BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**2388 of 2021**
Order reserved on:	**07.12.2022**
Date of pronouncement of order:	**21.02.2023**

1. Mrs. Rupali Dheer 2. Mr. Vikram Dheer **Address:-** A-201, Krishna Apra Residency, Sector -61,Noida-U.P.	**Complainants**
Versus	
Ninaniya Estates Ltd. **Address:-** 160, Karni Vihar, Ajmer Road, Near Rawat Mahila College, Jaipur RJ -302021. **And also, at:-** Pegasus One, 3rd Floor, Behind Hotel IBS, Golf Course Road, Gurugram, Haryana.	**Respondent**

CORAM:	
Shri Ashok Sangwan	**Member**
Shri Sanjeev Kumar Arora	**Member**

APPEARANCE:
Shri Gaurav Rawat — Advocate for the complainants
None — Advocate for the respondent

ORDER

1. The present complaint dated 25.06.2021 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and

Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Project and unit related details

2. That the particulars of the project, the details of the sale consideration, the amount paid by the complainants/allottees, the date of proposed handing over the possession, delay period, if any are being given in the tabular form.

S. No.	Particulars	Details
1.	Name and location of the project	"Prism Portico", Sector 89, Gurugram
2.	Project area	5.05 acres
3.	DTCP License no.	179 of 2008 dated 11.10.2008 and valid upto 10.10.2018
4.	Name of licensee	Ninaniya Estate Ltd.
5.	RERA Registered/ not registered	Unregistered
6.	Executive Suites Unit no.	118, 1st floor (As per BBA on page 19 of complaint)
7.	Unit area admeasuring (Super area)	385 sq. ft. (As per BBA on page 19 of complaint)
8.	Allotment Letter	N/A
9.	Date of suites buyer's	23.08.2013

	agreement	(As per BBA on page 17 of complaint)
10.	MOU executed on	14.08.2013 (Page 13 of complaint)
11.	Possession Clause	5.1 *That the Company shall complete the construction of the said Unit within **36 months from the date of execution of this agreement and/or from the start of construction whichever is later** and Offer of possession will be sent to the Allottee subject to the condition that all the amounts due and payable by the Allottee by the stipulated date as stated in Annexure II attached with this agreement including sale price, maintenance charges, security deposit, stamp duty and other charges etc. have been paid to the Company. The Company on completion of the construction shall apply for completion certificate and upon grant of same shall issue final letters to the Allottee(s) who shall within 30 (thirty) days, thereof remit all dues.*
12.	Due date of possession	**23.08.2016** (As per the possession clause the due date is calculated from the date of execution of this agreement and/or from the start of construction whichever is later. Due date of possession is calculated from the date BBA, because the date of start of construction is not on record)

13.	Total sale consideration	Rs. 24,54,650/- (BSP) (As per BBA on page 20 of complaint)
14.	Amount paid by the complainants	Rs. 23,34,862/- (As mentioned by complainant on page 10 of CRA)
15.	Occupation certificate	Not offered
16.	Offer of possession	Not offered
18.	Assured return clause	Clause 6 of MoU: The developer shall give the assured investment return @ Rs. 18,114/- (after deducting TDS) on or before first day of every subsequent month after the expiry of the month for which it shall fall due w.e.f 07.08.2013, till the date of possession of the fully furnished said unit is handed over to the buyer.
19.	Amount received by complainants(assured return)	Rs. 15,95,024/- (As pleaded by respondent in his reply on page 5)

B. Facts of the complaint

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

i. That it is relevant to submit here that complainants was searching/seeking for viable project in the year 2013 for the security of their future necessity to emerge. During the course of their search complainants came to know through advertisements of the proposed project of the opposite party.

ii. That it is further essential to submit here that thereafter both the complainants had made discussion about the project of the opposite party of which advertisement made and thereafter Mrs. Rupali Dheer called on the contact number provided in the advertisement, which found to be of the customer care department of the opposite party.

iii. That it is needful to mention here that customer care department of the opposite party transferred the call of the Mrs. Rupali Dheer to the marketing department personnel of the opposite party, which in turn represented that the opposite party is a dynamically leading real estate development company in Gurgaon, DELHI/NCR region and Rajasthan working in the process of building an array of IT Parks, Hotels, Commercial Complexes, Residential / Service Suites, Education Institutions and other infrastructure projects.

iv. That it was further represented that the opposite party is a name that has become synonymous with the highest quality, excellence and innovation in the field of real estate development. It was further informed that opposite party is proud of a spectacular track record in chosen sphere of business. The builder/OP has successfully executed and commissioned a number of real estate projects as well as Education institutions.

V. That it is further pertinent to submit here that OP has further represented that OP has launched a project in the name of the "Prism Portico Executive Suites" situated at Pataudi Road, Sector

-89, Gurugram Haryana. It was further essentially represented that the aforesaid project is coming up with symbiotic proposal which a consumer must avail. That it is further necessary to submit here that according to the representations of the OP/Builder an amount equivalent to around 50% of the cost/consideration of the unit was to be deposited prior at the time of the booking of the unit which in turn made complainant entitled for an amount of Rs. 20,127/- per month with effect from the date of the execution of the memorandum of understanding or such other date which both parties may agree/ fix together. As such the complainant is entitled to Rs. 20,127/- per month on the sole condition of the default of the builder/OP to handover the fully furnished unit within a period of 36 months from the date of the execution of agreement specifically being 23.08.2013.

vi. That believing the representation of the OP/BUILDER, complainants decided to book a unit in the aforesaid project of the OP. Thereupon the complainants had made the advance payment of Rs. 11,12,670/- at the time of the booking of a unit in the project of the OP, which has subsequently been recognised in the memorandum of understanding executed. That thereafter a unit bearing number 118 on first floor, admeasuring around 550 sq. ft. super area was allotted to the complainants. The basic sale price of the flat was fixed to be Rs. 24,54,650/- and towards the assured return as agreed of the above-mentioned amount of Rs.

20,127/- eight cheques were handed over in advance, which also find stipulation in the MOU as well.

vii. That according to terms and conditions of the MOU executed between both the parties, the possession of the unit was to be handed over within a period of 36 months from the date of the execution of the MOU, however the OP categorically failed to handover the possession within the stipulated period ended on August 2016. That the complainants on various occasions tried to contact to the OP for pursuing the status of the project, however OP neither providing the cogent information nor provided the possession till date and as per the specific terms and conditions of the MOU, as such the complainant is entitle to the delay interest as well as agreed assured returns as per the MOU executed.

viii. That it is pertinent to mention herein that executive of respondent company has sent an email dated 14-09-2020 and admitted the delay of construction and also undertakes to make the payment of unpaid assured return from Aug 2020 but respondent have not made any payment till date.

ix. That it is pertinent to mention here that the complainants had made the entire payment of the sale consideration of the unit more specifically submitting that an amount of Rs. 23,34,862/- has been duly paid by the complainants and the same has been undisputedly acknowledged by the OP/builder.Therefore, the complainant most respectfully prays to allow the present

complaint for providing possession along with delay penalty interest from the committed date of possession till actual handover of the unit along with direction for compliance of payment of unpaid assured return as per MOU.

C. Relief sought by the complainants:

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

   i. Direct the respondent to pay delay penalty interest/ compensation at the rate of 18% per annum on our amount paid from the committed date of possession till date of actual physical possession along with Interest for every month of delay at prevailing rate of interest

   ii. Direct the opposite party to not levy extra/arbitrary demands/charges in final offer of possession.

   iii. Direct the opposite party to make the payment of unpaid assured return as per the terms and conditions of the MOU.

5. On the date of hearing, the authority explained to the respondent/ promoter 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

6. The respondent has contested the complaint on the following grounds.

   i. That the complainants came to the officials of the respondent for booking a unit in one the most coveted projects of the respondent company. That the complainants submitted the

application form and paid the booking amount accordingly. That at the time of signing the application form, the respondents' officials clarified and explained in detail all the terms and conditions of the application form. The complainants are shooting arrow in the dark with the hope and aspiration of making easy money while misusing the jurisdiction of this authority however the respondent is hopeful and confident that once the present reply will be considered by this authority, the present complaint will be dismissed by this authority with costs to set out an example that frivolous complaints will not be encouraged by this authority.

ii. That it is further submitted that on one hand the complainants are relying on particular clauses of the agreement and on the other hand the complainants are submitting that the terms of agreement are illegal and amount to unfair trade practices. It is pertinent to mention herein that the complainants cannot be allowed to refer to the agreement as per their own convenience nor should be complainants be allowed to rely upon certain terms and clauses of the agreement and deny the other terms and clauses of the agreement which they themselves, with free will, have signed. The indecisive and preferential reading of the agreement and the complainants actual intention of procuring the suit property as an investment is writ large from the bare perusal of the complaint. The present complaint is just a tactic to earn easy money.

iii. That the complainants have come before the real estate regulatory authority with un-clean hands. That the complaint has been filed by the complainants just to harass the respondent and to gain the unjust enrichment. It is pertinent to mention here that for the fair adjudication of grievance as alleged by the complainants requires detailed deliberation by leading the evidence and cross-examination, thus only the Civil Court has jurisdiction to deal with the cases required detailed evidence for proper and fair adjudication. Moreover, the complainants have already received a sum of Rs 15,95,024/- towards the payment of assured return in respect of the unit in question. Thus, the complainants are not entitled for the relief which t seeking by the way of the present complaint as they are already seeking the claim of assured return in respect of the unit in question and the present petition is not maintainable under the provisions of the Real Estate (Regulation and Development) Act, 2016 (*hereinafter referred as RERA.*).

iv. That it is pertinent to mention that the present complaint is not maintainable before the real estate regulatory authority as it is crystal clear from reading the complaint that the complainants are not the 'allottees', but are 'investors', who are only seeking assured return from the respondent, by way of present petition, which is not maintainable under the provisions of the real estate (regulation and development) Act, 2016 (*hereinafter referred as RERA).* Complainant themselves have admitted the fact that he

has invested in the project of the Respondent. That in the matter of ***Brhimjeet & Ors vs. M/s Landmark Apartments Pvt.Ltd.*** **(Complaint No. 141 of 2018),** this authority has taken the same view as observed by Maharashtra RERA in Mahesh Pariani (supra) stating that, *"where the relief sought is for assured returns and since RERA Act deals with the builder buyer relationship to the extent of timely delivery of possession to the buyer or deals with withdrawal from the project, as per section 18(1) of the Act and directed the Complainant to pursue the matter with regard to getting assured return as per the MoU by filing a case before appropriate forum/ Adjudicating Officer".* That further in the matter of ***Bharam Singh & Ors vs. Venetian LDF ProjectsLLP*** **(Complaint No. 175 of 2018),** the real estate regulatory authority, Gurugram upheld its earlier decision of not entertaining any matter related to assured returns. That the authority in the said order stated ***"that as already decided in*** *complaint no. 141 of 2018 no case is made out by the Complainant". "That since the authority has taken a view of much earlier as stated above, the authority cannot go beyond the view taken already. In such types of assured return schemes, the authority has no jurisdiction, as such the Complainant is at liberty to approach the appropriate forum to seek remedy".*

v. That presently, the real estate regulatory authority is not the right forum for the relief sought by the complainant. As there is no question of possession to be delivered in view of the catena of judgements passed by the real estate regulatory authority, Gurugram as the complainants are already claiming the assured

return in respect of the units in question. That the complainants are attempting to seek an advantage of the slowdown in the real estate sector and trying to seek undue advantage by concealing the true facts. It is apparent from the facts of the present case that the main purpose of the present complaint is to harass the Respondent by engaging and igniting frivolous issues with ulterior motives to pressurize the respondent.

vi. That the present complaint is an arm-twisting method employed by the complainants to fulfil the illegitimate, illegal and baseless claims so as to get benefit from the respondent. Thus, the present complaint is without any basis and no cause of action has arisen till date in favour of the complainants and against the respondent and hence the complaint deserves to be dismissed. That the bare reading of the buyer's agreement executed between the complainants and the respondent, it is clearly visible that the intention of the complainants 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 complainants are investors 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.

vii. That the complainants be treated as 'co-promoters' and not as 'allottees', as the complainants have invested in the project just to earn profits from the commercial unit. That the sole motive of

the complainants is to get profits from the project by the way of assured returns scheme. Thus, the complainants shall be treated as co-promoters in the project, in no eventuality, the complainants may be called as the "allottees" before this authority under the definition and provisions of Rera Act, 2016 and, thus, on this ground alone, the present complaint is not maintainable in the eyes of law before the real estate regulatory authority and is liable to be rejected.

viii. That since the hurdles faced by the respondent company were beyond the control of the respondent, no fault can be found qua the respondent. It is further submitted that, it was never the intention of the respondent company to not complete the project on time, rather the alteration in the timeline was beyond the control as indicated in previous paragraph. That it is extremely important to bring to the notice of this authority that the development of project in question was delayed due to external, unseen and unavoidable reasons and there was no fault on part of the respondent company.

ix. That there was an instant decline in the real estate market within the one year of the launch of the project in question. It is important to mention here that while executing the construction of such a large-scale project a continuous and persistent flow of fund is the essence of smooth operations. However, this situation prevailed and continued for a longer period. Moreover, in the year 2018, Non-Banking Financial Company Crisis also led

to drying up the source of funding for the sector. Its further lead to alteration in the timeline of the completion of the project. That the present complaint has been filed by the complainant only to make some quick money while misusing the jurisdiction of this authority. That it is pertinent to mention that from the bare perusal of the complaint it can be seen that there is no faults on the part of the respondent company. That the alterations in the timeline for the completion of the project cannot be attributed to the respondent company and is result of external factors which were beyond the of control of the respondent, which is completely absurd since, the timeline as postulated within the agreement are intended and tentative and based on the timely payments made by the investors, force majeure etc.

x. 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. It is most respectfully submitted that the complainant had wilfully agreed to the terms and conditions of the buyer's agreement and now at a belated stage is attempting to wriggle out of the obligation imposed by the said mutually agreed agreement terms by the filing the instant complaint before this authority.

xi. It is pertinent to mention that in the matter titled, ***CREDAI-NCR vs. Department of Town and Country Planning, Government***

of Haryana & Anr. before the Competition Commission of India – Case No. 40 of 2017 it has been opined and well conveyed by the Hon'ble Commission that there is a dependency of a project vis-à-vis the concerned department's responsibilities and failure of government departments in providing the necessary development work subsequently, impact the project timelines. Thus, the altered timelines were never intended, and the respondent lacked any control in the subsequent deference of the project. The respondent had never intended to cause any extension of the timely completion of project however, in the light of inaction by the concerned department, the respondent faced an impossible task of fulfilling its obligations under the agreement within strict timelines. That the present authority is not the right forum for the relief sought by the complainant. That the main purpose of the present complaint is to harass the respondent by engaging and igniting frivolous issues with ulterior motives to pressurize the respondent company. Thus, the present complaint is without any legal and factual basis and no cause of action has arisen till date in favour of the complainant and against the respondent and hence the present complaint deserves to be dismissed.

xii. That, it is evident that the entire case of the complainants is nothing but a web of lies and the false and frivolous allegations made against the respondent are nothing but an afterthought hence the present complaint filed by the complainants deserves

to be dismissed with heavy costs. It is pertinent to mention here that complainant's act is also violative of the provisions of *Banning of Unregulated Deposit Ordinance,2019 as she 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.*

7. The respondent has raised preliminary objection regarding jurisdiction of authority to entertain the present complaint. 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

8. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana 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

9. 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;

The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

Section 34-Functions of the Authority:

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

10. So, in view of the provisions of the Act of 2016 quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondent:

F.I Objection regarding entitlement of DPC on ground of complainants being investor

11. The respondent submitted that the complainants are investor and not consumers/allottees, thus, the complainants are not entitled to the protection of the Act and thus, the present complaint is not maintainable.

12. The authority observes 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 and 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 under section 31 of the Act, any aggrieved person can file a complaint against the promoter if the promoter 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 buyer's agreement, it is revealed that the complainants are an allottees/buyers and they have paid total price of Rs. 23,34,862/- to the promoter towards purchase of the said unit 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;"*

13. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement executed between respondent and complainants, it is crystal clear that the complainants are allottee as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt.***

Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr. has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the complainant-allottee being investors is not entitled to protection of this Act stands rejected.

G. Findings on the relief sought by the complainants:

G. I Assured Return

14. While filing the petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 23.08.2013, the complainants have also sought assured returns on monthly basis as per clause 6 of the MOU at the rate of Rs 18,114/- (after deducting TDS) on or before first day of every subsequent month after the expiry of the month for which it shall fall due w.e.f 07.08.2013, till the date of possession of the fully furnished said unit is handed over to the buyer. 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 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 Act of 2019). But that Act does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act. However, the plea of respondent is otherwise and who took a stand that though it paid the amount of assured returns upto the year January, 2019 but did not pay the same

amount after coming into force of the Act of 2019 as it was declared illegal.

15. 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 the real estate regulatory 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, two 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.

16. While taking up the cases **of Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd. (complaint no 141 of 2018), and Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP" (complaint no 175 of 2018) decided on 07.08.2018 and 27.11.2018** respectively, it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the issue of assured returns was involved to be paid by the builder to an

allottee but at that time, neither the full facts were brought before the authority nor it was argued on behalf of the allottees that on the basis of contractual obligations, the builder is obligated to pay that amount. However, there is no bar to take a different view from the earlier one if new facts and law have been brought before an adjudicating authority or the court. There is a doctrine of "prospective overruling" and which provides that the law declared by the court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. A reference in this regard can be made to the case of **Sarwan Kumar & Anr Vs. Madan Lal Aggarwal Appeal (civil) 1058 of 2003 decided on 06.02.2003** and wherein the hon'ble apex court observed as mentioned above. So, now the plea raised with regard to maintainability of the complaint in the face of earlier orders of the authority in not tenable. The authority can take a different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. It is now well settled preposition of law that when payment of assured 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 arises out of the agreement for sale only and between the same contracting parties to agreement for sale. In the case in hand, the issue of assured returns is on the basis of contractual obligations arising between the parties. Then in case of **Pioneer Urban Land and Infrastructure Limited & Anr. v/s Union of India & Ors. (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019**, it was observed by the Hon'ble Apex Court of the land that "...allottees who had entered into "assured return/committed returns' agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of agreement till the date of handing over of possession to the allottees". It was further held that 'amounts raised by developers under assured return schemes had the "commercial effect of a borrowing' which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code" including its treatment in books of accounts of the promoter

and for the purposes of income tax. Then, in the latest pronouncement on this aspect in case **Jaypee Kensington Boulevard Apartments Welfare Association and Ors. vs. NBCC (India) Ltd. and Ors. (24.03.2021-SC): MANU/ SC/0206 /2021,** the same view was followed as taken earlier in the case of Pioneer Urban Land Infrastructure Ld & Anr. with regard to the allottees of assured returns to be financial creditors within the meaning of section 5(7) of the Code. 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(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 respondents/builders 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.

17. It is pleaded on behalf of respondents/builders that after the Banning of Unregulated Deposit Schemes Act of 2019 came into force, there is bar for payment of assured returns to an allottee. But

again, the plea taken in this regard is devoid of merit. Section 2(4) of the above mentioned Act defines the word ' deposit' as *an amount of money received by way of an advance or loan or in any other form, by any deposit taker with a promise to return whether after a specified period* or otherwise, either in cash or in kind or in the form of a specified service, *with or without any benefit in the form of interest, bonus, profit or in any other form, but does not include*

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*

18. 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;

19. 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.

20. 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.

21. 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.

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

23. 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.

24. 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.

25. It is not disputed that the respondent is a real estate developer, and it had not obtained registration under the Act of 2016 for the project in question. However, the project in which the advance has been received by the developer from the allottees is an ongoing project as per section 3(1) of the Act of 2016 and, the same would fall within the jurisdiction of the authority for giving the desired relief to the complainants besides initiating penal proceedings. So, the amount paid by the complainants 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.

F.II Delay possession charges

26. In the present complaint, the complainants intend to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

> *"**Section 18: - Return of amount and compensation***
>
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
>
> .....
>
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

27. Clause 5.1 of the buyer's agreement provides for time period for handing over of possession and is reproduced below:

> 5.1 *That the Company shall complete the construction of the said Unit within **36 months from the date of execution of this agreement and/or from the start of construction whichever is later** and Offer of possession will be sent to the Allottee subject to the condition that all the amounts due and payable by the Allottee by the stipulated date as stated in Annexure II attached with this agreement including sale price, maintenance charges, security deposit, stamp duty and other charges etc. have been paid to the Company. The Company on completion of the construction shall apply for completion certificate and upon grant of same shall issue final letters to the Allottee(s) who shall within 30 (thirty) days, thereof remit all dues.*

28. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the prescribed rate. Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be

paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

29. The legislature in its wisdom in the subordinate legislation under rule 15 of the rules has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

30. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 21.02.2023 is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.

31. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*

Explanation. —For the purpose of this clause—

(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;

(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

32. On consideration of documents available on record and submissions made by the complainants and the respondent, the authority is satisfied that the respondent is in contravention of the provisions of the Act. The agreement executed between the parties on 23.08.2013, the possession of the subject unit was to be delivered within stipulated time i.e., 23.08.2016 (calculated from the date of execution of BBA). However now, the proposition before it is as to whether the allottees who are getting/entitled for assured return even after expiry of due date of possession, can claim both the assured return as well as delayed possession charges?

33. To answer the above proposition, it is worthwhile to consider that the assured return is payable to the allottees on account of a provision in the BBA or in a MoU having reference of the BBA or an addendum to the BBA or in a MoU or allotment letter. The assured return in this case is payable from the date of 07.08.2013, till the date of possession of the fully furnished said unit is handed over to the buyer. If we compare this assured return with delayed possession charges payable under proviso to section 18(1) of the Act, 2016, the DPC is much better i.e., assured return in this case is

payable a Rs. 18,114/- per month whereas the delayed possession charges are payable approximately Rs. 20,819.18/- per month. Accordingly, the promoter is directed to pay DPC at the prescribed rate of intertest i.e. 10.70% from the due date of possession i.e. 23.08.2016 till the actual date of handing over of possession as per provisions of section 18(1) of the Act read with rule 15 of the rules.

G. Directions of the authority

34. Hence, the authority hereby passes this order and issue 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 interest at the prescribed rate i.e. 10.70% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 23.08.2016 till the date of actual date of handing over of possession. The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.

ii. The respondent shall not levy/recover any charge from the complainants which is not the part of the buyer's agreement. The respondent is also not entitled to claim holding charges from the complainants/allottees at any point of time even after being part of the buyer's agreement as per law settled by hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

35. The complaints stand disposed of.

36. File be consigned to registry.

Sanjeev Kumar Arora
(Member)

Ashok Sangwan
(Member)

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 21.02.2023