BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**1379 of 2021**
Date of filing complaint:	**08.03.2021**
First date of hearing:	**07.04.2021**
Date of decision :	**12.07.2022**

	Ms. Neha Singh W/o Sh. Vikram Singh **R/O**: B-4, 2nd Floor, Safdurjang Enclave, New Delhi	**Complainant**
	Versus	
1.	M/s Advance India Projects Limited **Regd. office:** 232B, 4th Floor, Okhla Industrial Estate, Phase-III, New delhi-110020	**Respondents**
2.	Landmark Apartments Private Limited **Regd. office:** A-11, C.R Park, New Delhi - 110010	

CORAM:	
Dr. KK Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Ms. Sonali Joon (Advocate)	Complainant
Sh. MK Dang (Advocate)	Respondents

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 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations,

responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S.n.	Particulars	Details	
1.	Name of the project	"AIPL Joy Street", Sector-66, Gurgaon	
2.	Nature of project	Commercial colony	
3.	**RERA registered/not registered**	157 of 2017 dated 28.08.2017	
		Valid up to	31.12.2020
4.	**DTPC License no.**	7 of 2008 dated 21.01.2008	152 of 2008 dated 30.07.2008
	Validity status	20.01.2022	01.08.2016
	Licensed area	2.8875 acres	13.55
	Name of licensee	Landmark Apartments Private Limited	Ananya Land Holdings
5.	Application letter dated	06.02.2018 [As per page no. 21 of complaint]	
6.	Unit no.	1021 on 10th floor [As per page no. 21 of complaint]	

7.	Unit area admeasuring	775 sq. ft. [Super area] [As per page no. 21 of complaint]
8.	Allotment letter	23.04.2018 [As per page no. 21 of complaint]
9.	Date of builder buyer agreement	Not executed
10.	Total sale consideration	Rs. 70,67,804.70/- [BSP] Rs. 76,08,806.70 [TSC] [As per statement of account dated 06.10.2020 on page no. 102-103 of reply]
11.	Amount paid by the complainant	Rs. 45,37,296/- [As alleged by the complainant on page no. 06 of complaint]
12.	Possession clause	**Clause j as per application form** *The company shall subject to force majeure conditions proposes to handover possession of the unit on or before December 2022 notified by the promoter to the authority at the time of project under the Real Estate (Regulation and Development) Act, 2016 and the Haryana Real Estate (Regulation and Development) Rules 2017 and regulation made thereunder for completion of the project or as may be further revised/approved by the authorities.*
13.	Possession clause	**Clause 5 of sample agreement** *The promoter shall abide by the time schedule for completing the project, handing over the possession of the unit to the allottee and the common area to the association **of allottee or the government authority, as the case may be, as provided under the rule 2(1(f) of***

		Rules, 2017 by 31.12.2020 *as disclosed at the time of registration of the project with the authority or such extended period as may be intimated and approved by the authority from time to time.*
14.	Assured return clause	**Clause 21 of sample agreement** *Subject to Allottee making the due payments as per the agreed Payment Plan as per Schedule F, the Promoter has agreed to pay Rs 35,922.00 (Rupees Thirty-Five Thousand Nine Hundred Twenty-Two Only) per month by way of assured return to the Allottee from the succeeding day from the date of receipt of Rs. 3,772,562.00 (Rupees Thirty Seven Lakhs Seventy Two Thousand Five Hundred Sixty Two Only)(including taxes) from the Allottee, credited to the bank account of the Promoter, till the date of Notice of Offer of Possession of the Unit or 31.12.2020, date of completion of the Project as disclosed at the time of registration of the Project with the Authority, whichever is earlier. The return shall be inclusive of all Taxes and Cesses whatsoever payable or due on the return. All payments made to the Allottee shall be subject to applicable tax deduction at source as per the provisions of the Income Tax Act.*
15.	Due date of possession	**31.12.2020** [As per clause 5 of sample agreement]
16.	Pre- termination letter dated	16.01.2021 [As per page no. 126 of complaint]
17.	Occupation certificate	28.09.2020 [As per page no. 80 of reply]
18.	Offer of constructive possession	05.10.2020

[As per page no. 113 of complaint]

B. Facts of the complaint:

3. That the complainant was allotted unit bearing no. 1021 on 10th floor admeasuring super area 775 sq. ft. along with one car parking in the project "AIPL Joy Street" (hereinafter referred to as "the project") situated at Sector-66, Village Maidawas and Badshahpur, Tehsil Badshahpur, District Gurugram, Haryana.

4. That it was also represented to the complainant that M/s. Landmark Apartments Private Limited i.e. respondent no. 2 is the owner of the land wherein the project was being constructed and it was also represented that the respondent no. 1 had entered into a development agreement dated 31-12-2015 with respondent no. 2 to develop the said project.

5. That the respondent no.1 came up with lucrative advertisements and promotions for the said project. It is pertinent to mention herein that the only reason which prevailed upon the complainant to invest in the project was the promises and immense importance laid down by the respondent no.1 with regard to quality of the unit, timely possession of the unit and assured returns from the unit which subsequently turned out to be false promises which caused immense hardship, both mental and physical, to the complainant.

6. That it was represented and promised by the respondent no. 1 that they have entered into a collaboration agreement with M/s. Bridge

Street Apartments, a global leader in corporate short-term leasing. Thus, on the strength of the alleged collaboration agreement it was assured by the respondents that assured return which was promised to the complainant would be paid on time. However, this promise of the respondent no.1 also turned out to be false and they have not paid the assured return. She sent many e-mails regarding the same and did not receive any reply/ reason for the omission of their duty.

7. That it is relevant to point out that the total area of the unit was 775 sq. ft. and the same was allotted to the complainant @ Rs. 9,145 per sq. ft. in addition to the same the complainant was also liable to pay Rs. 600/- per sq. ft. towards development charges and Rs. 100/- per sq. ft. towards IFMS. Thus, the total price of the unit based on the carpet area was Rs. 75,52,667.35/-.

8. That the complainant has made a total payment of Rs. 4,537,296/ to the respondent no.1 among which a sum of Rs. 2,00,000/- was paid vide cheque no. 035985 dated 06-02-2018, drawn on HDFC Bank as booking amount. Further, a sum of Rs. 7,00,000/- by cash. No receipt for the same was provided by the respondents despite numerous reminders given by the complainant. This amount was promised to be adjusted towards parking charges. First installment of Rs. 25,00,000/- was paid vide cheque no. 361154 dated 14-03-2018, drawn on Punjab National Bank and second installment of Rs. 11,00,921/- was paid vide

cheque no. 035988 dated 14-03-2018, drawn on HDFC Bank, installment by TDS of Rs. 36,375/- dated 19-04-2018.

9. That the subject unit was booked under "construction linked plan" and pursuant to the said amount being paid by her to the respondent no.1, it issued allotment letter dated 23.04.2018 after much persuasion by the complainant.

10. That the respondent no. 1 has shared with her a copy of the sale agreement containing various terms & conditions. However, the said agreement was never executed as the complainant raised objections to various clauses of the same and the objections were never rectified by the respondents. The respondent no. 1 never addressed the issues raised by her seriously and always been in a denial mode without ever looking into the issues.

11. That she visited the unit in October 2020 and the same was not ready. Various photographs of the unit were duly taken by her and the respondents were also confronted with the same. However, it refused to acknowledge that the unit was not fit for possession and instead harped upon the OC received by the respondents. The complainant further submitted that the alleged OC obtained by the respondents was obtained by playing fraud upon the authority and by illegal means as the unit is still under construction and the same is not fit for possession.

12. That the respondents after being confronted with all the shortcomings, just to pressurize the complainant and to extort money from the complainant, issued pre-termination letter dated 16.01.2021 wherein it raised an illegal demand of Rs. 50,51,942.00/- (including taxes & excluding Interest, Stamp duty & Registration Charges) which was much more than the balance consideration payable by her. Thereby, threatening her of forfeiture of the amount deposited by her in case does not fall in line and pay to the respondents the demanded amount. The respondents being in commanding position having received more than Rs. 45,37,296/-.

13. That the complainant mainly objected the agreement on account of change in the due date of possession and it is relevant to point out that the at the time of booking of the unit, the delivery of possession was promised by end of 3rd Quarter of 2018 and the same was reiterated vide e-mail dated 11-05-2018 issued by the respondents. To the utter shock and surprise of the complainant, the respondents mischievously mentioned the date of possession as 31.12.2020 in clause 5 of the said agreement, which was totally contrary to the promise made earlier.

14. That she regularly visited the site and was not satisfied with progress of the project and which was completely stalled, and no satisfactory explanation was ever provided by the respondents for the same.

15. That the complainant was shocked to receive an alleged offer of possession on 05.10.2020 wherein it was mentioned in the offer of

possession that it has received an occupation certificate from the concerned authority along with tax invoices and account statement containing payment plan details and further, threatened the complainant to ensure that the complainant pays the illegal demands raised by the respondents. Thereafter respondent no.1 thereafter, sent a reminder letter, JOY/RTM/B/0496 dated 23.10.2020 with reference to the offer of possession for the amount Rs. 51,44,964/- (including taxes) and the same was followed by another reminder letter, JOY/RTM/B/0496 dated 24 12-2020 in lieu of offer of possession for the amount Rs. 50,51,942/- (including taxes & excluding interest, stamp duty & registration charges).

16. That she sent a reply dated 27.10.2020 to the letter sent by respondent no. 1, reference no. JOY/RTM/B/0496 dated 23-10-2020 regarding different final dues being demanded by it and submitted that the possession of the said unit was promised as per letter dated 11.05.2018 by e-mail, to be made by the end of 3 Quarter 2018, it has been more than 2 years since the promised date.

17. That the complainant sent another reply letter dated 22.02.2021 to the respondent no. 1 against pre-termination letter dated 16.01.2021 and letter dated 05.10.2020, reminder letters dated 24.12.2020, 13.01.2021 and 20.01.2021 being violative of the law and extortive in nature. It is pertinent to mention that the respondents company has raised a demand of and received from the allottee an amount of Rs.

4,537,296/- even before the execution of flat buyer agreement which is much above the 10% cost of the apartment as such is in contravention of the provision of the section 13 of Act of 2016.

18. That as per clause 1.13 of the sale agreement the respondents themselves have mentioned frivolously that "allottee has paid sum of Rs. 34,26,157/- whereas in the allotment letter dated 23-04-2018, booking ID JOY/RTM/B/0496 they have attached the payment receipt of total sum of Rs. 38,37,296/- already paid by the complainant even before the execution of flat buyer agreement. Furthermore, the respondent no. 1 has purposely failed to mention and acknowledge the sum of Rs. 7,00,000/- which was paid by the her in cash.

19. That the respondent-company has failed to develop and complete the project in accordance with the sanctioned plans and specification as approved by the competent authorities and it is on account of such defects that the project is facing delays, furthermore it has not cared to disclose to the complainant any alterations in the sanctioned plans, layout plans and specification of the project after the alterations and additions to the same and thus, is in non-compliance of the mandate of section 14 Act of 2016. It has further failed to obtain the requisite insurance for the said project only to save out on the premium and other charges in respect of the insurance and thus, failed to protect the interest of the innocent and bona-fide allottee/subsequent. It is merrily waiting for some natural calamity or any such mis-happening

to happen on account of which they could further claim extension of time citing force majeure conditions. The blatant non-compliance of the respondent company is covered under section 14 Act and calls for imposition of heavy penalties.

20. That the respondent company has not maintained a separate account for the funds collected from the allottee of the present project and the cheques have been asked to be issued in favour your A/c maintained with IndusInd Bank, New Delhi, which is a common pool from where the funds have been diverted to make payments for construction of commercial sites and the project in which the complainant herein have invested, have suffered on account of non-availability of funds. Furthermore, it would be relevant to point out here that "time along with the promised amenities and assured returns" were sine qua non for the complainant to make payment and take possession. The complainant sent many e-mails regarding the unpaid assured returns promised by the respondents but was have not received any payment from February 2020 date.

C. Relief sought by the complainant:

21. The complainant have sought following relief(s):

i. Direct the respondenta to return the amount of Rs.45,37,296/- in full being the consideration paid by the complainant for the flat.

ii. Direct the respondents severally and jointly liable to pay interest @ 24% p.a. compounded quarterly on amount paid by the

complainant from respective date of payment till date on which arrears are paid.

iii. Direct the respondents to grant such a penalty, as may deem fit and proper by this authority, towards the delay in offering of possession of the flat which was promised in the Year 2018 until the day such possession was actually offered at the rate of 18 % per annum along with pendent-lite and future compensation at the same rate till the date of actual realization of the amount.

iv. Direct the respondents severally and jointly pay a sum of Rs. 4,31,064/- for the unpaid assured returns.

v. Direct the to pay an amount of Rs. 10,00,000/- towards damages for the physical and mental hardship caused to the complainant and his family as a result of omission on the part of respondents.

vi. Direct the respondents pay an interest of 24% and amount of interest on the State Bank of India highest marginal cost of lending rate plus two percent of the principle amount paid by him, towards exemplary damages mental agony and harassment to the complainant.

vii. Direct the respondents severally and jointly to pay a sum of Rs. 2,00,000/- to the complainant towards the cost of litigation.

viii. Direct the respondents to pay for the rent of the interim accommodation of the complainant until the position of the flat unit is offered.

D. Reply by respondent no. 1:

The respondent no. 1 by way of written reply made following submissions

22. That the complainant, after checking the veracity of the project namely, 'AIPL Joystreet', Sector 66, Gurugram applied for allotment of unit vide the booking application form and further, agreed to be bound by the terms and conditions of the documents executed by her.

23. That respondent no.1 vide its allotment offer letter dated 23.04.2018 allotted unit bearing no. 1021 having tentative super area of 775 sq. ft. for sale consideration of Rs. 76,29,875/- (exclusive of the registration charges, stamp duty, service tax and other charges).

24. That as per the terms of the allotment, it was agreed that time is the essence with respect to the due performance under the agreement and more specially timely payment of instalments towards sale consideration and other charges, deposits and amounts payable by the complainant. It was acknowledged by her that the said unit was purchased not for the purpose of self-occupation but was for the purpose of leasing to third parties. The complainant purchased the said unit on assured return basis payable every month from respondent no.1. She has already earned huge amount as assured return.

25. That on account of certain force majeure circumstances such as ban on construction, due to court order/governmental authority guidelines such as order dated 01.11.2019, 04.11.2019, 08.11.2019 and

11.11.2019 of the Environment Pollution (Prevention and Control) Authority for the NCR and order of the Hon'ble Apex Court dated 04.11.2019. The assured return could not be paid by respondent no.1 to the complainant from 01.11.2019 till 05.12.2019 and the same was intimated to the complainant by respondent no.1 vide its letter dated 30.11.2019.

26. That the outbreak of the deadly Covid-19 virus resulted in implementation of the project being affected. The outbreak resulted in not only disruption of the supply chain of the necessary materials but also in shortage of the labour at the construction sites as several labourers have migrated to their respective hometowns. The Covid-19 outbreak which has been classified as 'pandemic' is an Act of God and the same was thus beyond the reasonable apprehension of respondent no.1. In such unprecedented time could not have given the assured return amount to her in the lockdown period and the relevant mails have already been attached by the complainant along with the complaint.

27. That the constructive possession of the unit was to be handed over to the complainant strictly as per the terms of the allotment and as per clause (j) of the booking application form, "The company shall subject to force majeure conditions propose to handover possession of the unit on or before 31st December, 2022 notified by the Promoter to the Authority at the time of registration of the Project under the Real

Estate (Regulation and Development) Act, 2016 and the Haryana Real Estate (Regulation and Development) Rules, 2017 and regulations made thereunder for completion of the project or as may be further revised/approved by the Authorities."

28. That although the implementation of the project was affected, yet respondent no.1 completed the construction of the project and applied for the grant of occupation certificate on 16.07.2020 which was granted by the concerned authorities on 28.09.2020.

29. That respondent no.1 raised the payment demands dated 05.10.2020. However, despite reminders dated 23.10.2020 and 13.01.2021, the complainant failed to remit the due amount. It has already offered the constructive possession of the unit to her on 05.10.2020 and as per the statement of account huge amount is still payable by the complainant to the it. The complainant vide the said offer was informed to complete the documentation formalities and make payment towards the outstanding amount by 20.10.2020 and any delay in doing so would attract holding charges as per the terms of the allotment. However, the complainant has failed to do the needful and respondent no.1 has been constrained to issue a pre-termination letter dated 16.01.2021 to the complainant.

30. 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:

31. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

> ***Section 11(4)(a)***
>
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee or the competent authority, as the case may be;*
>
> *The provision of assured returns is part of the builder buyer's agreement, as per relevant clause of the BBA. Accordingly, the promoter is*

responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

Section 34-Functions of the Authority:

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

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on objections raised by the respondent.

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

32. The respondent-promoter has raised a contention that the construction of the project was delayed due to force majeure conditions such as various orders passed by the National Green Tribunal & Environment Pollution (Prevention & Control) Authority, thereafter, shortage of labour due to stoppage of work. Since there were circumstances beyond the control of respondent, so taking into consideration the above-mentioned facts, the respondent be allowed the period during which his construction activities came to stand still, and the said period be excluded while calculating the due date. But the plea taken in this regard is not tenable. Though there has been various orders issued to curb the environment pollution. But these were for a

short period of time and therefore, no period can be allowed to the respondent- builder.

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

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

34. The Act of 2016 defines "agreement for sale" means an agreement entered into between the promoter and the allottee [Section 2(c)]. An agreement for sale is defined as an arrangement entered between the promoter and allottee with freewill and consent of both the parties. An agreement defines the rights and liabilities of both the parties i.e., promoter and the allottee and marks the start of new contractual relationship between them. This contractual relationship gives rise to future agreements and transactions between them. The different kinds

of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral part of this agreement is the transaction of assured return inter-se parties. The "agreement for sale" after coming into force of this Act (i.e., Act of 2016) shall be in the prescribed form as per rules but this Act of 2016 does not rewrite the "agreement" entered between promoter and allottee prior to coming into force of the Act as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.,*** (Writ Petition No. 2737 of 2017) decided on 06.12.2017. Since the agreement defines the buyer-promoter relationship therefore, it can be said that the agreement for assured returns between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate regulatory authority has complete jurisdiction to deal with assured return cases as the contractual relationship arises out of agreement for sale only and between the same parties as per the provisions of section 11(4)(a) of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the agreement for sale till the execution of conveyance deed of the unit in favour of the allottee. Now, three issues arise for consideration as to:

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

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

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

35. While taking up the cases ***of Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd. (complaint no 141 of 2018),*** and ***Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP" (complaint no 175 of 2018)*** decided on 07.08.2018 and 27.11.2018 respectively, it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the issue of assured returns was involved to be paid by the builder to an allottee but at that time, neither the full facts were brought before the authority nor it was argued on behalf of the allottee that on the basis of contractual obligations, the builder is obligated to pay that amount. However, there is no bar to take a different view from the earlier one if new facts and law have been brought before an adjudicating authority or the court. There is a doctrine of "prospective overruling" and which provides that the law declared by the court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. A reference in this regard can be made to the case of ***Sarwan Kumar & Anr Vs. Madan Lal***

Aggarwal Appeal (civil) 1058 of 2003 decided on 06.02.2003 and wherein the hon'ble apex court observed as mentioned above. So, now the plea raised with regard to maintainability of the complaint in the face of earlier orders of the authority in not tenable. The authority can take a different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. It is now well settled preposition of law that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum , memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement for sale defines the builder-buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allottee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arises out of the agreement for sale only and between the same contracting parties to agreement for sale. In the case in hand, the issue of assured returns is on the basis of contractual obligations arising between the parties. Then in case of ***Pioneer Urban Land and Infrastructure Limited & Anr. v/s Union of India & Ors. (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019,*** it was observed by the Hon'ble Apex Court of the land that "...allottee 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 allottee on a monthly basis from the date of execution of agreement till the date of handing over of possession to the allottee". 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 allottee 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 allottee 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.

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

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

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

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

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

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

38. 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.

39. 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.

40. 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.

41. Moreover, the developer is also bound by promissory estoppel. As per this doctrine, the view is that if any person has made a promise and the promisee has acted on such promise and altered his position, then the person/promisor is bound to comply with his or her promise. When the builder failed to honour their commitments, a number of cases were filed by the creditors at different forums such *as* ***Nikhil Mehta, Pioneer Urban Land and Infrastructure*** which ultimately led the central government to enact the Banning of Unregulated Deposit

Scheme Act, 2019 on 31.07.2019 in pursuant to the Banning of Unregulated Deposit Scheme Ordinance, 2018. However, the moot question to be decided is as to whether the schemes floated earlier by the builders and promising as assured returns on the basis of allotment of units are covered by the abovementioned Act or not. A similar issue for consideration arose before Hon'ble RERA Panchkula in case ***Baldev Gautam VS Rise Projects Private Limited*** (*RERA-PKL-2068-2019*) where in it was held on 11.03.2020 that a builder is liable to pay monthly assured returns to the complainant till possession of apartments stands handed over and there is no illegality in this regard.

42. 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.*

43. The money was taken by the builder as deposit in advance against allotment of immovable property and its possession was to be offered within a certain period. However, in view of taking sale consideration by way of advance, the builder promised certain amount by way of assured returns for a certain period. So, on his failure to fulfil that commitment, the allottee has a right to approach the authority for redressal of his grievances by way of filing a complaint.

G. Findings on the relief sought by the complainant:

G.I Direct the respondents to return the amount of Rs.45,37,296/- in full being the consideration paid by the complainant for the flat.

G.II Direct the respondents severally and jointly liable to pay interest @ 24% p.a. compounded quarterly on amount paid by the complainant from respective date of payment till date on which arrears are paid.

G.III Direct the respondents to grant such a penalty, as may deem fit and proper by this authority, towards the delay in offering of possession of the flat which was promised in the Year 2018 until the day such possession was actually offered at the rate of 18 % per annum along with pendent-lite and future compensation at the same rate till the date of actual realization of the amount..

44. In the present complaint, the complainant alleged that the respondents kept changing the due date of handing over of possession, failed to pay the assured return and the quality of the unit are not as promised by the respondents. After receiving offer of constructive possession dated 05.10.2020, the complainant visited the site and observed that the same is not ready and placed photographs annexed as annexure P6. In view of aforesaid circumstances, the complainant wishes to withdraw from the project of the respondent. On the other

hand, respondent alleged that a demand letter date 05.10.2020 was issued along with offer of possession but the same was defaulted by the complainant. Following which reminders dated 23.10.2020, 13.01.2021 were sent to the complainant before issuance of pre-termination letter dated 16.01.2021.

45. The authority is of considered view that a valid offer of possession must have following components:

i Possession must be offered after obtaining occupation certificate;

ii The subject unit should be in a habitable condition;

iii The possession should not be accompanied by unreasonable additional demands.

In the present case, said offer of possession is made after obtaining occupation certificate from competent authority, and hence is regarded as a valid offer of possession.

46. The section 18(1) is applicable only in the eventuality where the promoter fails to complete or unable to give possession of the unit in accordance with terms of agreement for sale or duly completed by the date specified therein. This is an eventuality where the promoter has offered possession of the unit after obtaining occupation certificate and on demand of due payment at the time of offer of possession the allottee wishes to withdraw from the project and demand return of the amount received by the promoter in respect of the unit with interest at the prescribed rate.

47. The due date of possession as per agreement for sale as mentioned in the table above is **31.12.2020** and the aforesaid complaint has been filed after delay of 2 months 08 days i.e.; on 08.03.2021 after possession of the unit was offered to him after obtaining occupation certificate by the promoter. The allottee never earlier opted/wished to withdraw from the project even after the due date of possession and only when offer of possession was made to him and demand for due payment was raised then only filed a complaint before the authority. The occupation certificate /part occupation certificate of the buildings/towers where allotted unit of the complainant is situated is received after obtaining occupation certificate. Section 18(1) gives two options to the allottee if the promoter fails to complete or is unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein:

    a. Allottee wishes to withdraw from the project; or

    b. Allottee does not intend to withdraw from the project

48. The right under section 18(1)/19(4) accrues to the allottee on failure of the promoter to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale or duly completed by the date specified therein. If allottee has not exercised the right to withdraw from the project after the due date of possession is over till the offer of possession was made to him, it impliedly means that the

allottee has tacitly wished to continue with the project. The promoter has already invested in the project to complete it and offered possession of the allotted unit. Although, for delay in handing over the unit by due date in accordance with the terms of the agreement for sale, the consequences provided in proviso to section 18(1) will come in force as the promoter has to pay interest at the prescribed rate of every month of delay till the handing over of possession and allottee's interest for the money he has paid to the promoter are protected accordingly.

49. Further in the judgement of the Hon'ble Supreme Court of India in the cases of ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. (supra) reiterated in case of M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022.*** it was observed : -

> *25. The unqualified right of the allottee to seek refund referred Under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed*

50. The promoter is responsible for all obligations, responsibilities, and functions under the provisions of the Act of 2016, or the rules and regulations made thereunder or to the allottee as per agreement for sale under section 11(4)(a). This judgement of the Supreme Court of India recognized unqualified right of the allottee and liability of the promoter in case of failure to complete or unable to give possession of the unit in accordance with the terms of agreement for sale or duly completed by the date specified therein. But the allottee has failed to exercise this right although it is unqualified one. He has to demand and make his intentions clear that the allottee wishes to withdraw from the project. Rather tacitly wished to continue with the project and thus made him entitle to receive interest for every month of delay till handing over of possession. It is observed by the authority that the allottee invest in the project for obtaining the allotted unit and on delay in completion of the project never wished to withdraw from the project and when unit is ready for possession, such withdrawal on considerations other than delay such as reduction in the market value of the property and investment purely on speculative basis will not be in the spirit of the section 18 which protects the right of the allottee in case of failure of promoter to give possession by due date either by way of refund if opted by the allottee or by way of delay possession charges at prescribed rate of interest for every month of delay.

51. In the case of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors. Civil appeal no. 5785 of 2019 decided on 11.01.2021***, some of

the allottee failed to take possession where the developer has been granted occupation certificate and offer of possession has been made. The Hon'ble Apex court took a view that those allottee are obligated to take the possession of the apartments since the construction was completed and possession was offered after issuance of occupation certificate. However, the developer was obligated to pay delay compensation for the period of delay occurred from the due date till the date of offer of possession was made to the allottee. As per proviso to sec 18(1)

> *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 possession, at such as rate as may be prescribed.*

52. In case allottee wishes to withdraw from the project, the promoter is **liable on demand** to the allottee return of the amount received by the promoter with interest at the prescribed rate if promoter fails to complete or unable to give possession of the unit in accordance with the terms of the agreement for sale. The words liable on demand need to be understood in the sense that allottee has to make his intentions clear to withdraw from the project and a positive action on his part to demand return of the amount with prescribed rate of interest if he has not made any such demand prior to receiving occupation certificate and unit is ready then impliedly he has agreed to continue with the project i.e. he does not intend to withdraw from the project and this proviso to sec 18(1) automatically comes into operation and allottee

shall be paid by the promoter interest at the prescribed rate for every month of delay. This view is supported by the judgement of Hon'ble Supreme Court of India in case of of ***Ireo Grace Realtech Pvt. Ltd. v/s Abhishek Khanna and Ors.(Supra***) and also in consonance with the judgement of Hon'ble Supreme Court of India in case ***of M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors.***

53. In the present case, there is no delay on part of the respondent in handing over the possession of the allotted unit, no case of DPC is made out. The complainant is directed to make necessary due installments payable towards consideration of allotted unit.

G.IV Direct the respondents severally and jointly pay a sum of Rs. 4,31,064/- for the unpaid assured returns.

54. Clause 21 of agreement deals with payment of assured return by the respondent. As per said clause an amount of Rs. 35,922/-p.m. was payable by the promoter-builder from date of receipt of an amount of Rs. 37,72,562/- till date of notice of offer of possession or completion of construction as per disclosed at time of RERA registration or 31.12.2020, whichever is earlier. The respondent- promoter is directed to pay the balance amount of assured return as per clause 21 of the agreement.

G.V Direct the to pay an amount of Rs. 10,00,000/- towards damages for the physical and mental hardship caused to the complainant and his family as a result of omission on the part of respondents.

G.VI Direct the Respondents pay an interest of 24% and amount of interest on the State Bank of India highest marginal cost of lending

rate plus two percent of the principle amount paid by him, towards exemplary damages mental agony and harassment to the complainant.

G.VII Direct the respondents severally and jointly to pay a sum of Rs. 2,00,000/- to the complainant towards the cost of litigation.

G.VIII Direct the respondents to pay for the rent of the interim accommodation of the complainant until the position of the flat unit is offered.

55. The complainant are seeking relief w.r.t compensation in the aforesaid relief, Hon'ble Supreme Court of India in civil appeal titled as ***M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors. (SLP(Civil) No(s). 3711-3715 OF 2021),*** held that an allottee is entitled to claim compensation under sections 12, 14, 18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainant may approach the adjudicating officer for seeking the relief of compensation.

H. Directions of the Authority:

56. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

i) The respondents are directed to make payment of balance assured return as per agreed terms contained in clause 21 of agreement till offer of possession, if not already paid.

57. Complaint stands disposed of.

58. File be consigned to the registry.

(Vijay Kumar Goyal)
Member

(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.07.2022