# BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

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| **Complaint no. :** | **3739 of 2021** |
| **Date of filing complaint:** | **20.09.2021** |
| **First date of hearing:** | **09.11.2021** |
| **Date of decision :** | **09.09.2022** |

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| | Anand Singh Bisht<br><br>R/o: E-1001, Park View City-2, Sohna Road, Sector-49, Gurugram, Haryana | **Complainant** |
| | Versus | |
| | M/s Ninaniya Group<br><br>R/o: 278/3, Old Delhi Road, Opp. Ajit Cinema, Sector-2, Gurugram, Haryana | **Respondent** |

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| **CORAM:** | |
| Shri Vijay Kumar Goyal | **Member** |
| Shri. Ashok Sangwan | **Member** |
| Shri. Sanjeev Kumar Arora | **Member** |
| **APPEARANCE:** | |
| Sh. Geetansh Nagpal (Advocate) | Complainant |
| None | Respondent |

## ORDER

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter

alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act 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 complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

| S.No. | Heads | Information |
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| 1. | Project name and location | "Prism Portico", Sector 89, Gurugram |
| 2. | Project area | 5.05 acres |
| 3. | Nature of the project | Commercial complex |
| 4. | DTCP license no. and validity status | 179 of 2008 dated 11.10.2008 and valid up to 10.10.2018 |
| 5. | Name of licensee | Ninaniya Estate Ltd. |
| 6. | RERA Registered/ not registered | **Unregistered** |
| 7. | Unit no. | PPES-411, 4th0 floor<br>[Page 59 of the complaint] |
| 8. | Unit measuring (super area) | 550 sq. ft.<br>[Page 59 of the complaint] |
| 9. | Date of allotment letter | 03.01.2013<br>[Page 49 of the complaint] |
| 10. | Date of execution of builder buyer agreement | 27.05.2013<br>[Page 56 of the complaint] |
| 11. | Date of start of construction of the project | 01.04.2015<br>[As per email received from the respondent on 21.01.2022] |

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| 12. | Possession clause | ***5.1***<br>***That the Company shall complete the construction of the said Unit within 36 months from the date of execution of this agreement and/or from the start of construction whichever is later and Offer of possession will be sent to the Allottee subject to the condition that all the amounts due and payable by the Allottee by the stipulated date as stated in Annexure II attached with this agreement including sale price, maintenance charges, security deposit, stamp duty and other charges etc. have been paid to the Company. The Company on completion of the construction shall apply for completion certificate and upon grant of same shall issue final letters to the Allottee(s) who shall within 30 (thirty) days, thereof remit all dues. (emphasis supplied)*** |
| 13. | Due date of delivery of possession | 01.04.2018<br>Calculated from the date of start of construction i.e., 01.04.2015 as the same is later<br>Grace period of 6 months is disallowed as no substantial evidence/document has been placed on record to corroborate that any such event, circumstances, condition has occurred which may have hampered the construction work. |
| 14. | Date of Memorandum of understanding | 13.01.2013<br>[Page 51 of the complaint] |
| 15. | Assured return clause | ***Clause 6 of MOU***<br>***The developer shall pay the assured investment return@ Rs.23,141/- per month(after deducting TDS) on or before first day of every subsequent month after the expiry of the month after*** |

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| | | ***the expiry of the month for which it shall fall due w.e.f. 01.02.2013 till the possession of a fully furnished suite under reference is handed over to the buyer.***<br>[Page 53 of the complaint] |
| 16. | Total sale consideration | Basic sale price- Rs.30,25,000/-<br>Rs. 34,27,500/-<br>[As per payment plan at page no. 80 of the complaint] |
| 17. | Total amount paid by the complainant | Rs.26,97,051/-<br>[Page 50 of the complaint] |
| 18. | Payment plan | Construction linked payment plan<br>[Page 80 of the complaint] |
| 19. | Offer of possession | Not offered |
| 20. | Occupation Certificate | Not obtained |
| 21. | Assured amount received by the complainant | Rs.18,76,976/-<br>As admitted by the respondent on page 24 of the reply<br>The complainant has admitted the amount of assured return has been received till March 2019 |

## B. Facts of the complaint:

3. That the complainant Mr. Anand Singh Bisht was caught in the web of false promises of the agents of the respondent and paid an initial amount of Rs. 26,97,051/- which included a payment Rs. 25,71,250/- towards the booking amount along with an amount of Rs. 41,250 towards PLC and an additional amount of Rs. 84,551 towards service tax vide cheque No: 064632 dated 03.01.2013.

4. The complainant was allotted an executive suit unit no. being **PPES-411** admeasuring 550 sq. ft in the above-mentioned project. The payment made by the complainant was acknowledged by the respondent vide letter dated 11.01.2013.

5. That the complainant was caught in the web of lies and false promises of the Respondent duly executed the Memorandum of Understanding on the 13.01.2013.

6. That the complainant having paid a colossal sum of **Rs. 26,97,051/-** amounting to almost 90% of the total sale consideration being **Rs. 30,25,000/-** was forced to sign on the dotted line a completely one-sided suites buyer's agreement with the respondent on the 27.05.2013, which was flooded with arbitrary demands and one sided clauses.

7. That the respondent was to handover the possession of the said allotment to the complainant on 27.05.2016. that due to this default the complainant made various visits at the office of the respondent seeking clarity as to when the possession of his unit would be handed over to him. However, the respondent issued various arbitrary timelines, however, were unable to deliver the possession of the same.

8. That the complainant received a letter saying that due to lockdown in the full country there was a scarcity of labour and that in June 2020 they were given permission to again start the construction work with various restrictions and minimal labour.

9. That the respondent also promised to give to the complainant an Investment assured return of Rs. 25,713/- per month w.e.f. from 05.01.2013 in arrears till the date of possession of the fully furnished said unit is handed over to the buyer.

10. That the respondent only paid this amount till March 2019 and nothing has been received from the builder since April 2019 till

date. It is pertinent to note that herein that as per clause 5.1of the suites buyer agreements, which was signed on 27.05.2013, details of which are attached, the possession of the said unit was supposed to be delivered within thirty-six months from the date of execution of buyers agreement i.e., 27.05.2016 plus a grace period of six months as according to clause 5.2 of the suites buyer agreement i.e. by the 27.05.2016.

11. That as per clause 5.1 of the suites buyer's agreement, which was signed on 27.05.2013, details of which are attached, the possession of the said unit was supposed to be delivered within Thirty-six months from the date of execution of suites buyer's agreement i.e., 27.05.2016 plus a grace period of six months i.e. by the 27.10.2016. It would be appreciated that the offer of possession of the flat has not been made till date.

12. The complainant has paid the respondent a sum of Rs.26,97,05.00 as per the receipt dated 11.01.2013 furnished by the respondent to the complainant and the possession of flat to the complainant was due on 27.05.2016. Hence, there is a delay of more than five years.

13. The grievance of the complainant relates for the assured returns which was been given in the MOU signed by the parties dated 13.01.2013, accordingly in point (2) Of the MOU states that the developer shall give an investment assured return of Rs. 25,713.00 per month w.e.f. 05.01.2013 in arrears, till the date of possession of the said unit is handed over to the buyer.

14. According to the point (4) of the MOU states that the developers will pay in arrears 03 PDC cheques of Rs. 23,141.00 after deducting

TDS each of the first day of every month for the financial year starting from 01.02.2013 and assure its clearance on presentation. The company will also give 1 amalgamated cheque for the financial year 2013-2014, and thereafter another cheque for the financial year 2013-2014, and thereafter another cheque for the financial year 2014-2015. If the possession of the fully furnished said unit is handed over before the period of 36 months, then the buyer will return the remaining balance cheque back to the developer and if the possession is delayed by more than 36 months then the developer will continue to pay to the buyer an amount of Rs. 23,141/-per month on or before first day of every subsequent month till the said unit is handed over to the Buyer.

15. The developer shall pay the assured return of Rs. 25,713/- per month on or before first day of every subsequent month after the expiry of the month for which it shall fall due w.e.f. 05.01.2013, till the possession of a said unit (retail shop) under reference is handed over to the buyer.

## C. Reliefs sought by the complainants:

16. The complainant has sought following relief(s):

i. Direct the respondent to pay simple interest at the prevalent rates as per RERA Act, 2016 and HRERA Rules, 2017, per annum to the complainants on the entire amount paid by him.

ii. Direct the respondent to pay the assured return payment amounting to Rs. 25,713/- per month from April 2019 till the actual physical possession is handed over.

iii. Direct the respondent to pay the outstanding dues of assured returns amounting to Rs.7,97,103.00 from April 2019 till September 2021 and the amount of assured return of the future months shall be incorporated till the date the physical possession of the said unit is handed over.

iv. Direct the respondent to not to charge the amount charged on account of Fixed Deposit of HVAT, which in any case is not payable by the complainants.

v. Direct the respondent not to charge the amount charged on account of the Advance monthly maintenance charges for a period of 12 months.

vi. Direct the respondent not to charge any amount on account of the Interest Free Maintenance Security as the Maintenance security should be interest bearing.

vii. Direct the respondent to kindly handover the entire possession of the unit of the complainants, once it is ready, in all respects and not to force an incomplete unit without proper road, electrification of the roads, functioning of the club etc.

viii. Direct the respondent not to ask for any charges which is not as per the buyer agreement.

ix. Direct the respondent to execute a conveyance deed in favour of the complainant after having received the occupation certificate.

D. **Reply by respondent**

17. That the complainant is not an 'Allottee', but the 'Investor', complainant himself have admitted the fact that he has invested in the project of the respondent, which is not maintainable under the provisions of the Real Estate (Regulation and Development) Act, 2016.

18. That the bare reading of the buyer's agreement executed between the parties, it is clearly visible that the intention of the complainant has never been to take possession and only to gain assured returns. That from the facts of the complaint and from the agreed terms and conditions of the buyer's agreement it may be implied that the complainant is an investor since, the only purpose of booking a commercial unit in the project was to get monetary gains even after the completion of the said unit.

19. It is humbly submitted that the complainant be treated as 'co-promoter' and not as an 'allottee', as the complainant has invested in the project just to earn profits from the commercial unit. That the sole motive of the complainant is to get profits from the project by the way of assured returns scheme. Thus, the complainant shall be treated as co-promoter in the project, in no eventuality, the complainant may be called as the "allottee" before this hon'ble authority under the definition and provisions of RERA Act, 2016.

20. That the primary prayer of the complainant is that they want assured return, interest on account of delay in possession however it is submitted that there is no delay on the part of respondent. It further submitted that if there is any alteration in the timeline of

the completion of the project, it was beyond the control of the respondent owing to the following reasons:

- Policies regarding availability of FAR based on various factors/ grounds and conditions including TOD and TDR.
- Revised taxation policies including GST, Brokerage Policies.
- Environmental restrictions such as use of untreated water and frequent stoppage of construction due to pollution control measure on environment etc.
- Increase in the cost of construction material.
- Two stage process of environmental clearance which takes 2 to 3 years.
- Labour strikes and shortage of construction workers, construction material and even the contractor hired for the construction works was not performing as per the scope of the project work and the Respondent had to send constant reminders to the contractor regarding slow pace of work and workforce deployed, which was resulting in timeline alterations for the timely completion of project.
- Statutory construction ban across the NCR region during the winter season, resulting in slow down of the project.
- Many investors in the project had defaulted in timely payment of instalments due to which it became difficult for the Respondent to adhere to the timelines for the completion of the project.
- The connecting roads to the project were not timely acquired by the Government authorities, thus the construction

equipment, raw material and labour ingress became a difficult task.

- Demonetisation also resulted in delaying the timely completion of project.
- Outbreak of the novel-corona virus is also the major factor which leads to the alteration in the timeline for the completion of project.

21. That since the hurdles faced by the respondent was beyond the control of the respondent, no fault can be found qua the respondent. There was an instant decline in the real estate market within the one year of the launch of the project in question. It is important to mention here that while executing the construction of such a large-scale project a continuous and persistent flow of fund is the essence of smooth operations. However, this situation prevailed and continued for a longer period. Moreover, in the year 2018, Non-Banking Financial Company Crisis also led to drying up the source of funding for the sector. It further lead to alteration in the timeline of the completion of the project.

22. That the alterations in the timeline for the completion of the project cannot be attributed to the respondent and is result of external factors which were beyond the of control of the respondent, which is completely absurd since, the time line as postulated within the agreement are intended and tentative and based on the timely payments made by the investors, force majeure etc.

23. That the clause 5.2 of the buyer's agreement clearly in explicit terms states that the estimated time of the completion of the project

may change due to force majeure or by the reasons beyond the control of the company.

24. Thus, the assured return scheme proposed and floated by the respondent has become infructuous due to operation of law, thus the relief prayed for in the present complaint cannot survive due to operation of law. It is pertinent to mention here that the complainant is concealing about the fact that they have already received a sum of Rs 18,76,976/- (Excluding TDS) towards the payment of assured return in respect of the unit in question.

25. That as per Section 3 of the BUDS Act all Unregulated Deposit Scheme have been strictly banned and deposit takers such as builders, cannot, directly or indirectly promote, operate, issue any advertisements soliciting participation or enrolment in; or accept deposit. Thus, the section 3 of the BUDS Act, makes the Assured Return Schemes, of the builders and promoter, illegal and punishable under law. Further as per the Securities Exchange Board of India Act, 1992 collective investment schemes as defined under Section 11 AA can only be run and operated by a registered person. Hence, the assured return scheme of the respondent has become illegal by the operation of law and the Respondent cannot be made to run a scheme which has become infructuous by law. Further Clause 11 of the BBA also discusses the Severability clause, which allows severance of terms of the BBA which become infructuous due to operation of law.

E. **Jurisdiction of the authority:**

26. 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 complainants at a later stage.

F. **Findings on the objections raised by the respondent:**

**F.I. Objection regarding entitlement of DPC on ground of complainant being investors.**

27. The respondent is contending that the complainants has invested in the unit in question for commercial gains, i.e., to earn income by way of rent and/ resale of the property at an appreciated value and to earn premium thereon. Since the investment has been made for commercial purpose therefore the complainants are not consumers but are investors, 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 consumers of the real estate sector. The authority observes 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 it 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 buyers and paid total price of Rs. **26,97,051**/- 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;"*

28. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainants, it is crystal clear that the complainants are allottee(s) as the subject unit was allotted to her 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 promoter that the allottee being an investor is not entitled to protection of this Act also stands rejected.

G. Findings **regarding relief sought by the complainant:**

G.1. **Direct the respondent to pay simple interest at the prevalent rates as per RERA Act, 2016 and HRERA Rules, 2017, per annum to the complainants on the entire amount paid by him.**

G.2. **Direct the respondent to pay the assured return payment amounting to Rs. 25,713/- per month from April 2019 till the actual physical possession is handed over.**

G.3. **Direct the respondent to pay the outstanding dues of assured returns amounting to Rs.7,97,103.00 from April 2019 till September 2021 and the amount of assured return of the future months shall be incorporated till the date the physical possession of the said unit is handed over.**

The above-mentioned reliefs sought by the complainants are being taken together as the findings in one relief will definitely affect the result of the other relief and these reliefs are interconnected

❖ **Admissibility of delay possession charges:**

29. In the present complaint, the complainant intends to continue with the project and is 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***
>
> *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*

30. 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 the

complainants 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 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.

31. The buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottee are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit. In pre-RERA period it was a general practice among the promoters/developers to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear

clauses that either blatantly favoured the promoters/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.

32. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provisions of this agreements and in 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 allottee 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 apartment buyer's 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 his 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.

33. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges 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.*

34. 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.

35. 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., 09.09.2022 is @ 8%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10%.

36. 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;"*

Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.

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. 10% p.a. for every month of delay on the amount paid by the complainants to the respondent from the due date of possession i.e., 01.04.2018 till actual handing of possession or offer of possession plus 2 months whichever is earlier.

❖ **Assured returns:**

While filing the claim, complainants besides delayed possession charges of the allotted unit as per builder buyer agreement dated 27.05.2013, the claimant has also sought assured returns of

Rs.23,141/- on monthly basis i.e. 01.02.2013 till offer of possession of the said unit as per clause 6 of memorandum of understanding dated 13.01.2013. 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.18,76,976/- 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. Clause 6 of the Memorandum of understanding stipulates that -

> *The developer shall pay the assured investment return@ Rs.23,141/- per month(after deducting TDS) on or before first day of every subsequent month after the expiry of the month after the expiry of the month for which it shall fall due w.e.f. 01.02.2013 till the possession of a fully furnished suite under reference is handed over to the buyer.*

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 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 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. 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 complainants 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?**

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 01.02.2013 till the possession of the fully furnished suite under reference is handed over to the buyer. The promoter has committed to pay monthly assured return of Rs.**23,141**/- 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 an amount of **Rs.23,141**/- per month whereas the monthly

delayed possession charges are payable at the rate of 10% per annum i.e. **Rs. 22,475/-**. 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 possession of the** fully furnished suite**.** 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.

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

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 possession of** fully furnished suite **as per clause 6 of MOU dated 13.01.2013.**

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 @ 8% p.a. till the date of actual realization.

4G.4. **Direct the respondent to not to charge the amount charged on account of Fixed Deposit of HVAT, which in any case is not payable by the complainants.**

G.5. **Direct the respondent not to charge the amount charged on account of the Advance monthly maintenance charges for a period of 12 months.**

G.6. **Direct the respondent not to charge any amount on account of the Interest Free Maintenance Security as the Maintenance security should be interest bearing.**

Neither in the pleadings nor from any document it is evident that the respondent demanded any amount on account of fixed deposit of HVAT, advance monthly maintenance charges for 12 months or any amount of an account of IFMS. Moreover, neither the occupation certificate of the project has been received nor the complainants have been offered possession of the allotted unit. So, these issues can only be raised after the receipt of occupation certificate.

G.7. **Direct the respondent to kindly handover the entire possession of the unit of the complainants, once it is ready, in all respects and not to force an incomplete unit without proper road, electrification of the roads, functioning of the club etc.**

In such a situation no direction can be given to the respondent to handover the possession of the subject unit, as the possession cannot be offered till the occupation certificate for the subject unit has been obtained.

G.8. **Direct the respondent not to ask for any charges which is not as per the buyer agreement.**

It is a well-settled principle that the promoter shall not charge anything which is not part of the builder buyer's agreement.

**G.9. Direct the respondent to execute a conveyance deed in favour of the complainant after having received the occupation certificate.**

In such a situation no direction can be given to the respondent to execute the conveyance deed/sale deed, as the occupation certificate for the subject unit has not yet been obtained from the competent authority.

Section 17(1) of Act of 2016 says that

> *The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws:*
>
> *Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate.*

## H. Directions of the authority:

48. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act of 2016 to ensure compliance of obligation cast upon the promoter as per the function entrusted to the authority under section 34(f) of the Act of 2016:

i. The respondent is directed to pay the amount of assured return as agreed upon between the parties from April 2019

till the possession of the allotted unit as per clause 6 of the memorandum of understanding dated 13.01.2013.

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 the part of buyer's agreement.

49. Complaint stands disposed of.

50. File be consigned to registry.

(Sanjeev Kumar Arora) Member | (Ashok Sangwan) Member | (Vijay Kumar Goyal) Member

Haryana Real Estate Regulatory Authority, Gurugram

**Dated: 09.09.2022**