Corrected vide order dated 26.05-2022

31.05-2022

HARYANA REAL ESTATE REGULATORY AUTHORITY
GURUGRAM
हरियाणा भू–संपदा विनियामक प्राधिकरण, गुरुग्राम

New PWD Rest House, Civil Lines, Gurugram, Haryana   नया पी.डब्ल्यू.डी. विश्राम गृह, सिविल लाईंस, गुरुग्राम, हरियाणा

PROCEEDINGS OF THE DAY	**31**
Day and Date	Friday and 22.04.2022
Complaint No.	CR/2852/2021 Case titled as Sharda Trivedi and Pranay Trivedi VS Revital Reality Private Limited
Complainant	Sharda Trivedi and Pranay Trivedi
Represented through	Ms. Kavesh Nair Advocate
Respondent	Revital Reality Private Limited
Respondent Represented	Shri Bhrigu Dhami Advocate
Last date of hearing	09.02.2022
Proceeding Recorded by	Naresh Kumari and HR Mehta

Proceedings through VC

The present complaint has been received on 23.07.2021 and the reply on behalf of respondent was received on 25.08.2021.

Succinct facts of the case as per complaint and annexures are as under:

S.N.	Particulars	Details
1.	Name of the project	"Supertech Basera" sector- 79&79B, Gurugram
2.	Unit no.	0019, upper ground floor, Tower/block- Basera Super Market/Commercial, Unit measuring 346 sq. ft. (Page 20 of complaint)
3.	Date of provisional allotment letter cum buyer's agreement	08.05.2017 (Page 20 of complaint)

4.	Date of execution of memorandum of understanding	03.08.2017 [Page 40 of complaint]
5.	Possession clause	**E (26). Possession of unit** The possession of the unit shall be given by April 2019 or extended period as permitted by the agreement. However, the company hereby agrees to compensate the Allottee/s @ Rs. 5.00/-(five rupees only) per sq. ft. of super area of the commercial unit per month for any delay in handing over possession of the unit beyond the given period plus the grace period of 6 months and up to the offer letter of possession or actual physical possession whichever is earlier. However, any delay in project execution or its possession caused due to force majeure conditions and/or any judicial pronouncement shall be excluded from the aforesaid possession period. The compensation amount will be calculated after the lapse of the grace period and shall be adjusted or paid, if the adjustment is not possible because of the complete payment made by the Allottee till such date, at the time of final account statement before possession of the unit. The penalty clause will be applicable to only those Allottees who have not boked their unit under any special/beneficial scheme of the company i.e. No EMI till offer of possession, Subvention scheme, Assured return etc and who honour their agreed payment schedule and make timely payment of due installments and

		additional charges as per the payment given in Allotment Letter. (Page 29 of agreement).
6.	Assured return clause	**1.** The parties hereby agree and acknowledge that the allottee has opted/ confirmed for an Assured return scheme available for their allotted unit as proposed by the company, under which the company hereby, agrees to provide an Assured return of 11% p.a. on the amount received as per the payment plan mentioned in the allotment letter, from the allottee for the said unit allotted to the allottee, till offer of possession letter sent to the allottee(Assured return) 2. It is hereby agreed between the parties that the aforesaid Assured Return amount shall ***become payable to the company to the allottee when 50% of the payment of price/cost of the unit is made by the Allottee*** as mentioned in their allotment letter. [page 41 of complaint]
7.	Due date of possession	30.04.2019
8.	Total sale consideration	Rs.36,41,100/- (As per payment plan page 21 of complaint)
9.	Total amount paid by the complainant	Rs.18,83,625/- (As per annexure -D, payment information page 43 of complaint)
10.	Occupation certificate	Not obtained

11.	Delay in handing over possession till the date of order i.e., 22.04.2022	2 years 11 month and 23 days
12	Grace period	**Not allowed** The promoter has proposed to hand over the possession of the said flat within stipulated time period i.e., 30.04.2019 and has sought further extension of a period of 6 months (after the expiry of the said time) but they have not mentioned the grounds/circumstances on the happening of which he would become entitled for the said extension of period. It may be stated that asking for the extension of time in completing the construction is not a statutory right nor has it been provided in the rules. Further, there is no provision in relation to grace period in Affordable Group Housing Policy, 2013. As such in absence of any provision related to grace period, the said grace period of six months as sought by the respondent promoter is disallowed in the present case.

The complainant has sought following relief:

1. **Direct the respondent to pay interest @ 20% per annum on delayed possession on the entire deposited amount of Rs.18,83,625/- till handing over of possession.**

Considering the above-mentioned facts, the authority calculated due date of possession as per clause (E) 26 of the allotment letter cum buyer's agreement executed between the parties on 08.05.2017, the possession of the subject apartment was to be delivered within stipulated time i.e., by 30.04.2019.

The authority allows DPC at the prescribed rate of interest and it has been prescribed under rule 15 of the rules. 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., 22.04.2022 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., ~~9.30%~~. 9.40%.

Accordingly, the complainant is entitled for delayed possession charges as per the proviso of section 18(1) of the Real Estate (Regulation and Development) Act, 2016 at the prescribed rate of interest i.e., 9.30% p.a. for every month of delay on the amount paid by the complainant to the respondent from the due date of possession i.e., 30.04.2019 till handing over of possession.

2. **Direct the respondent to pay the due and payable Assured return in accordance with PLA and MOU.**

The complainants have sought assured return on yearly basis as per clause 1.1 of Memorandum of understanding dated 03.08.2017 at the rate of 11% per annum on the amount received as per payment plan and the scheme shall become operative when the allottees have paid 50% of the payment of price/cost of the unit to the respondent company. The total sale consideration of the allotted unit as per allotment letter cum buyer's agreement dated 08.05.2017 is Rs.36,41,100/- and as per assured return scheme, the allottees were required to pay a sum of Rs.18,20,550/- i.e., 50% of the total sale price. That amount was admittedly paid by the complainants to the builder by 23.05.2017 as evident from payment information dated 07.07.2021. The respondent has not complied with the terms and conditions of the memorandum of understanding.

The Act of 2016 defines "agreement for sale" as an agreement entered into between the promoter and the allottee [Section 2(c)]. 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. Therefore, different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral parts of this agreement is the transaction of assured return inter-se parties. Though 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 return between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate authority has

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complete jurisdiction to deal with assured return cases as the contractual relationship arise 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 allottee.

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 returns. Moreover, an agreement defines the builder/buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allotee arises out of the same relationship and is marked by the original agreement for sale.

Now, the proposition before the Authority whether an allottee who is getting/entitled for assured return even after expiry of due date of possession, is entitled to both the assured return as well as delayed possession charges?

To answer the above proposition, it is worthwhile to consider that the assured return is payable to the allottee on account of a provision in the BBA or in a MoU having reference of the BBA or an addendum to the BBA/MoU or allotment letter. The assured return in this case is payable from the date of making down payment till offer of possession. The rate at which assured return has been committed by the promoter is 11% per annum which is more than reasonable in the present circumstances. If we compare this assured return with delayed possession charges payable under proviso to section 18 (1) of the Real Estate (Regulation and Development) Act, 2016, the assured return is much better i.e. the assured return in this case is payable at the rate of more than 11% whereas the delayed possession charges are payable at the rate of ~~9.30%~~ 9.40% per annum. By way of assured returns, the promoter has assured the allottee that he will be entitled for this specific amount till offer of possession. Accordingly, the interest of the allottee is protected even after the due date of possession is over as the assured return are payable till offer of possession. The purpose of delayed possession charges after due date of possession is over and payment of assured return after due date of possession is over as the same to safeguard the interest of the allottee as his money is continued to be used by the promoter even after the promised due date and in return, he is paid either the assured return or delayed possession charges whichever is higher.

Accordingly, the Authority decides that in cases where assured return is reasonable and comparable with the delayed possession charges, allottee is

entitled under section 18 and is payable from the making payment of 50% of the payment of price/cost of the unit is made by the allottee i.e., 23.05.2017 till the offer of possession letter sent to the allottee, the allottee shall be entitled only assured return or delayed possession charges whichever is higher without prejudice to any other remedy including compensation.

The respondent is directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of this order after adjustment of outstanding dues, if any, from the complainant and failing which that amount would be payable with interest @ ~~7.30%~~ 7.40% p.a. till the date of actual realization.

3. Direct the respondent not to charge holding charges.

As on date, the cause of action has not arisen with regard to the aforesaid reliefs. The respondent has not raised any demand with regard to holding charges and it is mere contingency that the respondent may or may not raise demand in regard to holding charges of subject unit. Therefore, the complainants are advised to approach the authority as and when cause of action arises. Further, as per law settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020 the respondent is not entitled to claim holding charges from the complainants at any point of time even after being part of the buyer's agreement.

4. Direct the respondent to pay cost of litigation to the complainants

The complainant is claiming compensation in the present relief. The authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee can claim. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

Complaint stand disposed of. Detailed order will follow. File consigned to the registry.

Vijay Kumar Goyal
Member

Dr. KK Khandelwal
Chairman
22.04.2022

BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**2852 of 2021**
First date of hearing	:	**25.08.2021**
Date of decision	:	**22.04.2022**

1. Shradha Trivdei
2. Pranay A Trivedi

Both RR/o: - Apartment No. 901, Media House, Plot No. 10, Sector-47, Gurugram - 122001 — **Complainants**

Versus

M/s Revital Reality Private Limited.
Office at: 1114, 14th floor, Hemkunt Chamber, 89, Nehru Place, New Delhi- 110019 — **Respondent**

CORAM:

Shri KK Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**

APPEARANCE:

Sh. Kavesh Nair	Advocate for the complainants
Sh. Bhrigu Dhami	Advocate for the respondent

ORDER

1. The present complaint dated 23.07.2021 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the

Act or the Rules and regulations made there under or to the allottees as per the agreement for sale executed *inter se.*

A. **Unit and project related details**

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

S.No.	Heads	Information
1.	Project name and location	"Basera", Sector- 79, 79B, Gurugram.
2.	Project area	12.10 acres
3.	Nature of the project	Affordable Group Housing Project
4.	DTCP license no and validity status	I. 163 of 2014 dated 12.09.2014 valid upto 11.09.2019 II. 164 of 2014 dated 12.09.2014 valid till 11.09.2019
5.	Name of licensee	Revital Realty Pvt. Ltd. & others
6.	RERA Registered/ not registered	**Registered vide no. 108 of 2017 dated 24.08.2017.**
7.	RERA registration valid up to	31.01.2020
8.	RERA Extension no.	14 of 2020 dated 22.06.2020
9.	RERA Extension valid upto	31.01.2021
10.	Unit no.	0019, upper ground floor, tower/block: Basera Super Mart/Commercial [Page no. 20 of complaint]
11.	Unit measuring	346 sq. ft. [carpet area]

12.	Date of execution of provisional allotment letter cum buyer's agreement	08.05.2017 [Page no. 20 of complaint]
13.	Date of execution of memorandum of understanding	03.08.2017 [Page 40 of complaint]
14.	Payment plan	Flexi payment Plan [Page no. 21 of complaint]
15.	Total consideration	Rs.36,41,100/- [as per payment plan page no. 21 of complaint]
16.	Total amount paid by the complainants	Rs.18,83,625/- [as per payment information dated 07.06.2021page no. 43 of complaint]
17.	Due date of delivery of possession as per clause E (26) of the flat buyer's agreement: by April 2019 or extended period as permitted by the agreement. However, the company hereby agrees to compensate the Allottee/s @ Rs. 5.00/-(five rupees only) per sq. ft. of super area of the commercial unit per month for any delay in handing over possession of the unit beyond the given period plus the grace period of 6 months and up to the offer letter of possession or actual physical possession whichever is earlier. [Page 29 of complaint]	30.04.2019

18.	Assured return clause	**1.** The parties hereby agree and acknowledge that the allottee has opted/ confirmed for an Assured return scheme available for their allotted unit as proposed by the company, under which the company hereby, agrees to provide an Assured return of 11% p.a. on the amount received as per the payment plan mentioned in the allotment letter, from the allottee for the said unit allotted to the allottee, till offer of possession letter sent to the allottee(Assured return) 2. It is hereby agreed between the parties that the aforesaid Assured Return amount shall ***become payable to the company to the allottee when 50% of the payment of price/cost of the unit is made by the Allottee*** as mentioned in their allotment letter. [Page 41 of complaint]
19.	Delay in handing over possession till the date of order i.e., 22.04.2022	2 year 11 months and 23 days
20.	Occupation certificate	Not obtained
21.	Status of the project	On going
22.	Offer of possession	Not offered

23.	Whether any amount of assured return paid as per clause 1 of the MOU.	The respondent paid the assured return amount till November 2019. No specific amount is mentioned.

B. Facts of the complaint

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

   I. That the complainants were on a lookout for a good project to invest their hard-earned money. In pursuance of the same, the complainants decided to book a commercial space/unit in the commercial market project named as "Supertech Basera/Mart", the building plan of which was approved by the Director General, Town and Country Planning, Chandigarh (Haryana) (DGTCP) vide Memo No. ZP-1033/AD(RA)2014/28487 dated 19.12.2014. The project was advertised by the respondent/promoter and applications for the scheme were invited through the distribution of brochures containing the details of the project.

   II. That the reputation of the respondent as one of the best real estate companies and believing the representations/assurances and warranties of the respondent to be true, the complainants decided to purchase a commercial space/unit in the project. Therefore, the complainants booked a commercial space/unit vide booking form No. STC\Booking\2017\4002822 dated 11.04.2017. In view of the same a provisional allotment letter was issued by the respondent on

08.05.2017 herein allotting a commercial space/unit with an area of 346 Sq. Ft. (Super built-up area) bearing unit no. C034UGF0019 in the project at Sector 79, 79B Gurgaon Haryana 122101. Subsequently, both the parties entered into a Memorandum of Understanding in furtherance to the allotment letter on 03.08.2017 for the Erstwhile Shop.

III. That the terms and condition of the provision allotment letter, the erstwhile shop was allotted to the complainants at the basic price of Rs. 36,41,100/- taxes and levies extra as applicable were to be charged along with if, opted for, preferential location charges and additional charges.

IV. That as per the MOU, clauses 1 & 2, the complainants were promised an assured return at the rate of 11% (Eleven Percent) per annum and that was to be paid on the amount received as per the payment plan mentioned in the provisional allotment letter till the offer of possession letter is sent to them. That the aforesaid assured return amount was to become payable by the company to the complainant when 50% of the payment of the cost of the shop was made to it.

V. That till date, the complainants made the total payment of Rs. 18,83,625/-. Further, the complainants have procured a statement of accounts for the erstwhile shop reflecting the amount paid to the respondent. That the said amount exceeds the 50% threshold for eligibility of assured returns and hence making the complainants eligible for assured returns starting from 11.05.2017.

VI. In terms of the provisional allotment letter, the respondent promised to deliver the possession of the erstwhile shop to the complainants by April 2019 as commitment period excluding 6 months of grace period.

VII. That the respondent miserably failed to comply with the clauses of the said provisional allotment letter and MOU. Further, the possession of the erstwhile shops ought to have been delivered to the aforesaid complainants by April 2019 after the date of approval of the building plans and/or fulfilment of the pre-conditions if any, imposed under the approval of the building plans. The respondent was entitled to a grace period of 6 months but only for the unforeseen reasons beyond their control.

VIII. That the respondents stopped paying assured returns since ***November 2019*** and by taking undue advantage of its position, and began pressurizing the complainants to agree on adjusting the unpaid assured return towards the next demand as per the payment schedule. The complainants have vehemently denied any adjustment of the assured return and demanded the pending assured return and resume the monthly payment of the same.

IX. That during the course of development of the project, the complainants visited the project to verify the development and progress but was given false hope after every visit, the same can be verified by the visitor's entry register at the project's site. The complainants also inquired about the status of the project via calls,

meetings and made various representations to the respondent. Further, the respondent stopped paying the assured return as payable to the complainants as mentioned above. The complaint through several emails from May 2019 to November 2020 expressed his financial hardship, and consequently requested the respondent to provide the assured return as agreed in the MOU. It is further stated that the complainants also requested the respondent to arrange a site visit for their family in order to see the status of the project and to understand if any further development was made.

X. That In response to the foregoing email, the Complainants vide email dated 24.09.2020 asked for clarification on the assured returns as agreed by them, considering the fact that the respondent itself were at fault by delaying the possession of the concerned Erstwhile Shop. It was further stated by the complainants that respondent is liable to compensate them on account of the delay of possession, irregularity in assured returns also requested to allow a visit to see the condition of the erstwhile shop before making any further payment for a delayed project.

XI. That without prejudice, it can be stated with conviction that there has been no intentional delay in payment from the end of the complainants and they have made numerous representations to the respondent and have been constantly following up through personal messages, letters, physical visits to the office and calls but the respondent has not given any satisfactory response and no clarity

regarding the likely date of delivery of the subject erstwhile shop as per the allotment letter and MOU, they have intentionally kept the complainants in misinformed about the progress of the project and provided him with false hopes.

XII. That upon exhausting all available measures to follow up and inquire about the shop and assured returns, the complainants finally sent a legal notice dated 01.01.2021 in response to the non-compliance with the MOU and allotment letter. That which was replied with no specific information and substantial reasons for such delay on 23.01.2021. Further, the complainants are facing major financial difficulties due to purchase of the erstwhile shop whose possession has been delayed by 2 years from the scheduled date of possession by the respondent.

XIII. That it is humbly submitted that the respondent failed to comply with the construction plan promised vide allotment letter, MOU, brochures and advertisement made in the project. The respondent with mala fide intentions used the hard-earned money of the allottees in the project for personal gains and delayed the delivery of possession of the erstwhile apartment.

XIV. That the respondent has committed grave violation of the terms and conditions of the allotment letter and the MOU. The respondent has miserably failed to hand over the possession of the apartment in dispute as and when promised i.e., on or before April 2019. Hence, the complainants are before this authority and pray for the rightful

compensation in terms of interest on delayed possession on the hard-earned money deposited till date on account of default made by the respondent and pending assured returns as due and payable.

C. Relief sought by the complainants

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

   I. Direct the respondents to pay interest @20% per annum on delayed possession on the entire deposited amount of Rs. 18,83,625/- till handling over of possession.

   II. Direct the respondent to pay the due and payable assured returns in accordance with PAL and MOU.

   III. Direct the respondent not to charge holding charges.

   IV. Direct the respondents to pay cost of the litigation to the complainants.

   V. Restrain the respondents from raising any fresh demand & any liability on the complainants until letter of possession is issued.

5. On the date of hearing, the authority explained to the respondent/promoter about the contravention 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

6. The respondent contested the complaint on the following grounds. The submission made therein, in brief is as under: -

I. That the project "Basera" located in sector-79, 79-B, Gurugram, Haryana. The complainants approached the respondent, making enquiries about the project and after complete information being provided to them, sought to book a unit in the said project and the complainants submitted an application for allotment of a unit.

II. That vide letter dated 08.05.2017, that complainants were allotted commercial unit bearing no. Shop-0019, upper ground floor, Basera Super Mart in the said project. The payment plan for remaining sale consideration was also detailed in the said letter.

III. That in terms of agreement, the possession is to be handed over by April 2019 plus grace period of 6 months. However, the same was subject to force majeure conditions which would hamper the development of the project. Further, in terms of clause E, "Possession of The Unit" of the agreement the timely possession was subject to timely payments of sale consideration and the other charges. Further, it was mutually agreed that the time frame for possession was tentative and would depend upon force majeure conditions, timely payments, and completion of all required formalities.

IV. In the interregnum, the pandemic of Covid 19 has gripped the entire nation since March of 2020. The Government of India has itself categorized the said event as a 'Force Majeure' condition, which automatically extends the timeline of handing over possession of the apartment to the complainants.

V. That the construction of the project is in full swing, and the delay if at all, has been due to the Government-imposed lockdowns which stalled any sort of construction activity. Till date, there are several embargos qua construction at full operational level.

VI. That the said project is registered with this authority vide registration no. 108 of 2017 dated 24.08.2017.

VII. That the period of lockdown owing to the covid-19 first and second wave may be waived for the calculation of the DPC, if applicable to be paid by the respondent as no construction despite numerous efforts could be continued during the lockdown period.

VIII. That the delay if at all, has been beyond the control of the respondent and as such extraneous circumstances would be categorized as 'Force Majeure', and would extend the timeline of handing over the possession of the unit, and completion the project.

IX. The delay in construction was on account of reasons that cannot be attributed to the respondent. That the buyer's agreement provides that in case the developer/respondents delay in delivery of unit for reasons not attributed to the developer/respondent, then the developer/respondent shall be entitled to proportionate extension of time for completion of said project.

X. The force majeure clause, it is clear that the occurrence of delay in case of delay beyond the control of the respondent, including but

not limited to the dispute with the construction agencies employed by it for completion of the project is not a delay on account of the respondent for completion of the project.

XI. That the timeline stipulated under the allotment letter was only tentative, subject to force majeure reasons which are beyond the control of the respondent. The respondent in an endeavor to finish the construction within the stipulated time, had from time to time obtained various licenses, approvals, sanctions, permits including extensions, as and when required. Evidently, the respondent had availed all the licenses and permits in time before starting the construction.

XII. That apart from the defaults on the part of the allottee, like the complainants herein, the delay in completion of project was on account of the following reasons/circumstances that were above and beyond the control of the respondent: -

- Shortage of labour/ workforce in the real estate market as the available labour had to return to their respective states due to guaranteed employment by the Central/State Government under NREGA and JNNURM Schemes;
- that such acute shortage of labour, water and other raw materials or the additional permits, licenses, sanctions by different departments were not in control of the respondent and were not at all foreseeable at the time of launching of the project and commencement of construction of the complex.

The respondent cannot be held solely responsible for things that are not in control of the respondent.

XIII. The respondent has further submitted that the intention of the force majeure clause is to save the performing party from the consequences of anything over which he has no control. It is no more res integra that force majeure is intended to include risks beyond the reasonable control of a party, incurred not as a product or result of the *negligence or malfeasance* of a party, which have a materially adverse effect on the ability of such party to perform its obligations, as where non-performance is caused by the usual and natural consequences of external forces or where the intervening circumstances are specifically contemplated. Thus, in light of the aforementioned, it is most respectfully submitted that the delay in construction, if any, is attributable to reasons beyond the control of the respondent and as such the respondent may be granted reasonable extension in terms of the allotment letter.

XIV. It is public knowledge, and several courts and quasi-judicial forums have taken cognisance of the devastating impact of the demonetisation of the Indian economy, on the real estate sector. The real estate sector is highly dependent on cash flow, especially with respect to payments made to labourers and contractors. The advent of demonetisation led to systemic operational hindrances in the real estate sector, whereby the respondent could not

effectively undertake construction of the project for a period of 4-6 months. Unfortunately, the real estate sector is still reeling from the aftereffects of demonetisation, which caused a delay in the completion of the project. The said delay would be well within the definition of 'Force Majeure', thereby extending the time period for completion of the project.

XV. That the complainants have not come with clean hands before this authority and has suppressed the true and material facts from this authority. It would be apposite to note that the complainant is a mere speculative investor who has no interest in taking possession of the apartment.

XVI. That the completion of the building is delayed by reason of non-availability of steel and/or cement or other building materials and/or water supply or electric power and/or slow down strike as well as insufficiency of labour force which is beyond the control of respondent and if non-delivery of possession is as a result of any act and in the aforesaid events, the respondent shall be liable for a reasonable extension of time for delivery of possession of the said premises as per terms of the agreement executed by the complainant and the respondent. The respondent and its officials are trying to complete the said project as soon as possible and there is no malafide intention of the respondent to get the delivery of project, delayed, to the allottees. It is also pertinent to mention here that due to orders also passed by the

Environment Pollution (Prevention & Control) Authority, the construction was/has been stopped for a considerable period day due to high rise in pollution in Delhi NCR.

XVII. That the enactment of Real Estate (Regulation and Development) Act, 2016 is to provide housing facilities with modern development infrastructure and amenities to the allottees and to protect the interest of allottees in the real estate market sector. The main intension of the respondent is just to complect the project within stipulated time submitted before the authority. According to the terms of the builder buyer agreement also, it is mentioned that all the amount of delay possession will be completely paid/adjusted to the complainants at the time final settlement on slab of offer of possession. The project is ongoing project and construction is going on.

XVIII. That the respondent further submitted that the Central Government has also decided to help bonafide builders to complete the stalled projects which are not constructed due to scarcity of funds. The Central Government announced Rs.25,000 Crore to help the bonafide builders for completing the stalled/ unconstructed projects and deliver the homes to the homebuyers. It is submitted that the respondent/ promoter, being a bonafide builder, has also applied for realty stress funds for its Gurgaon based projects.

XIX. That compounding all these extraneous considerations, the ***Hon'ble Supreme Court vide order dated 04.11.2019***, imposed a blanket stay on all construction activity in the Delhi- NCR region. It would be apposite to note that the 'BASERA' project of the respondent was under the ambit of the stay order, and accordingly, there was next to no construction activity for a considerable period. It is pertinent to note that similar stay orders have been passed during winter period in the preceding years as well, i.e., 2017-2018 and 2018-2019. Further, a complete ban on construction activity at site invariably results in a long-term halt in construction activities. As with a complete ban the concerned labor was let off and they traveled to their native villages or look for work in other states, the resumption of work at site became a slow process and a steady pace of construction as realized after long period of time.

XX. The respondent has further submitted that graded response action plan targeting key sources of pollution has been implemented during the winters of 2017-18 and 2018-19, These short-term measures during smog episodes include shutting down power plant, industrial units, ban on construction, ban on brick kilns, action on waste burning and construction, mechanized cleaning of road dust, etc. This also includes limited application of odd and even scheme.

XXI. That the pandemic of covid-19 has had devastating effect on the world-wide economy. However, unlike the agricultural and tertiary sector, the industrial sector has been severally hit by the pandemic. The real estate sector is primarily dependent on its labour force and consequentially the speed of construction. Due to government-imposed lockdowns, there has been a complete stoppage on all construction activities in the NCR Area till July 2020. In fact, the entire labour force employed by the respondent was forced to return to their hometowns, leaving a severe paucity of labour. Till date, there is shortage of labour, and as such, the respondent has not been able to employ the requisite labour necessary for completion of its projects. The Hon'ble Supreme Court in the seminal case of ***Gajendra Sharma v. UOI & Ors, as well Credai MCHI & Anr. V. UOI & Ors*** has taken cognizance of the devastating conditions of the real estate sector and has directed the UOI to come up with a comprehensive sector specific policy for the real estate sector. According to notification no. 9/3-2020 HARERA/GGM (Admn) dated 26.05.2020, passed by this authority, registration certificate upto 6 months has been extended by invoking clause of force majeure due to spread of corona virus pandemic, which beyond the control of respondent.

XXII. This authority vide, its order dated 26.05.2020 had acknowledged the Covid-19 as a force majeure event and had granted extension of six months period to ongoing projects. Furthermore, it is of

utmost importance to point out that vide notification dated 28.05.2020, the Ministry of Housing and Urban Affairs has allowed an extension of 9 months vis-a-vis all licenses, approvals, end completion dates of housing projects under construction which were expiring post 25.03.2020 in light of the force majeure nature of the Covid pandemic that has severely disrupted the workings of the real estate industry. That the pandemic is clearly a 'force majeure' event, which automatically extends the timeline for handing over possession of the apartment.

E. Jurisdiction of the authority

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

E.I Territorial jurisdiction

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.

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 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;

The provision of assured returns is part of the memorandum of understanding, as per clause 1 of the MOU dated 03.08.2017. Accordingly, the promoter is responsible for all obligations /responsibilities and functions including payment of assured returns as provided in memorandum of understanding.

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.

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 the objections raised by the respondent

F. I. Objection regarding the project being delayed because of force majeure circumstances and contending to invoke the force majeure clause.

8. From the bare reading of the possession clause of the allotment letter, it becomes very clear that the possession of the unit was to be delivered by **30.04.2019.** The respondent in his contribution pleaded the force majeure clause on the ground of Covid- 19. That in the High Court of Delhi in case no. ***O.M.P (I) (COMM.) No. 88/2020 & I.As. 3696-3697/2020 title as M/S HALLIBURTON OFFSHORE SERVICES***

INC VS VEDANTA LIMITED & ANR. 29.05.2020 it was held that *the past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself.* Now this means that the respondent/promoter has to complete the construction of the apartment/building by 30.04.2019. The respondent/promoter has not given any reasonable explanation as to why the construction of the project is being delayed and why the possession has not been offered to the complainants/allottees by the promised/committed time. That the lockdown due to pandemic in the country began on 25.03.2020. So, the contention of the respondent/promoter to invoke the force majeure clause is to be rejected as it is a well settled law that ***"No one can take benefit out of his own wrong"***. Moreover, there is nothing on record to show that the project is near completion, or the developer applied for obtaining occupation certificate. Thus, in such a situation the plea with regard to force majeure on ground of Covid- 19 is not sustainable.

F. II. Objection regarding entitlement of DPC on ground of complainant being investor.

9. The respondent has taken a stand that the complainants are investor and not consumers, therefore, they are not entitled to the protection of

the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumer of the real estate sector. The authority observed that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyer and they have paid total price of **Rs.18,83,625/-**to the promoter towards purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

> *"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

10. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement cum provisional allotment letter executed between promoter and complainants, it is crystal clear that they are allottee(s) as the subject unit allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.*** has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoters that the allottees being investors are not entitled to protection of this Act also stands rejected.

G. Findings on the relief sought by the complainants

G.I Direct the respondent to pay interest @ 20% per annum on delayed possession on the entire deposited amount of Rs.18,83,625/- till handing over of possession.

11. In the present complaint, the complainants intends 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."

12. Clause E (26) of the allotment letter provides for handing over of possession and is reproduced below: -

E. POSSESSION OF THE UNIT

26 *The possession of the unit shall be given by* ***April 2019*** *or extended period as permitted by the agreement. However, the company hereby agrees to compensate the Allottee/s @ Rs. 5.00/-(five rupees only) per sq. ft. of super area of the commercial unit per month for any delay in handing over possession of the unit beyond the given period plus the grace period of 6 months and up to the offer letter of possession or actual physical possession whichever is earlier. However, any delay in project execution or its possession caused due to force majeure conditions and/or any judicial pronouncement shall be excluded from the aforesaid possession period. The compensation amount will be calculated after the lapse of the grace period and shall be adjusted or paid, if the adjustment is not possible because of the complete payment made by the Allottee till such date, at the time of final account statement before possession of the unit. The penalty clause will be applicable to only those Allottees who have not boked their unit under any special / beneficial scheme of the company i.e. No EMI till offer of possession, Subvention scheme, Assured return etc and who honour their agreed payment schedule and make timely payment of due installments and additional charges as per the payment given in Allotment Letter.*

13. The authority has gone through the possession clause of the agreement and observes that this is a matter very rare in nature where builder has specifically mentioned the date of handing over possession rather than specifying period from some specific happening of an event such as signing of buyer developer agreement, commencement of construction, approval of building plan etc. This is a welcome step, and the authority appreciates such firm commitment by the promoter

regarding handing over of possession but subject to observations of the authority given below.

14. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottees in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer developer agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused its dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

15. **Admissibility of grace period:** As per clause E (26) of the allotment letter, the possession of the allotted unit was supposed to be offered by the April 2019 with a grace period of 6(six) months i.e., October

2019. There is nothing on record to show that the respondent has completed the project in which the allotted unit is situated and has applied for occupation certificate by April 2019. So, in view of these facts, the developer can't be allowed grace period of 6 months more beyond April 2019 as mentioned in clause E (26) in the buyer developer agreement.

16. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the rate of 20% p.a. however, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under: -

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
>
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

17. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

18. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 22.04.2022 is 7.40%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

19. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
> *(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

20. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondent/ promoter which the same is as is being granted to the complainants in case of delayed possession charges.

G. II Direct the respondent to pay the due and payable Assured return in accordance with PLA and MOU.

20. The complainants have sought assured return on yearly basis as per clause 1.1 of Memorandum of understanding dated 03.08.2017 at the rate of 11% per annum on the amount received as per payment plan

and the scheme was to become operative when the allottees have paid 50% of the payment of price/cost of the unit to the respondent company. The total sale consideration of the allotted unit as per allotment letter cum buyer's agreement dated 08.05.2017 is Rs.36,41,100/- and as per assured return scheme, the allottees were required to pay a sum of Rs.18,20,550/- i.e., 50% of the total sale price. That amount was admittedly paid by the complainants to the builder by 23.05.2017 as evident from payment information dated 07.07.2021. The respondent has not complied with the terms and conditions of the memorandum of understanding. 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. 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 return upto the November 2019 but did not pay assured return amount after coming into force of the Act of 2019 as the same was declared illegal.

21. An MOU can be considered as an agreement for sale interpretating 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 understanding 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. Therefore, different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral parts 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 return 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 arise 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, two issues arise for consideration as to:

i. Whether authority is within the jurisdiction to vary its earlier stand regarding assured return due to changed facts and circumstances.
ii. Whether the authority is competent to allow assured returns to the allottees in pre-RERA cases, after the Act of 2016 came into operation,
iii. Whether the Act of 2019 bars payment of assured returns to the allottees in pre-RERA cases

22. 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 allottee 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 a 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 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 allotee 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 arise 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. In cases of ***Anil Mahindroo & Anr. v/s Earth Iconic Infrastructure Pvt. Ltd.*** (Company Appeal (AT) (Insolvency) No. 74 of 2017) and ***Nikhil Mehta and Sons (HUF) and Ors. vs. AMR Infrastructure Ltd.*** (CA NO. 811 (PB)/2018 in (IB)-02(PB)/2017) decided on 02.08.2017 and 29.09.2018 respectively, it

was held that the allottees are investors and have chosen committed return plans. The builder in turn agreed to pay monthly committed return to the investors. Thus, the amount due to the allottee comes within the meaning of 'debt' defined in Section 3(11) of the I&B Code. 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. Then 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.

23. 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*

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

   ii. 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.

24. 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.

    i. *as an advance, accounted for in any manner whatsoever, received in connection with consideration for an immovable property.*
    ii. *as an advance received and as allowed by any sectoral regulator or in accordance with directions of Central or State Government.*

25. 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.

26. 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.

27. 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.

28. 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 builders 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

respective apartments stands handed over and there is no illegality in this regard.

29. 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.*

30. 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.

31. It is not disputed that the respondent is a real estate developer, and it had obtained registration under the Act of 2016 for the project in question. The authority under this Act has been regulating the advances received under the project and its various other aspects. 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. 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 complainant besides initiating penal proceedings.

32. 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 allotee arises out of the same relationship and is marked by the original agreement for sale.

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

To answer the above proposition, it is worthwhile to consider that the assured return is payable to the allottee on account of a provision in the BBA or in a MoU having reference of the BBA or an addendum to the BBA/MoU or allotment letter. The assured return in this case is payable from the date of making down payment till offer of possession. The rate at which assured return has been committed by the promoter is 11% per annum which is more than reasonable in the present circumstances. If we compare this assured return with delayed possession charges payable under proviso to section 18 (1) of the Real Estate (Regulation and Development) Act, 2016, the assured return is much better i.e., the assured return in this case is payable at the rate of more than 11% whereas the delayed possession charges are payable at the rate of 9.40% per annum. By way of assured returns, the promoter has assured the allottee that he

will be entitled for this specific amount till offer of possession. Accordingly, the interest of the allottee is protected even after the due date of possession is over as the assured return are payable till offer of possession. The purpose of delayed possession charges after due date of possession is over and payment of assured return after due date of possession is over as the same to safeguard the interest of the allottee as his money is continued to be used by the promoter even after the promised due date and in return, he is paid either the assured return or delayed possession charges whichever is higher.

Accordingly, the authority decides that in cases where assured return is reasonable and comparable with the delayed possession charges, allottee is entitled under section 18 and is payable even after due date of possession is over till offer of possession then after due date of possession is over, the allottee shall be entitled only assured return or delayed possession charges whichever is higher without prejudice to any other remedy including compensation.

The authority directs the respondent/promoter to pay assured return from the date the payment of assured return was stopped till offer of possession and declines to offer any amount on account of delayed possession charges as his interest has been protected by granting assured returns till the offer of possession of the allotted unit.

G.III Direct the respondent not to charge holding charges.

21. The respondent shall not charge anything from the complainants which is not the part of the flat buyer agreement. The respondent is also not entitled to claim holding charges from the complainants at any point of time even after being part of the buyer's agreement as per law

settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

G. IV Direct the respondent to pay cost of litigation to the complainants

22. The complainant is claiming compensation in the present relief. The authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee can claim. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

H. Directions of the authority

23. 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/builder is directed to pay arrears of assured return to the complainants/allottees from November 2019 @ 11% per annum till the offer of possession letter sent to the allottee as per memorandum of understanding.

    ii. Since the complainants/allottees have been allowed assured return being reasonable and comparable with delayed possession charges, so his interest is protected even after due date of possession is over and the assured return being payable

till the offer of possession letter sent to the complainants/allottees as per memorandum of understanding. So, he is not entitled to any delayed possession charges as claimed.

iii. The respondent is directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of this order after adjustment of outstanding dues, if any, from the complainants and failing which that amount would be payable with interest @ 7.40% p.a. till the date of actual realization.

iv. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period;

24. Complaint stands disposed of.

25. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 22.04.2022