BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**1406 of 2021**
Date of filing complaint:	**31.03.2021**
First date of hearing:	**27.04.2021**
Date of decision :	**23.08.2022**

	1.Monish Sharma 2.Sneh Sharma **Both R/o:** E-1201, La Lagune, South Block, Gurugram-122001, Haryana	**Complainants**
Versus		
	M/s Neo Developers Private Limited R/o: 32 B, Pusa Road, New Delhi-110005	**Respondent**

CORAM:	
Dr. K.K Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Ms. Daggar Malhotra (Advocate)	Complainants
Sh. Venket Rao (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions 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.No.	Heads	Information
1.	Project name and location	"Neo Square" Sec 109, Dwarka Expressway, Gurugram
2.	Project area	3.06 acres
3.	Nature of the project	Commercial colony
4.	DTCP license no. and validity status	102 of 2008 dated 15.05.2008 valid up to 14.05.2022
5.	Name of licensee	M/s Shrimaya Buildcon Pvt. Ltd
6.	RERA Registered/ not registered	**Registered vide registration no. 109 of 2017 dated 24.08.2017**
	RERA Registration valid up to	**23.08.2021**
7.	Unit no.	705, 7th floor [Page no. 47 of complaint] And it was unilaterally changed to unit no. 604 on 6th floor
8.	Unit measuring (super area)	1000 sq. ft. [Page no. 47 of complaint]
9.	Date of allotment letter	N/A
10.	Date of execution of builder buyer agreement	BBA has not been executed
11.	Date of Memorandum of understanding	01.05.2011 [Page no. 16 of the complaint]
12.	Payment plan	Assured return payment plan [Page 61 of the complaint]
13.	Possession Clause	Clause 5.2 of the BBA, construction completion date

		shall be deemed to be the date when application for grant of certificate is made. The completion/occupancy application for OC was moved on 24.02.2020 as per reply. The OC for the tower in which unit is situated has not been granted by DTCP so far. The possession of the unit can only be handed over once OC is granted.
14.	Assured return clause	**Clause 7 of MOU:** The company shall pay a monthly return of Rs. 60,000/- on the total amount deposited till the signing of this MOU with effect from 01.05.2011 **Clause 10 of MOU:** That the responsibility of paying assured returns to be paid by the company shall cease upon the execution of the lease deed/ agreement to lease between the company and the intending lessee after the finalization of the lease terms by the company.
15.	Due date of possession	No specific due date of possession has been mentioned in the BBA or MOU. But to safeguard the interest of allottee, a provision of assured return has been made which comes out to be more than the delayed possession charges applicable, if there was a stipulation of specific due date of possession and penalties/compensation applicable thereafter.
16.	Total sale consideration	Rs. 76,99,517/- [Page 61 of the complaint]
17.	Total amount paid by the complainants	Rs.66,23,700/- [As per account statement dated 31.03.2021 at page 49 of the reply]

18.	Offer of possession	Not received
19.	Occupation Certificate	Not offered
20.	Cancellation	23.03.2021 [Page 50 of the reply]
21.	Assured amount received by the complainants	Rs.52,92,000/- [As admitted by the respondent in his reply at page no. 49 as per account statement dated 31.03.2021]

B. Facts of the complaint:

3. On the basis of license bearing no. 102 of 2008 dated 15.05.2008, the respondent was developing a project by the name of Neo square situated in Sec 109, Gurugram. The complainant booked a unit in it on 25.04.2011 and was informed that unit no.705 on the seventh floor has been allotted. On 01.05.2011, the complainants entered into a memorandum of understanding (herein referred to as MOU) with the respondent under the "investment return plan"

4. The complainants paid Rs. 60 lakhs against an allotted unit, the receipt of which was acknowledged in the MoU. The respondent vide clause 7 of that document undertook to pay a monthly return of Rs.60,000/- with effect from 01.05.2011.

5. As per clause 8, it was agreed that the unit would be constructed and handed over to the lessee directly and that the allottee would not use the same for his own purpose. As per clause 10, the respondent agreed that its responsibility to pay assured returns to be paid by it to the complainants would cease only upon the execution of the lease deed between it and the lessee.

6. It is the case of complainants that later on, the respondent unilaterally changed the allotted unit to unit no. 604 on the sixth

floor of the project. Even the copies of documents with respect to change of allotment were not shared with the complainants. However, the unit number and booking date were clearly mentioned in the account statements dated 11.05.2017 of the respondent.

7. The respondent has failed in paying assured returns since May 2019 onwards. Vide letter dated 18.12.2019, the respondent informed the complainants that pending assured returns, the payments would be paid/adjusted at the time of possession.

8. Vide account statement dated 14.01.2021, the respondent sought payment of additional amount of VAT Rs.4,82,897/- @ 13.125%, additional service tax/GST Rs.193920/-, additional EDC Rs.1,74,000/- without any explanation. Even EDC of Rs. 5,63,660/- had already been paid by the complainants vide three cheques dated 25.04.11, 10.09.11, and 01.10.2011 respectively. All these payments were made in relation to EDC demand of respondent which it added to the VAT demand and then later increased the VAT demand to 13.125% and started demanding more under EDC charges heading. Various emails were exchanged between the parties in regard to excess VAT being charged, requesting for copy of buyer's agreement and date of completion of project.

9. The respondent finally shared a copy of the buyer's agreement with the complainants in 2021 after several requests made by them. As per clause 6 of the MoU the following illegalities were noted in the buyer's agreement:

a) No specific clause dealing with possession date was mentioned in the buyer's agreement.

b) Unit no. was changed again and mentioned as unit no. 703.

c) As per clause 5.2 of buyer's agreement, construction completion date was deemed to be the date when application for grant of occupancy certificate is made.

d) As per clause 5.4: On taking possession, the allottee would have no claim against the respondent in respect of any item or work alleged not to have been carried out.

e) Clause 10.2: The liability of the allottee towards total maintenance charges would be 1.2 times of the actual cost.

10. The respondent further stated in the buyer's agreement that it would be registered only after payment of all charges. Therefore, in view of the above, the complainants have not signed the buyer's agreement. Till date, only 60% of the construction of the project is complete and the respondent with a malafide intention sent across to the complainants a completely lopsided buyers' agreement.

C. Relief sought by the complainants:

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

i. Direct the respondent to pay interest for delay on the total amount paid by the complainants @ prescribed rate of interest for every month of delay, till the date of actual handing over of the possession of the unit.

ii. Direct the respondent to inform in writing the due date of possession and there is no date of possession mention in the MoU or BBA.

iii. Direct the respondent to pay the outstanding balance amount of assured returns from May 2019 till date.

iv. Direct the respondent to produce proof of completion of construction as alleged by it.

v. Direct the respondent to not illegally charge excess VAT, EDC etc from the complainants.

vi. Direct the respondent to withdraw the illegal terms of the BBA and give the complainants an agreements terms of which are in compliance with the Act.

D. Reply by respondent:

12. The complainants submitted an application form on 25.04.2011. it is pertinent to note that in the application form submitted the complainants clearly have applied for the unit no. 604 in the project of the respondent. Accordingly, a memorandum of understating dated 01.05.2011 was executed between the complainants and the respondent. It is pertinent to note that the complainants had agreed to purchase the commercial space not for their personal use but to earn return on the same.

13. That it is brought to the attention of the authority that the respondent herein has already applied for the issuance of the occupation certificate by way of application dated 24.02.2020 and the same is pending before the concerned competent authority. Further, the respondent has received "Approval of Fire Fighting Scheme" on 24.04.2020. Therefore, it cannot be concluded by any stretch of imagination that the respondent has not shown due prudence in the timely execution of the project.

14. It is most humbly submitted that the complaint at hand is not maintainable before the authority as the authority does not have

the jurisdiction to try & decide the present matter. It was mutually agreed in clause 19 of MOU, executed between the parties, that in case of dispute and differences between the parties, the matter shall be referred for arbitration of a sole arbitrator appointed by the Manging Director of the Company. Thus, this authority is barred by the presence of the arbitration clause. Clause 19 is reproduced herein below:

> *"That in case of any dispute/ difference between the parties arising out of or in relation to this Agreement, the matter shall be referred for arbitration of a sole arbitrator appointed by the Managing Director of the Company. The venue of Arbitration shall be Delhi and the language of arbitration shall be English."*

15. Further it is brought to the attention of this Hon'ble authority that a reading of the MOU clearly stipulated that the complainants had booked the premise only for the purpose of gaining commercial advantage through assured return and not for self-use. It is pertinent to note that, the complainants agreed that it shall not utilise the premises for its own personal usage and can be used only for the purposes of leasing through the respondent, in accordance with the terms of the MOU. The clauses from the MOU clearly specifies that the relationship of the complainants with the respondent is not that of a builder-buyer, especially to the extent of timely delivery of possession.

16. It is noteworthy in the present situation, that in order to provide a comprehensive mechanism to ban the unregulated deposit schemes, other than the deposits taken in the ordinary course of business, Parliament has passed an act titled as "The Banning of Unregulated Deposit Schemes Act, 2019"

17. It is also provided that in respect of a respondent, "deposit" shall have the same meaning as assigned to it under the Companies Act, 2013. Sub section 31 of section 2 of the Companies Act provides that "deposit" includes any receipt of money by way of deposit or loan or in any other form by a respondent but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India. The Companies (Acceptance of Deposits) Rules, 2014(herein after referred to as "deposit rules") in sub – rule 1(c) of Rule 2 sets out what is not included in the definition of deposits.

18. One of the amounts as set out in sub rule (1)(c)(xii)(b) of Rule 2 of the Deposit Rules (i.e. which is not a deposit) is an advance, accounted for in any manner whatsoever, received in connection with consideration for an immovable property under an agreement or arrangement, provided that such advance is adjusted against such property in accordance with the terms of the agreement or the arrangement. Therefore, the agreements of these kinds, may, after 2019, and if any assured return is paid thereon or continued therewith may be in complete contravention of the BUDS Act. It is submitted that for this very reason post coming into force of the said BUDS Act in 2019, the respondent was forced to stop payment of any assured return.

19. The BUDS Act provides for two forms of deposit schemes, namely Regulated Deposit Schemes and Unregulated Deposit Schemes. Thus, for any deposit scheme, for not to fall foul of the provisions of the BUDS Act, must satisfy the requirement of being a 'Regulated Deposit Scheme' as opposed to Unregulated Deposit

Scheme. Hence, the main object of the BUDS Act is to provide for a comprehensive mechanism to ban Unregulated Deposit Scheme.

20. Further, any orders or continuation of payment of any assured return or any directions thereof may be completely contrary to the subsequent act passed post RERA Act, which, is not violating the obligations or provisions of the RERA Act. Therefore, enforcing an obligation on a Promoter against a Central Act which is specifically banned, may be contrary to the central legislation which has come up to stop the menace of unregulated deposit.

21. That it is pertinent to note herein that the respondent had on various occasions requested the complainants to execute the builder buyer's agreement. The representatives of the respondent were regularly communicating with the complainants for the same and requested the complainants to come to the office for execution of the documents on numerous occasions. Copy of the draft BBA were also shared with the complainants. However, the complainants utterly failed in fulfilling its obligations and to sign the same. It has been clearly admitted by the complainants in the present complaint that by their own volition they have not signed the BBA. It is also humbly submitted that the complainants had not approached the respondent with any of their grievances for due negotiation on the terms of the BBA.

22. It is also pertinent to note that timely payment is the essence of any real estate project. However, in the present case, the complainants have defaulted in the same. Thus, the complainants is estopped from taking the plea of incapacity of the respondent to timely complete the project. Further it is brought to the attention

of the authority that though the complainants may have cleared the basic sale price of the said commercial property, but they are still liable to pay all other charges such as EDC, IDC, IFMS, Security Deposit, duties, taxes, levies etc. when demanded. The same has been clearly agreed to in Clause 7 of the MoU.

23. That there exist outstanding amounts to the tune of Rs. 13,78,328/-, that stands due and payable on part of the complainants till date. The same can be perused from the statement of accounts already annexed with this counterclaim. That in the light of the facts mentioned herein, the complainants cannot be allowed to take the benefit of his own wrong.

24. It is submitted that the respondent had on many occasions intimated the complainants regarding the outstanding dues and requested them to make the payments, but the complainants had paid no heed to them. It is submitted here that it the complainants is in violation of provisions of section 19 of the RERA Act, by not paying its dues. Therefore, the respondent on 23.03.2021 had cancelled the unit booked in the commercial project of the respondent on account of the complainants being a defaulter in paying its dues.

25. It is humbly submitted that the respondent by this counter-claim, requests the authority to allow it to cancel the unit allotted to the complainants by refunding the amount received from the complainants after deducting 10% of the sale consideration as earnest money and deducting the amount of assured return paid to the complainants till date.

26. It is further submitted that the complainants had agreed to the terms set out in clause 14 of the memorandum of understanding that the company reserves its right to change the location of the unit and further in such event new unit will be allotted to the complainants. It is submitted that demands are raised in due course of time as and when the same becomes payable. The complainants have outstanding dues to the tune of Rs. 13,78,328/- pending payment.

27. It is pertinent to mention that the respondent has already paid an amount of Rs. 52,92,000/- as assured return to the complainants. It is submitted that the complainants has already agreed to pay on demand of the respondent all taxes, charges, levies, cesses, applicable, GST, developmental charges, stamp duties, registration charges, EDC cess, IDC cess, administrative charges, property tax but the complainants is now malafidely dragging something which was already agreed between the parties. Furthermore, it is submitted that the complainants were a continuous defaulter in making timely payments despite of making numerous intimations to the complainants for the same.

28. It is submitted that respondent has already applied for the occupancy certificate and the registration of the project is valid till 23.08.2021. Also due to the ongoing pandemic which has affected the real estate sector adversely, various authorities have been gracious to grant extension in completion dates due to the force majeure conditions. Further, it is submitted that the construction work of the site is in the full swing and possession will be handed over to the buyer

29. 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:

30. 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 allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of*

all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

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

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 complainant at a later stage.

F. Findings on the objections raised by the respondent:

F.I Objection regarding complainant is in breach of agreement for non-invocation of arbitration.

31. The respondent has raised an objection that the complainants have not invoked arbitration proceedings as per the provisions of proposed buyer's agreement which contains provisions regarding initiation of arbitration proceedings in case of breach of agreement. The following clause has been incorporated w.r.t arbitration in the buyer's agreement:

"Clause 22: That in case of any dispute/ difference between the parties, including in respect of interpretation of the present agreement, the same shall be referred to arbitration of a sole arbitrator appointed by the parties mutually. The venue of arbitration shall be New Delhi and the language of arbitration shall be English. The costs of arbitration shall be borne jointly by parties. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1966.

32. The respondent contended that as per the terms & conditions of the application form duly executed between the parties, it was

specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional booked unit by the complainant, the same shall be adjudicated through arbitration mechanism. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainant and builders could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -

"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.

...

56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainant and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

33. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the Hon'ble Supreme Court in case titled as ***M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017*** **decided on 10.12.2018** has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory

of India and accordingly, the authority is bound by the aforesaid view. The relevant para of the judgement passed by the Supreme Court is reproduced below:

> *"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."*

Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainant is well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act,1986 and Act of 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily

G. Findings regarding relief sought by the complainants:

G.1 Direct the respondent to pay interest for delay on the total amount paid by the complainants @ prescribed rate of interest for every month of delay, till the date of actual handing over of the possession of the unit.

G.2. Direct the respondent to pay the outstanding balance amount of assured returns from May 2019 till date.

The above-mentioned relief no.1 and 2, as sought by the complainants are being taken together as the findings in one relief will definitely affect the result of the other relief and these reliefs are interconnected.

34. While filing the claim petition besides delayed possession charges of the allotted unit as per memorandum of understanding dated 01.05.2011, the claimants also sought assured returns of Rs.60,000/- on monthly basis i.e. 01.05.2011 till execution of the lease deed/ agreement to lease between the company and the intending lessee after the finalization of the lease terms by the company as per clause 7 and 10 of memorandum of understanding dated 01.05.2011. It is pleaded that the respondent has not complied with the terms and conditions of the agreement. Though for some time the amount of assured return 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 return 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. The plea of respondent is otherwise and who took a stand that though it paid the amount of Rs.52,92,000/- as assured return as promised vide memorandum of understanding but did not pay the same amount after coming into force of the Act of 2019 as it was declared illegal.

35. But it is pleaded on behalf of respondent that though the complainants are its allottees on the basis of application dated 25.04.2011 of a commercial unit but were not regular pay masters. Though MOU dated 01.05.2011 was executed with regard

to allotted unit between the parties but the allottees failed to pay as per the schedule of payments leading to its cancellation vide letter dated 23.03.2021. So, after cancellation of the unit, the allottees remained with no right or interest in the same. But the plea advanced in this regard is devoid of merit. A perusal of annexure 1 i.e. payment schedule of the allotted unit shows its total sale price as Rs.74,75,880/-. The complainants admittedly paid a sum of Rs.66,23,700/- (Annexure R/6 at page no. 49 of the reply). If the version of the respondent is believed only an amount of Rs.8.5 lacs was due against the complainants. The booking of the unit was made under assured return plan and the respondent admittedly paid that amount to the complainants at the agreed rates up to April 2019 so if any amount as alleged by the respondent was due, then it could have deducted that amount and adjust the same towards the sale price of the allotted unit. Taking from another angle the amount of assured returns is due against the respondent since May 2019 and cancellation of the allotted unit have made on 23.03.2021 without giving any notice and adjusting the arrears of assured returns due up to that date. So, keeping in view all these facts the cancellation of the allotment by the respondent vide letter dated 23.03.2021 is not sustainable and is liable to be set aside.

36. Now the second issue for consideration arises as to whether the claimants are entitled for delay possession charges or assured returns on the basis of MOU entered into between the parties on 01.05.2011.

37. An MoU can be considered as an agreement for sale interpreting the definition of the "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. 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 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 allottee. Now, three issues arise for consideration as to:

i. Whether authority is within the jurisdiction to vary its earlier stand regarding assured returns 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.

38. 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 return 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 return 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 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.

39. It is pleaded on behalf of respondent/builder that after the Banning of Unregulated Deposit Scheme Act of 2019 came into force, there is bar for payment of assured return 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.

40. 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.

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.

41. 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.

42. 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.

43. 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 honor 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 complainants till possession of respective apartments stands handed over and there is no illegality in this regard.

44. 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.*

45. 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 return 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.

46. 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 on 24.08.2017. 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 complainant 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.

47. 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.

Now, the proposition before the authority is as to 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?

48. This is a peculiar case where no specific due date of possession has been mentioned but to safeguard the interest of the allottee a provision of assured return has been made which is not only applicable up to the date of offer of possession but even beyond that i.e. **till the execution of the lease deed/ agreement to lease between the company and the intending lessee after the finalization of the lease terms by the company.**. It is also worthwhile to point that the assured return as per MoU/BBA is more than what is payable to the allottee as delayed possession charges. The provision of delayed possession charges was made in

the Act to safeguard the interest of the allottee in case possession is delayed and in case of delay, only a meagre sum is payable by the promoter to the allottee as compensation/penalty to the allottee.

49. 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 an amount of **Rs.60,000**/- per month whereas the monthly delayed possession charges are payable at the rate of 10% per annum i.e. **Rs. 55,197**/-. Accordingly, the interest of the allottee is protected even after the due date of possession is over as the assured return are payable **till the execution of the lease deed/agreement to lease between the company and the intending lessee after the finalization of the lease terms by the company.** The purpose of delayed possession charges after due date of possession is served on payment of assured return after due date of possession as the same is to safeguard the interest of the allottee as his money is continued to be used by the promoter even after the promised due date is over and in return, he is paid either the assured return or delayed possession charges, whichever is higher.

Therefore, considering the facts of the present case, the respondent is directed to pay the amount of assured return at the agreed rate from the date the payment of assured return has not been paid **till the execution of the lease deed/ agreement to lease between the company and the intending lessee after the finalization of the lease terms by the company.**

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 paid by it to the complainants and failing which that amount would be payable with interest @ 8% p.a. till the date of actual realization.

G.3. Direct the respondent to inform in writing the due date of possession and there is no date of possession mention in the MoU or BBA.

Clause 5.2 of the BBA states that construction completion date shall be deemed to be the date when application for grant of certificate is made. The completion/occupancy application for OC was moved on 24.02.2020 as per reply. The OC for the tower in which unit is situated has not been granted by DTCP so far. The possession of the unit can only be handed over once OC is granted. No specific due date of possession has been mentioned in the BBA or MOU.

G.4. Direct the respondent to produce proof of completion of construction as alleged by respondent.

No details have been provided by the complainant and as such no relief can be granted

G.5. Direct the respondent to not illegally charge excess VAT from the complainants.

In large number of judgments, the authority has clarified that VAT is not chargeable in those cases where for the period 01.04.2014 to 30.06.2017 if amnesty scheme has been availed by the promoter. If for this period any VAT has been paid the same is

refundable in case of availing amnesty scheme availed by the promoter.

G.6. Direct the respondent to withdraw the illegal terms of the BBA and give the complainant a BBA terms of which are in compliance with the Act.

In the present complaint the complainant allottee has not specified any specific clause being arbitrary. Hence, no direction to this effect.

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 function entrusted to the authority under section 34(f):

i. The respondent is directed to pay assured return as agreed upon from the date of payment of assured return has not been paid i.e. May 2019 till the execution of the lease deed/ agreement to lease between the company and the intending lessee after the finalization of the lease terms by the company as per clause 7 and 10 of the memorandum of understanding dated 01.05.2011.

ii. The respondent is also liable to pay the arrears of assured returns as agreed upon up to the date of order with interest@ 8% p.a. on the unpaid amount as per proviso to the section 34(1) of the CPC i.e., the rates at which lending of moneys is being made by the nationalized banks for commercial transactions.

iii. The arrears of assured return accrued besides interest would be paid to the complainants within a period of 90 days from the date of this order.

iv. The respondent shall not charge anything from the complainants which is not part of the agreement of sale.

51. Complaint stands disposed of.

52. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. KK Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 23.08.2022