

**BEFORE THE HARYANA REAL ESTATE REGULATORY  
AUTHORITY, GURUGRAM**

Complaint no. :	3635 of 2020
Date of filing complaint:	04.11.2020
First date of hearing:	10.12.2020
Date of decision :	28.09.2022

Asha Kapoor R/o: Flat No. 12D, Tower 26(P), Central Park 2 Resort, Sohna Road, Sector-48, Gurugram	<b>Complainant</b>
Versus	
M/s Ninaniya Group R/o: 278/3, Old Delhi Road, Opposite Ajit Cinema, Gurugram-122001	<b>Respondent</b>

<b>CORAM:</b>	
Shri Vijay Kumar Goyal	<b>Member</b>
Shri Ashok Sangwan	<b>Member</b>
Shri Sanjeev Kumar Arora	<b>Member</b>
<b>APPEARANCE:</b>	
Sh. Dharmender Sehrawat (Advocate)	Complainant
Sh. Shagun Singla (Advocate)	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
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	<b>Unregistered</b>
7.	Unit no.	PPRS-GE-07, Ground floor [Annexure P2 at page no. 28 of the complaint]
8.	Unit measuring (super area)	550 sq. ft. [Annexure P2 at page no. 28 of the complaint]
9.	Date of allotment letter	14.08.2013 [Annexure P1 at page no. 19 of the complaint]
10.	Date of execution of builder buyer agreement	02.09.2013 [Annexure P2 at page no. 25 of the complaint]
11.	Date of start of construction of the project	01.04.2015 [As per email received from the respondent on 21.01.2022]
12.	Date of Memorandum of understanding	02.09.2013 [Annexure P3 at page no. 52 of the

		complaint]
13.	Completion & Possession clause	<p>5.1                  That the Company shall complete the construction of the said Unit <b>within 36 months from the date of execution of this agreement and/or from the start of construction whichever is later</b> 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. <b>(emphasis supplied)</b></p>
14.	Assured return clause	<p><b>Clause 5 of MOU</b>                  The developer shall pay the assured investment return@ Rs.34,079/- 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. 19.08.2013 till the possession of a said unit(Retail shop) under reference is handed over to the buyer.</p>
15.	Due date of delivery of possession	<p>01.04.2018                  [Calculated from the date of start of construction i.e. 01.04.2017]</p>
16.	Total sale consideration	<p>Rs.24,75,000/-                  [As per payment schedule at page no.49 of the complaint]</p>

17.	Total amount paid by the complainant	Rs.20,85,978/- [As per page 54 of the complaint]
18.	Payment plan	Construction linked payment plan [Page 49 of the complaint]
19.	Offer of possession	Not offered
20.	Occupation Certificate	Not obtained
21.	Assured amount received by the complainant	Rs.23,85,558/- [As admitted by the respondent at page 16 of the reply] Payment received till 31.12.2018

**B. Facts of the complaint:**

3. The representatives of respondent informed and assured the complainant that the construction of the project will commence within a period of 2 months i.e. maximum by the end of November 2013 and possession will be handed over within the period of 36 months. Further the representatives of respondent had represented that the respondent will pay the assured return amount of Rs. 37,866/- per month to complainant till the date of handing over the possession on making the complete payment of basic sale price. Thus, believing upon the representations and assurances of the respondent, the complainant made the basic sale price of Rs. 19,16,750/- and through the letter, a unit no. PPRS-GE-007, Prism Portico was allotted in the name of the complainant. It is pertinent to mention here that the letter dated 14.08.2013 has also confirmed the booking and further mentioned that "the application amount already received of Rs. 5,50,000/- to the company as registration and booking amount for the said unit in the project." It is also pertinent to mention here that the complainant on 14.08.2013 paid an amount of Rs. 11,00,000/-

through the cheque nos. 023685 and 023686 dated 05.08.2013 and 08.08.2013, respectively and the same is confirmed by the letters dated 14.08.2013. Further the complainant has made an amount of Rs. 9,85,978/- through cheque no. 023687 dated 19.08.2013 and the same has been confirmed by the respondent in the MOU signed between the parties.

4. Thus, it represents that the said amount was acknowledged and accepted by the respondent. Therefore, a receipt in this regard was also issued by the officials of the respondent to the complainant. That on 02.09.2013, the complainant and respondent executed the buyer's agreement along with the MOU for the assured return.
5. That thereafter the respondent start paying the assured return amount and assured the complainant that the assured return will be provided till the date of possession of the unit. However, the respondent has failed to abide the terms and conditions as per buyer agreement and as per the MOU signed between the parties.
6. That initially respondent paid the assured return amount till 31.03.2018, however from 01.04.2018 to till date no assured return amount was given by the respondent. The respondent has acted in fraudulently manner who only give false assurance of possession and assured return amount on payment of complete basic sale price.
7. That as huge time had been lapsed, the complainant therefore made several calls to the customer care and marketing departments to seek status of the construction, but the complainant was never provided with a satisfactory response and

the respondent's officials made false and frivolous statements and gave false assurances that the construction is in full swing and the unit shall be handed over within the agreed time. Thereafter, the complainant had visited the site in the month of September 2020 and were shocked to realize that the project was getting delayed as very slow construction was being carried out. That interestingly till date project is far from completion.

8. That as the buyer's agreement stated that time was the essence of the contract, it was incumbent upon the builder i.e. the respondent to develop and hand over possession of the said shop/unit within the period of 36 months as per the timeframe set out in the buyer's agreement dated 02.09.2013. It is pertinent to mention that as per the clause 5(a) of buyer's agreement it has been stated 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".

**C. Reliefs sought by the complainant:**

9. The complainant has sought following relief(s):
- Direct the respondent to handover the possession of the unit.
  - Direct the respondent to pay assured return @37,866/- per month till the date of handover the possession of unit.

**D. Reply by respondent:**

10. It is crystal clear from reading the complaint that the Complainant is not an 'Allottee', but is an 'Investor', who is only seeking assured return from the respondent, by way of present petition,

11. That the bare reading of the buyer's agreement executed between the complainant and the respondent, 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. 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. The complainant has already received a sum of Rs 23,85,558/- towards the payment of assured return in respect of the unit in question.
12. That 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:
- a) Policies regarding availability of FAR based on various factors/ grounds and conditions including TOD and TDR.
  - b) Revised taxation policies including GST, Brokerage Policies.
  - c) Environmental restrictions such as use of untreated water and frequent stoppage of construction due to pollution control measure on environment etc.
  - d) Increase in the cost of construction material.

- e) Two stage process of environmental clearance which takes 2 to 3 years.
- f) 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.
- g) Statutory construction ban across the NCR region during the winter season, resulting in slow down of the project.
- h) 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.
- i) 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. The same was a major component which lead to the changed timelines in the completion of the project since the construction and development works became slow and delayed.
- j) Demonetisation also resulted in delaying the timely completion of project.
- k) Outbreak of the novel-corona virus is also the major factor which leads to the alteration in the timeline for the completion of project.



13. 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.
14. That before signing the agreement the complainant was well aware of the terms and conditions as imposed upon the parties under the buyer's agreement and only after thorough reading, the said agreement got signed and executed. That the complainant is misrepresenting the true contents of the buyer's agreement to extract more money from the respondent. That the respondent has fulfilled all the obligations so far, as per the said agreement.
15. It is pertinent to mention here that complainant's act is also violative of the provisions of Banning of Unregulated Deposit Ordinance, 2019 as he is falling within the definition of "Deposit Takers", as per the Section 2(6) of "The Banning of Unregulated Deposit Schemes Ordinance, 2019 and the said ordinance bans such deposits, thereby also bars such assured returns.

**E. Jurisdiction of the authority:**

16. 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.1 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.**

17. The respondent is contending that the complainant 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 complainant is 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 complainant is buyer and paid total price of Rs. 20,85,978/- 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;"*

18. 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 complainant, it is crystal clear that the complainant is 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. 000600000010557 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 assured return @37,866/- per month till the date of handover the possession of unit.**

Vide memorandum of understanding dated 02.09.2013 the claimant has sought assured returns of Rs.34,079/- on monthly basis i.e. 19.08.2013 till possession of the said unit as per clause 5 of memorandum of understanding. 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.23,85,558/- 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 5 of the Memorandum of understanding stipulates that -

*The developer shall pay the assured investment return@ Rs34,079/- 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. 19.08.2013 till the possession of a said unit (Retail shop) under reference is handed over to the buyer.*

19. 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.
20. 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 is 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 proposition 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 allottee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arises out of the agreement for sale only and between the same contracting parties to agreement for sale. In the case in hand, the issue of assured returns is on the basis of contractual obligations arising between the parties. Then in case of ***Pioneer Urban Land and Infrastructure Limited & Anr. v/s Union of India & Ors.*** (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019, it was observed by the Hon'ble Apex Court of the land that "*...allottees who had entered into "assured return/committed returns' agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the developer undertook to pay a certain amount to allottees on a*



monthly basis from the date of execution of agreement till the date of handing over of possession to the allottees". It was further held that 'amounts raised by developers under assured return schemes had the "commercial effect of a borrowing' which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code" including its treatment in books of accounts of the promoter and for the purposes of income tax. Then, in the latest pronouncement on this aspect in case *Jaypee Kensington Boulevard Apartments Welfare Association and Ors. vs. NBCC (India) Ltd. and Ors.* (24.03.2021-SC): MANU/ SC/0206 /2021, the same view was followed as taken earlier in the case of *Pioneer Urban Land Infrastructure Ltd & 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.

21. 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.*

22. 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.

23. 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.
24. 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.

25. 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 complainant till possession of respective apartments stands handed over and there is no illegality in this regard.
26. 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.*

27. 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.

28. 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 complainant besides initiating penal proceedings.

29. 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 allottee arises out of the same relationship and is marked by the original agreement for sale.
30. 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 a said unit as per clause 5 of memorandum of understanding dated 02.09.2013.
31. 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.

**G.2. Direct the respondent to handover the possession of the unit.**

32. In such a situation no direction can be given to the respondent to handover the possession of the subject unit, as the possession of the unit can only be offered after obtaining occupation certificate from the competent authority.

**H. Directions of the authority:**

33. 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 assured return as agreed upon between the parties from the date of payment of assured return has not been paid till offer of the possession of the said unit as per clause 5 of memorandum of understanding dated 02.09.2013.
- ii. 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.
- iii. The respondent shall not charge anything from the complainant which is not the part of buyer's agreement.

34. Complaint stands disposed of.

35. File be consigned to registry.

  
(Sanjeev Kumar Arora) Member

  
(Ashok Sangwan) Member

  
(Vijay Kumar Goyal) Member

Haryana Real Estate Regulatory Authority, Gurugram

**Dated: 28.09.2022**