BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Date of decision: 28.03.2023

NAME OF THE BUILDERS	**M/S ORRIS INFRASTRUCTURE PVT. LTD.**
PROJECT NAME	**"FLOREAL TOWERS"**

S.No.	Case No.	Case title
1	CR/4846/2021	Sarika Malhotra and anr. Vs. M/s Orris Infrastructure Pvt. Ltd.
2	CR/4851/2021	Nikhil Mehta and anr. Vs. M/s Orris Infrastructure Pvt. Ltd.

CORAM:

Shri Ashok Sangwan **Member**

Shri Sanjeev Kumar Arora **Member**

APPEARANCE:

Shri Varun Kathuria Counsel for the complainant

Ms. Charu Rustagi Counsel for the respondent

ORDER

1. This order shall dispose both complaints titled as above filed before this authority under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "the rules"). Since the core issues

emanating from these complaints are similar in nature and the complainant in the above referred matters are allottee of the project, namely, Floreal Towers, Sectors 83, Gurugram, Haryana being developed by the same respondent. The terms and conditions of the buyers' agreement that had been executed between the parties *inter se* are also almost similar with some additions or variation. The fulcrum of the issue involved in both these complaints pertain to failure on the part of the respondent/promoter to pay assured return in terms of the agreement, handover of actual physical possession of the subject unit and execution of conveyance deed.

2. The details of the complaints, reply status, unit no., date of agreement, possession clause, due date of possession, total sale consideration, total paid amount, and relief sought are given in the table below:

Project: Floreal Towers, Sectors 83, Gurugram, Haryana
Possession clause: 11A. Schedule for Possession of the said Unit The company based on its present plans and estimates and subject to all just exceptions, contemplates to hand over the possession of the Building/ said Unit within the period of **36 months from the date of execution of the Space Buyer's Agreement by the Company** unless there shall be delay or there shall be failure due to reasons mentioned in Clauses (13.1). (13.2). (11.3) and Clause (35) or due to failure of Allottee(s) to pay in time the price of the said Unit along with all other charges and dues in accordance with the schedule of payments given in Annexure B or as per the demands raised by the Company from time to time or any failure on the part of the Allottee(s) to abide by any terms or conditions of this Space Buyer's Agreement.
Table for both the complaints

Sr. no	Complaint No., Case Title, and Date of filing of complaint and reply	Unit no. and size of the unit	Date of execution of space buyer's agreement	MOU for assured return & paid till	Due date of possession	Total sale consideration and amount paid by the complainant	Occupation certificate and offer of possession
1.	CR/4846/2021 Sarika Malhotra Vs. Orris Infrastructure Pvt. Ltd. **DOF-** 14.12.2021 **Reply filed** on 08.02.2022	213, 2nd Floor, Tower A 750 sq. ft. (Pg. 63, 77 & 78 of complaint)	24,03.2017 (Page 27 of complaint)	25.07.2009 (Page 17 of complaint) **AR paid till-** August 2019 (Page 17 of reply)	24.03.2020	**TSC:** Rs. 15,00,000/- **AP:** Rs. 15,00,000 [Page 38 of complaint]	**OC-** 16.08.2017 (Page 15 of reply) **Const. possession offered on -** 10.04.2018 (Page 72 of complaint)
2.	CR/4851/2021 Nikhil Mehta Vs. Orris Infrastructure Pvt. Ltd. **DOF-** 14.12.2021 **Reply filed** on 08.02.2022	212, 2nd Floor, Tower A 750 sq. ft. (Pg. 62, 78 & 79 of complaint)	24.03.2017 (Page 26 of complaint)	25.07.2009 (Page 16 of complaint) **AR paid till-** August 2019 (Page 17 of reply)	24.03.2020	**TSC:** Rs. 15,00,000/- **AP:** Rs. 15,00,000 [Page 37 of complaint]	**OC-** 16.08.2017 (Page 15 of reply) **Const. possession offered on -** 10.04.2018 (Page 73 of complaint)

Relief sought in both the complaints:

1. Direct the respondent to pay the amount of monthly returns/investment returns due and payable by it to the complainants from September, 2019 till the date of order to be calculated at Rs. 55,088/- each month.
2. Direct the respondent to continue paying the investment returns / monthly returns to the complainants as per the terms of the MOU i.e. till the leasing of the unit of the complainants.
3. Direct the respondent to pay interest at the prescribed rate on the unpaid monthly returns/investment returns to be calculated from the date the monthly returns were due till the date of payment.
4. Direct the respondent to execute a conveyance deed for the unit of the complainants and to handover the actual physical possession of the unit booked by the complainants to them, complete and ready in all respects.

Note: In the table referred above certain abbreviations have been used. They are elaborated as follows:
DOF- Date of filing of complaint
AR- Assured return
TSC- Total sale consideration
AP- Amount paid by the allottee(s)
OC- Occupation certificate

3. The facts of both the complaints filed by the complainant/allottee(s) are also similar. So, out of the above-mentioned cases, the facts of the lead case of **CR/4846/2021 titled as Sarika Malhotra Vs. Orris Infrastructure Pvt. Ltd.** are being taken into consideration for determining the rights of the allottee(s) qua the relief sought by the complainant in the abovementioned complaints.

A. Project and unit related details

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

S. N.	Particulars	Details
1.	Name of the project	Floreal Towers, Sectors 83, Gurugram, Haryana
2.	Nature of the project	Commercial colony
3.	Project area	9.052 acres
4.	DTCP License no.	260 of 2007 dated 14.11.2017
	License valid up to	13.11.2024
	Licensee	Seriatim Land & Housing Pvt. Ltd

5.	RERA registered/ not registered	Not registered
6.	Unit no.	213, 2nd Floor, tower A (Page 63 of complaint)
7.	Unit area admeasuring	750 sq. ft. (super area) (Page 63 of complaint)
8.	Date of execution of Space Buyer Agreement	24.03.2017 (Page 27 of complaint)
9.	Possession clause	**11A. Schedule for Possession of the said Unit** The company based on its present plans and estimates and subject to all just exceptions, contemplates to hand over the possession of the Building/ said Unit within the period of **36 months from the date of execution of the Space Buyer's Agreement by the Company** unless there shall be delay or there shall be failure due to reasons mentioned in Clauses (13.1). (13.2). (11.3) and Clause (35) or due to failure of Allottee(s) to pay in time the price of the said Unit along with all other charges and dues in accordance with the schedule of payments given in Annexure B or as per the demands raised by the Company from time to time or any failure on the part of the Allottee(s) to abide by any terms or conditions of this Space Buyer's Agreement.
10.	Due date of possession	24.03.2020 (Calculated as 36 months from date of execution of buyer's agreement)

11.	MoU for assured return	25.07.2009 (Page 17 of complaint)
12.	Assured Return clause	2. After receipt of full consideration of Rs. 15,00,000/- (Rupees Fifteen Lac only) the **Developer shall give an investment return @ 65/- per sq. ft. per month i.e. Rs.48,750/- (Rupees Fourty Eight Thousand Seven hundred fifty only) with effect from 01-08- 2009, till the date, the premises are leased out by the developer to the Lessee**. Towards this PDC,s for Rs. 48750/-(Rupees Forty Eight Thousand Seven hundred fifty only) (Less of TDS) shall be issued in favor of the Purchaser of entire period of construction which is estimated at 36 months from 01/08/2009. However, it is clearly understood between the Parties that the Buyer is entitled of 13% increase in the committed return of Rs. 65/- (Rupees Sixty Five Only) per sq. ft. per month only after the expiry of 36 months from 01/08/2009 or till date when Occupancy Certificate of the said premises is obtained by the Developer from the appropriate authorities, for which post dated Cheques will be issued.
13.	Payment of assured return	Till August, 2019 (Annexure R-2 at page 17 of reply)
14.	Total sale consideration	Rs. 15,00,000/- (BSP)
15.	Amount paid by the complainants	Rs. 15,00,000/- (As per BBA on page 38 of complaint)

16.	Occupation certificate	16.08.2017 (Page 15 of reply)
17.	Offer of constructive possession	10.04.2018 (Page 72 of complaint)

B. Facts of the complaint

5. The complainants have made the following submissions in the complaint:

i. That complainant no. 1 is a widow, and the complainant no. 2 is a senior citizen and a cancer patient and the present complaint is being filed through the complainant no. 2 being the GPA holder of the complainant no. 1.

ii. That the respondent made false representations and claims of being a big company and a reputed developer and thereby induced the complainants to purchase a 750 sq. ft. unit in its project known as "Floreal Towers" by showcasing a fancy brochure which depicted that the project will be developed and constructed as state of the art being one of its kind with all modern amenities and facilities and payment of lucrative returns on investment from day one. An MOU dated 25.07.2009, was executed between the parties which mentioned that the total sale consideration of Rs. 15,00,000/-(Rupees fifteen lakhs only) was paid upfront at the time of execution of the MOU and that the complainants were allotted unit no. 216 on the 2nd floor of the project which was later changed to unit no. 213 in Tower – B and again changed to unit no. 213 in Tower – A.

iii. That as per clause 2 of the said MOU, the respondent was liable to pay an investment return calculated @ Rs. 65/- per sq. ft. per month being Rs. 48,750/- p.m to the complainants, w.e.f. 01.08.2009, till the premises are leased out by it. The respondent further undertook to give a 13% increase (to Rs. 73.45 per sq. ft.) in the committed return after the expiry of 36 months per month from 01.08.2009 or till date when the occupancy certificate was obtained by it. The monthly returns were due and payable on the 7th day of each month.

iv. That the respondent falsely claimed that the project where the unit of the complainants is located was complete and ready in December, 2014, which was later found to be untrue and therefore, the respondent continued paying the monthly returns to the complainants. It is pertinent to mention here that it subsequently came to the knowledge of the complainants that the respondent had applied for an "occupation certificate" for the said project with competent authority in 2014 after which it was revealed that the construction of the entire project was raised without any sanctioned plans due to which the certificate was not granted, and the respondent applied for the occupation certificate again in January, 2017.

v. That a pre-printed space buyers agreement was sent by the respondent to the complainants in September, 2016, in duplicate which the complainants signed and sent back to the respondent but the same was never counter signed or returned to the complainants for reasons unknown. Clause 27 of the space buyers agreement

specifically stated that *"in the Assured Return Plan cases all the terms and conditions mentioned in the Memorandum of Understanding (if any) executed between the Company and the Allotee(s) shall be concurrent and coterminous with the terms and conditions of the present Space Buyer's Agreement and in the event of any inconsistency between any of the terms and conditions, the terms and conditions of the Memorandum of Understanding shall override and prevail"*

vi. That the respondent unilaterally, without assigning any reason stopped paying the monthly returns to the complainants since November, 2016, even though the project was not complete because on 17.08.2017, the respondent sent a letter claiming that the project where the unit of the complainants is located had received a "occupation certificate" from the competent authority which stated that further communication would follow.

vii. That the respondent in furtherance of its mala fide intentions and ulterior motives also issued a letter dated 10.04.2018, offering the constructive possession of their unit to the complainants, but only upon the payment of false, exaggerated and fictitious charges under various headers /components of "Utility Charges", "One time electricity connection", "EDC & IDC" etc. which were never mentioned in the MOU executed between the parties. Amongst the above demands, the demand for utility charges of Rs. 5,00,000/- was illegal, arbitrary and without any basis or merit. A mere reading of the said letter made it clear that the same was issued in order to harass the complainants and to arm twist them to drop

their demand for the payment of monthly returns. The said extraneous demand was without any basis or merit and had no legal sanctity as it is contrary to the terms and conditions of the MOU executed between the parties and the same has been done to avoid paying the investment returns to the complainant. The complainants sent a reply dated 25.04.2018 to the respondent demanding the payment of the monthly returns and a copy of the space buyers agreement. The respondent sent another letter dated 28.06.2018 to the complainants reiterating its illegal demands. It is pertinent to mention here that the respondent claimed that the assured returns are due and payable by it to the complainants but refused to pay the same on arbitrary and unilateral interpretation of the clauses of MOU. Thereafter, several replies and counter replies were exchanged between the parties wherein the respondent reiterated its illegal demands while the complainants reaffirmed their stand that no further amounts were payable by it as per the terms of MOU executed between the parties.

viii. That the complainants being left with no option, alongwith with buyers of other units in the said project filed an application under section 7 of the Insolvency and Bankruptcy Code, 2016, before the Hon'ble Principal Bench of NCLT, being petition no. (IB)-933(PB)/2018, titled as Sarika Malhotra & Ors. Vs Orris Infrastructure Pvt. Ltd. demanding payment of their investment returns till date. During the pendency of the said proceedings, the respondent took various defences including but not limited to the fact that no returns were due or payable to the complainants and

other buyers since the project was completed in August, 2017, and that certain demands were due and payable by the complainants herein and other buyers to the respondent. It is pertinent to mention here that in its said reply, the respondent disclosed that it had applied for an ' occupation certificate" for the said project with competent authority in 2014 after which it was revealed that the construction of the entire project was raised without any sanctioned plans due to which the certificate was not granted and the respondent applied for compounding of the same and only after depositing the composition fees of almost Rupees 22 crores that it applied for the occupation certificate again in January, 2017 after which it was granted in ..ugust, 2017.

ix. That during the pendency of the above proceedings the respondent, realizing that it was unlikely to succeed in its defence before the Hon'ble NCLT which would result in initiation of Insolvency proceedings against it, decided to settle the matter with the applicants in the said petition, including the complainants herein. The respondent realizing that it is liable to pay the investment returns/monthly returns to the complainants till the leasing of their unit, paid the monthly returns due and payable by it to the complainants w.e.f. December, 2016 till August, 2019 of Rs. 18,17,904/- and withdrew their illegal demand for utility charges levied on the unit of the complainants thereby raising a final demand of Rs. 3,63,181/- qua the unit of the complainants despite the requests of the complainants to adjust all amounts due before paying the arrears of monthly returns. The respondent further

handed over the signed copies of the space buyers agreement to the complainants as well. It is pertinent to mention here that the space buyers agreement was wrongly dated by the respondent to 24.03.2017, for reasons undisclosed, even though the stamp on the same is of August, 2015. It is further a matter of record that the act of the respondent in paying the monthly returns for almost 3 years together to the complainants in one go resulted in an unnecessary and heavy tax burden upon the complainants. The application before the Hon'ble NCLT was subsequently disposed off vide order dated 05.12.2019. The respondent had hand delivered the said letters to the complainants at their residence and asked the complainants to sign duplicate copies of the various letters and documents copies of which have till date not been handed over by the respondent to the complainants and the complainants are apprehensive that the said documents may be misused by the respondents in future.

x. That after going through the agreement and MOU, the complainants were of the strong opinion that they were not liable to pay the revised demand of Rs. 3,63,181/- raised by the respondent vide its letter dated 18.09.2019, and also sent a letter dated 11.10.2019 to that effect to the respondent but eventually decided to pay the same as they did not want to get into another dispute with the respondent and wanted to start receiving the payment of their monthly returns from the respondent and therefore, sent a cheque bearing no. 113839, drawn on ICICI Bank, Greater Kailash – 1 Branch, to the respondent for the payment of the final demand of

Rs. 3,63,181/-. The complainants requested the respondent to execute a conveyance deed for their unit vide their letter sent around 31.10.2019, copy of which they are presently unable to trace. However, the respondent, for reasons undisclosed, neither presented the said cneque for payment nor executed the conveyance deed for the unit of the complainants. Furthermore, no monthly returns were paid to the complainants from September, 2019, despite of their repeated requests. The complainants also sent a letter dated 09.11.2020 to the respondent asking them to adjust any dues from the amount of assured returns payable to them and execute the conveyance deed but the respondent did not reply to the said communication. Since the complainant no. 1 is a widow and the complainant no. 2 is a super senior citizen and a cancer patient and have suffered a lot due to the non-payment of the investment returns by the respondent and are left with no option but to approach this Hon'ble Court.

xi. That the respondent has already taken over 10 years to complete the project and is deliberately harassing the complainants by refusing to pay the monthly returns due by it to the complainants since September, 2019, which it is liable to pay till the leasing of the unit of the complainants and has also not executed the conveyance deed for the unit. The complainants are paying huge amounts as property tax for their unit for which they don't have a clear and marketable title till date. The complainants have already undergone a round of litigation before the Hon'ble NCLT and are

again being made to run from pillar to post by the respondent for no fault of theirs.

xii. That the complainants have always been and are still ready to pay any amounts due and payable by them to the respondent towards EDC, IDC etc. and for the execution of conveyance deed, if any, after the adjustment of the monthly returns due and payable by the respondent to them by the respondent due to its ulterior motives and malafide intentions only wishes to harass the complainants.

C. Relief sought by the complainants: -

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

i. Direct the respondent to pay the amount of monthly returns/investment returns due and payable by it to the complainants from September, 2019 till the date of order to be calculated at Rs. 55,088/- each month.

ii. Direct the respondent to continue paying the investment returns / monthly returns to the complainants as per the terms of the MOU i.e. till the leasing of the unit of the complainants.

iii. Direct the respondent to pay interest at the prescribed rate on the unpaid monthly returns/investment returns to be calculated from the date the monthly returns were due till the date of payment.

iv. Direct the respondent to execute a conveyance deed for the unit of the complainants and to handover the actual physical possession of the unit booked by the complainants to them, complete and ready in all respects.

v. Any other relief which this hon'ble authority deems fit and proper may also be granted in favour the complainant.

7. On the date of hearing, the authority explained to the respondent/ promoters about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

8. The respondent has made the following submissions:

i. That in the present complaint, the complainant was allotted unit no. 213, 2nd floor, tower D admeasuring 750 Sq. Ft. in the project 'Floreal Towers', located at Sector-83, Gurugram, Haryana. The space buyer agreement between the parties took place on 24.03.2017 wherein as per clause 11a of the buyer agreement, the respondent was supposed to hand over the possession within a period of 36 months from the date of execution of buyers agreement.

ii. That thereafter, several obstructions had taken place which hampered the pace of the construction wherein in the year, 2012 on the directions of the Hon'ble Supreme Court of India, the mining activities of minor minerals (which includes sand) were regulated. The Hon'ble Supreme Court directed framing of Modern Mineral Concession Rules. Reference in this regard may be had to the judgment of ***"Deepak Kumar v. State of Haryana, (2012) 4 SCC 629"***. The competent authorities took substantial time in framing the rules and in the process the availability of building materials

including sand which was an important raw material for development of the said project became scarce in the NCR as well as areas around it. Further, the respondent was faced with certain other force majeure events including but not limited to non-availability of raw material due to various stay orders of **Hon'ble Punjab & Haryana High Court and National Green Tribunal** thereby stopping/regulating the mining activities, brick kilns, regulation of the construction and development activities by the judicial authorities in NCR on account of the environmental conditions, restrictions on usage of water, etc. It is pertinent to state that the **National Green Tribunal** in several cases related to **Punjab and Haryana** had stayed mining operations including in **O.A No. 171/2013**, wherein vide order dated 02.11.2015 mining activities by the newly allotted mining contracts by the state of Haryana was stayed on the Yamuna Riverbed. These orders inter-alia continued till the year 2018. Similar orders staying the mining operations were also passed by the Hon'ble High Court and the National Green Tribunal in Punjab and Uttar Pradesh as well. The stopping of mining activity not only made procurement of material difficult but also raised the prices of sand/gravel exponentially. It was almost 2 years that the scarcity as detailed above continued, despite which all efforts were made and materials were procured at 3-4 times the rate and the construction continued without shifting any extra burden to the customer. That the above said restrictions clearly fall within the parameter "reasons beyond the

control of the respondent as described under of clause 11.1 of the buyer agreement.

iii. That during that time, a writ petition was filed in the **Hon'ble High Court of Punjab and Haryana** titled as ***"Sunil Singh vs. Ministry of Environment & Forests Parayavaran"*** which was numbered as **CWP-20032-2008** wherein the Hon'ble High Court pursuant to order dated 31.07.2012 imposed a blanket ban on the use of ground water in the region of Gurgaon and adjoining areas for the purposes of construction. That on passing of the abovementioned orders by the High Court, the entire construction work in the Gurgaon region came to stand still as the water is one of the essential parts for construction. That in light of the order passed by the Hon'ble High Court, the respondent had to arrange and procure water from alternate sources which were far from the construction site. The arrangement of water from distant places required additional time and money which resulted in the alleged delay and further as per necessary requirement STP was required to be setup for the treatment of the procured water before the usage for construction which further resulted in the alleged delay.

iv. That orders passed by Hon'ble High Court of Punjab and Haryana wherein the Hon'ble Court has restricted use of groundwater in construction activity and directed use of only treated water from available sewerage treatment plants. However, there was lack of number of sewage treatment plants which led to scarcity of water and further delayed the project. That in addition to this, labour rejected to work using the STP water over their health issues

because of the pungent and foul smell coming from the STP water as the water from the S.T.P' s of the State/Corporations had not undergone proper tertiary treatment as per prescribed norms.

v. That on **19.02.2013,** the office of the executive engineer, HUDA Division No. II, Gurgoan vide memo no. 3008-3181, had issued instruction to all developers to lift tertiary treated effluent for construction purpose for Sewerage Treatment plant Behrampur. Due to this instruction, the respondent company faced the problem of water supply for a period of several months as adequate treated water was not available at Behrampur.

vi. That despite all these litigations and obstructions, the unit in question was made ready and available for the complainant and the complainant was offered possession vide letter dated 10.04.2018 and the same is within the knowledge of the complainants. The respondent had issued the said letter because occupation certificate was already applied for by the respondent and the same was also received by the respondent on 16.08.2017.

vii. That immediately after the receipt of the OC, the complainant was apprised about the fact that the OC has been duly received by the respondent vide letter dated 17.08.2017 and the complainant was thereby offered possession vide letter dated 10.04.2018 and requested the complainant to comply with all the possession formalities and execution of the conveyance deed and thereafter, another letter dated 28.06.2018 was sent to the complainants informing them about the pending dues and outstanding amount of the assured returns and it was understood that since the

outstanding amount to be paid on behalf of the complainants is more than the amount of the assured returns, the same shall be adjusted and the complainants were requested to make the balance payment so that the complainant take the possession of the unit in question.

viii. That the complainants had initiated insolvency proceedings before the Hon'ble National Company Law Tribunal, Delhi, titled as "Sarika Malhotra & Ors. vs Orris Infrastructure Pvt Ltd", having case no. (IB)-933(PB)2018, wherein the complainants were the petitioner no. 1 & 2 and the same was withdrawn due to the settlement arrived between the parties and thus, the complainants as of now are not eligible for any further assured return or delay possession charges as the possession has been offered to the complainants long before and the same is being ignored by the complainants.

ix. That the parties are bound by the terms and conditions of the agreement. The buyers agreement was entered into between the parties and, as such, the parties are bound by the terms and conditions mentioned in the said agreement. The said agreement was duly signed by the complainant after properly understanding each and every clause contained in the agreement. The complainant was neither forced nor influenced by respondent to sign the said agreement. It was the complainant who after understanding the clauses signed the said agreement in their complete senses.

x. That the respondent company cannot be made liable for the delay. As per clause 10.1 of the space buyer's agreement which clearly states that respondent shall be entitled to extension of time for

delivery of possession of the said premises if such performance is prevented or delayed due to conditions as mentioned therein. The answering respondent has acted in accordance with the terms and conditions of the buyers agreement executed between the parties on their own free will. That the complainant was duly informed about the schedule of possession as per clauses 11A of the buyers agreement entered into between the complainant and respondent.

xi. That there was a change in the zoning plan due to which the area/ size of the units was also increased but not more than 10 % and the land owner company, i.e., Seratum Land and Housing Pvt Ltd ("Seratum") had sent a letter regarding the approval from Director General Town and Country Planning Haryana vide letter dated 14.03.2014 wherein it was also requested grant of occupation certificate and to deposit compounding charges as per prevailing policies. On 22.05.2015 a letter from DTCP, Haryana was received by the Seratum wherein the amount of the compounding fees was informed and vide letter dated 06.09.2014, Seratum informed DTCP regarding payment of the requisite fees along with the details. Again the respondent as well as Seratum vide letters dated 17.11.2014 and 21.04.2016 respectively requested for grant of occupation certificate but the same was issued by the statutory authority on 16.08.2017.

xii. That the statement of objects and reasons of the said Act clearly state that the RERA is enacted for effective consumer protection. RERA is not enacted to protect the interest of investors. As the said Act has not defined the term consumer, therefore the definition of

"consumer" as provided under the Consumer Protection Act, 1986 has to be referred for adjudication of the present complaint. The complainant is an investor and not a consumer.

xiii. That the Hon'ble Authority has no jurisdiction to entertain the present complaint as the unit allotted to the complainant was under the assured return scheme and therefore, the matter falls under the Banning of Unregulated Deposit Schemes Act, 2019. The respondent has made the payment of the amount of the assured return to the complainants up to August 2019 as per the definition of deposit under the Companies Act, 2013 read with the Companies (Acceptance of Deposits) Rules, 2014. There is no provision in the Real Estate (Regulation and Development) Act, 2016 which empowers the Hon'ble Authority to grant assured return or interest on assured return. The present complaint is liable to dismissed and the complainant is not entitled to any reliefs as claimed herein before this Hon'ble Authority.

xiv. That it is submitted that even otherwise the complainant cannot invoke the jurisdiction of the Hon'ble Authority in respect of the unit allotted to the complainant, especially when there is an arbitration clause 46 provided in the space buyer agreement, whereby all or any disputes arising out of or touching upon or in relation to the terms of the said agreement or its termination and respective rights and obligations, is to be settled amicable failing which the same is to be settled through arbitration. Once the parties have agreed to have adjudication carried out by an

Alternative Dispute Redressal Forum, invoking the jurisdiction of this Hon'ble Authority, is misconceived, erroneous and misplaced.

9. Written arguments have been filed by both the parties. Copies of all relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided based on these undisputed documents and submissions made by parties.

E. Jurisdiction of the authority

10. 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

11. 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 completed territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

12. 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 promoter, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

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

F. Findings on the relief sought by the complainants

F. I **Direct the respondent to pay the amount of monthly returns/investment returns due and payable by it to the complainants from September, 2019 till the date of order to be calculated at Rs. 55,088/- each month.**

F.II **Direct the respondent to continue paying the investment returns / monthly returns to the complainants as per the terms of the MOU i.e. till the leasing of the unit of the complainants.**

F.III **Direct the respondent to pay interest at the prescribed rate on the unpaid monthly returns/investment returns to be calculated from the date the monthly returns were due till the date of payment.**

14. The counsel for the complainant is seeking the payment of assured return which have been paid upto August 2019 while as per MoU clause 2, the respondent is required to pay assured return till leasing of the unit. Since the unit is not yet put on lease and hence, the respondent is required to

make the payment of assured return till date. Therefore, the complainant requests that amount of assured return which has become due till date be adjusted in the outstanding amount and thereafter no outstanding amount shall remain balance which is required to be paid by the complainant and hence the respondent be directed for adjustment of assured return amount and execution of the conveyance deed.

15. However, the counsel for the respondent draws attention of the authority towards clause 7 and 11 of the BBA which provides that upon execution of BBA, the respondent is discharged of its responsibility of payment of assured return and the BBA was executed on 24.03.2017. The complainant had approached NCLT in 2019 and in view of same the payment of assured return was made till August 2019 (Annexure R2 of reply). Although the OC of the unit has been obtained on 16.08.2017 but no offer of possession has been made till date.

16. The authority is of the view that the complainant is seeking assured returns on monthly basis as per clause 2. of MOU at the rate of Rs.65/- per sq. ft. per month i.e., Rs.48,750/- with effect from 01.08.2009, till the date, the premises are leased out by the developer to the Lessee. It is pleaded by the complainant that the respondent has not complied with the terms and conditions of the MOU/agreement. Though for some time, the amount of assured returns was paid but later on, the respondent refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act,

2019 (herein after referred to as the BUDS Act, 2019). But that Act does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act. However, the complainant admitted that the respondent has paid the amount of assured return upto the August 2019 but did not pay assured return amount thereafter. Clause 2. of the memorandum of understanding stipulates that: -

> *2. After receipt of full consideration of Rs. 15,00,000/- (Rupees Fifteen Lac only) the* ***Developer shall give an investment return @ 65/- per sq. ft. per month i.e. Rs.48,750/- (Rupees Fourty Eight Thousand Seven hundred fifty only) with effect from 01-08- 2009, till the date, the premises are leased out by the developer to the Lessee.*** *Towards this PDC,s for Rs. 48750/-(Rupees Forty Eight Thousand Seven hundred fifty only) (Less of TDS) shall be issued in favor of the Purchaser of entire period of construction which is estimated at 36 months from 01/08/2009. However, it is clearly understood between the Parties that the Buyer is entitled of 13% increase in the committed return of Rs. 65/- (Rupees Sixty Five Only) per sq. ft. per month only after the expiry of 36 months from 01/08/2009 or till date when Occupancy Certificate of the said premises is obtained by the Developer from the appropriate authorities, for which post dated Cheques will be issued."*

17. An MOU can be considered as an agreement for sale interpretating the definition of the agreement for "agreement for sale" under section 2(c) of the Act and broadly by taking into consideration the objects of the Act. Therefore, the promoter and allottee would be bound by the obligations contained in the memorandum of understanding and the promoter shall be responsible for all obligations, responsibilities, and functions to the allottee as per the agreement for sale executed inter se them under section 11(4)(a) of the Act. An agreement defines the rights and liabilities of both

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

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

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

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

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

those who had trusted to its existence. A reference in this regard can be made to the case of ***Sarwan Kumar & Anr Vs. Madan Lal Aggarwal*** Appeal (civil) 1058 of 2003 decided on 06.02.2003 and wherein the Hon'ble Apex Court observed as mentioned above. So, now a plea raised with regard to maintainability of the complaint in the face of earlier orders of the authority in not tenable. The authority can take different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. It is now well settled preposition of law that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum, memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement for sale defines the builder-buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allotee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arise out of the agreement for sale only and between the same contracting parties to agreement for sale. In the case in hand, the issue of assured returns is on the basis of contractual obligations arising between the parties. Then in case of ***Pioneer Urban***

Land and Infrastructure Limited & Anr. v/s Union of India & Ors. (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019, it was observed by the Hon'ble Apex Court of the land that "*...allottees who had entered into "assured return/committed returns' agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of agreement till the date of handing over of possession to the allottees*". It was further held that 'amounts raised by developers under assured return schemes had the "commercial effect of a borrowing' which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code" including its treatment in books of accounts of the promoter and for the purposes of income tax. Then, in the latest pronouncement on this aspect in case ***Jaypee Kensington Boulevard Apartments Welfare Association and Ors. vs. NBCC (India) Ltd. and Ors.*** (24.03.2021-SC): MANU/ SC/0206 /2021, the same view was followed as taken earlier in the case of ***Pioneer Urban Land Infrastructure Ld & Anr.*** with regard to the allottees of assured returns to be financial creditors within the meaning of section 5(7) of the Code. Then after coming into force the Act of 2016 w.e.f 01.05.2017, the

builder is obligated to register the project with the authority being an ongoing project as per proviso to section 3(1) of the Act of 2017 read with rule 2(1)(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.

19. 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 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 taken 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.

20. 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 a 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;

21. 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.

22. 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.

23. 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.

24. Moreover, the developer is also bound by promissory estoppel. As per this doctrine, the view is that if any person has made a promise and the promisee has acted on such promise and altered his position, then the person/promisor is bound to comply with his or her promise. When the builders failed to honour their commitments, a number of cases were filed by the creditors at different forums such as Nikhil Mehta, Pioneer Urban Land and Infrastructure which ultimately led the central government to enact the Banning of Unregulated Deposit Scheme Act, 2019 on 31.07.2019 in pursuant to the Banning of Unregulated Deposit Scheme Ordinance, 2018. However, the moot question to be decided is as to whether the

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

25. 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 sectic 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.

26. 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.

27. 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.

28. In the present complaint, the unit has still not been put on lease and the occupation certificate was obtained on 16.08.2017. Therefore, considering the facts of the present case, the respondent is directed to pay the amount of assured return at the agreed rate i.e., @ Rs. 73.45 from the date the payment of assured return has not been paid i.e., **September 2019 till the date, the premises are leased out by the developer to the Lessee.**

29. 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 @ 8.70% p.a. (inadvertently mentioned as 'prescribed rate of interest' in the proceeding of the day dated 28.03.2023) till the date of actual realization.

F.IV Direct the respondent to execute a conveyance deed for the unit of the complainants and to handover the actual physical possession of the unit booked by the complainants to them, complete and ready in all respects

30. With respect to the conveyance deed, clause 15 of the buyer's agreement provides that the respondent shall prepare and execute along with the allottee a conveyance deed to convey the title of said unit in favour of the allottee but only after receiving full payment of the total price of the unit, parking space, if any. Clause 15 is reproduced hereinbelow for ready reference:

> *"The Company, its Association Companies, its Subsidiary Companies as stated earlier shall prepare and execute along with the Allottee(s) a conveyance deed to convey the title of the said Unit in favour of the Allottee(s) but only after receiving full payment of the total price of the Unit and the parking space, if any, allotted to him/her and payment of all securities including maintenance security deposits and charges for bulk supply of electrical energy, interest, penal interest etc. on delayed instalments, stamp duty, registration charges, incidental expenses for registration, legal expenses for registration and all other dues as set forth in in this Space Buyer's Agreement or as demanded by the Company from time to time prior to the execution of the Conveyance Deed..."*

31. Section 17 (1) of the Act deals with duties of promoter to get the conveyance deed executed and the same is reproduced below:

> ***"17. Transfer of title.-***
>
> *(1). 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."

32. In view of the above, the respondent is directed to handover the possession of the unit to the complainants and to execute the conveyance deed in favour of the complainants within a period of 30 days from the date of this order.

G. Directions of the authority

33. Hence, the authority hereby passes this order and issues the following directions under section 37 of the act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

i. The respondent is directed to pay the amount of assured return at the agreed rate i.e., @ Rs. 73.45 from the date the payment of assured return has not been paid i.e., **September 2019 till the date, the premises are leased out by the developer to the lessee.**

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 @ 8.70% p.a. till the date of actual realization.

iii. The respondent is directed to handover the possession of the unit to the complainants and to execute the conveyance deed in favour of the complainants within a period of 30 days from the date of this order.

34. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.

35. The complaints stand disposed of. True certified copies of this order be placed on the case file of each matter.

46. Files be consigned to registry.

(Sanjeev Kumar Arora)
Member

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Date: 28.03.2023