allottee is not in default of any of the terms and conditions of this Agreement and has complied with all provisions, formalities, documentation, etc as may be prescribed by the Company in this regard. The Allottee shall be liable to pay the Maintenance Charges from the date referred in the notice for taking possession of the Unit. After taking the possession of the Unit, it shall be deemed that the Allottee has satisfied himself with regard to the construction or quality of workmanship.*

The authority is of considered view that it nowhere stated or defined as what is meant by "constructive possession". Therefore, the respondent would hand over the physical possession of the unit to the complainants.

47. The complainants stated at bar that the unit is still not complete and is not as per the specification of agreement and further, submitted that the respondent has failed to make payment of assured return. The

authority observes that as per clause 32 of agreement dated 30.12.2016, an amount of Rs. 37,536.00/- per month was payable to the allottee by way of assured return from 03.12.2016 or the date of executing agreement (30.12.2016) to the date of offer of possession of the unit. As per page no. 104 of reply, the respondent started paying assured return from Dec 2016. As per relevant clause of BBA, the said returns were payable till the date of offer of possession.

48. During the course of proceedings, the respondent through its counsel very categorical stated that assured return till date of offer of possession has been given and would be filing account statement to this effect within one week after serving a copy to the complainant. The counsel for the complainants stated that assured return has been received only up to March 2020 and request for issuance of direction for its payment till offer of possession as well as for physical handing over of the possession. The respondent is directed to make the payment of assured return as per agreed terms contained in clause 32 of agreement till offer of possession, if not already paid for balance amount if any, along with handing over of physical possession of the unit to the complainant within 2 weeks. The allottees' would make the payment of outstanding dues towards the unit as per BBA within 2 weeks and thereafter, the respondent would hand over the possession within next 2 weeks after completing the unit along with fixtures as per specifications and making it fully habitable. If the unit was still not found fit for habitation for occupation in terms of specifications even

in BBA, the complainants-allottees may file fresh complaint before the Authority. The equitable rate of interest shall be applicable on any amount outstanding to be paid by either of complainants or the respondent.

G.III Direct the respondent to make payment of Rs. 25,00,000/- towards the compensation for the fraud, cheating, defect in title, lack of approvals loss of opportunity, for harassment, for mental trauma etc. along with litigation costs suffered by the complainant.

49. The complainants are seeking relief w.r.t compensation in the aforesaid relief, Hon'ble Supreme Court of India in civil appeal titled as ***M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors. (SLP(Civil) No(s). 3711-3715 OF 2021),*** held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation 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. Therefore, the complainants may approach the adjudicating officer for seeking the relief of compensation.

H. Directions of the Authority:

50. 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 functions entrusted to the Authority under Section 34(f) of the Act of 2016:

i) The respondent is directed to make payment of assured return as per agreed terms contained in clause 32 of agreement till offer of possession, if not already paid.

ii) The allottees shall make the payment of outstanding dues towards the unit as per buyer's agreement along with equitable rate of interest as per section 2(za) of Act, within 2 weeks and thereafter, the respondent would hand over the possession within next 2 weeks after completing the unit along with fixtures as per specifications and making it fully habitable.

iii) If the unit is still not found fit for habitation for occupation in terms of specifications even in BBA, the complainants-allottees may file fresh complaint before the Authority.

51. Complaint stands disposed of.

52. File be consigned to the registry.

(Vijay Kumar Goyal)
Member

(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.07.2022