BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**3765 of 2021**
Date of complaint	**:**	**05.10.2021**
Date of order	**:**	**09.08.2023**

Taufiq Ur Rehman,
R/o: - Jansons India, Wajid House,
Prince Road, Moradabad, U.P-244001. **Complainant**

Versus

1. M/s Parsvnath Developers Pvt. Ltd.
Regd. Office At: Parsvnath Tower,
Near Shahdara Metro Station, Shahdara,
East Delhi, Delhi-110032. **Respondent no.1**
2. Titan Infracon LLP
Regd. Office At: N-8, Unit no.2,
Basement, Near Panchsheel Park,
South Delhi, New Delhi-110017. **Respondent no.2**

CORAM:
Ashok Sangwan **Member**

APPEARANCE:

Aquib Ali and Kritika (Advocates)	Complainant
Deeptanshu Jain (Advocate)	Respondent no.1
Ishaan Dang (Advocate)	Respondent no.2

ORDER

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

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

A. Unit and project related details

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

Sr. No.	Particulars	Details
1.	Name of the project	"IT Park Colony" in Sector 48, Gurgaon
2.	Nature of the project	Commercial/IT space
3.	DTPC license no.	47 of 2008 dated 11.03.2008
	Validity status	10.03.2020
	Name of licensee	Dharmander-Karambir & 3 Ors.
	Licensed area	6.45 Acres
4.	RERA registered/not registered	Not registered
5.	Unit no.	No space no. was allotted.
6.	Unit area	Super area of 2500 sq.ft. each for space (a) & (b) and 800 sq.ft. for space (c) (page 22, 33A and 42 of complaint)
7.	Dates of booking	05.12.2005 for space (a) & (b) 05.04.2014 for space (c) (page 18 of complaint)
8.	Dates of execution of MoU	05.12.2005 for space (a) & (b) 05.04.2014 for space (c) (page 21, 33A and 41 of complaint)
9.	Due date of possession	05.12.2008 for space (a) & (b) 05.04.2017 for space (c) [Calculated as per ***Fortune Infrastructure and Ors. vs. Trevor***

		D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018]
10.	Total sale consideration	Rs.33,75,000/- each for space (a) & (b) Rs.16,00,000/- for space (c) ***i.e., Rs.83,50,000/- for all three spaces*** (page 22, 42 and 33A of complaint)
11.	Total amount paid by the complainant	Rs.82,43,395.20/- (as per payment receipts from page 47 to 57 of complaint)
12.	Approval of revised building plans	25.06.2021 (Page 108 of reply)
13.	Provisional Occupation certificate	11.08.2021 (Annexure R2, page 22 of reply)
14.	Offer of possession	Not offered

B. Facts of the complaint

3. The complainant has made the following submissions: -

I. That the respondent no.1 vide MoUs allotted 3 spaces to the complainant in its upcoming project named "IT Park Colony" at Sector 48, Gurgaon on two different occasions, the details of which are as follows:

a) Vide MoU dated 05.12.2005 admeasuring 2500sq. ft. for a total sale consideration of Rs.37,50,000/- (hereinafter referred to as "Space (a)").

b) Vide MoU dated 05.12.2005 admeasuring 2500sq. ft. for a total sale consideration of Rs.37,50,000/- (hereinafter referred to as "Space (b)").

c) Vide MoU dated 05.04.2014 admeasuring 800 sq. ft. for a total sale consideration of Rs.16,00,000/- (hereinafter referred to as "Space (c)").

II. That as per the aforesaid MoUs dated 05.12.2005 and 05.04.2014 the total price for the said 3 spaces were Rs.91,00,000/- and the complainant has paid a sum of Rs.81,90,000/- in all. However, the entire amount was to be paid on or before handing over the possession of the space(s) *vide* clause 2 & 4 of the MoU(s).

III. That the said MoUs are silent regarding the date of possession. However, it is settled principle of law that the reasonable time for the builder to handover the possession is 3 years from the date of allotment of the space. Therefore, the offer of possession of the spaces ought to be given by the respondent no.1 w.r.t the space (a) and (b) on or before December 2008 and April 2017 for the space (c).

IV. That as per clause 2 of the said MoUs dated 05.12.2005 the respondent no.1 agreed to give an investment return @Rs.26.09/- per sq.ft. per month i.e., Rs.65,225/- for the space (a) and (b) and @Rs.43/- per sq.ft. per month for the space (c) i.e., Rs.34,400/- to the complainant. However, it failed to pay return on investment for all the three spaces w.e.f. September 2017 and the said default is continuing till date. Also, an amount of Rs.13,58,483/- being an outstanding amount towards the payment of return on investment got adjusted by it while allotting the space (c). Clause 2 of the said MoUs is reproduced below for reference.

For Space (a) and (b)

"That out of the said total consideration amount the Second Party shall pay to the First Party a sum calculated @, Rs.1350/- per square foot of the entire super area to be allotted, on or before the signing of this Memorandum of Understanding. That First Party shall after receipt of the part consideration @, Rs.1350/- per square foot of the entire super area i.e., Rs.33,75,000 give an investment return @ Rs.26.09 per square foot per month i.e., Rs.65,225 by way of interest (subject to tax deduction at source) w.e.f. 1/1/2008 on quarterly intervals at the end of every quarter for which it is due.
That the first party shall give an investment return @ Rs.27.50 per square foot of area of the proposed premises subject to the timely payment of

balance consideration amount @, Rs.150/- per square foot of the unit area i.e., Rs.3,75,000/- by Second party till the date of offer of possession of the unit in complex".

For Spaces (c)

"That out of the said total consideration amount the Second Party shall pay to First Party a sum calculated @Rs.1800/- per square foot of the entire super area to be allotted, on or before the signing this Memorandum of Understanding. That First Party shall after the receipt of part consideration @, Rs.1800/- per square foot of the entire super area i.e., Rs.14,40,000/- given an investment return @, Rs.43/- per sq. foot per month i.e., Rs.34,400/- by way of interest (subject to deduction of tax at source) w.e.f. 01/01/2014 on quarterly intervals at the end of every quarter for which it is due."

V. That even after paying the consideration amount in a timely manner without any default, the respondent no.1 not only failed to get the sale deeds executed in his but also failed to pay the return on investment as per the said Memorandum of Understanding(s). The respondent no.1 has also failed to get the completion certificate for the said project till date, for reasons unknown. Thus, the complainant has not been able to use the said spaces even after paying 90% consideration amount on time and is bearing huge loss every day.

VI. That in the present case the complainant had entered into a Memorandum of Understanding with the respondent no.1 only. However, in February 2021, upon physical inspection of the site he came to know that the advertisement board of some other builder was placed/displayed which gave him the impression that the project has been taken been taken over by the respondent no.2. Upon enquiry, he came to across one public notice dated 01.02.2021 issued in the newspaper named "The Statesman" newspaper wherein, it was informed that some joint development agreement has been entered into between the respondent no.1 and respondent no.2 whereby, the beneficiary interest and marketing right of the project was agreed to be

transferred in favour of the respondent no.2 and the office of Director, Town and Country Planning Haryana, Chandigarh has required/invited objections against the said change. Thereafter, the complainant also received a letter dated 03.02.2021 from the respondent no.1 intimating the above said change.

VII. That the complainant immediately upon the receipt of the said information, filed his objection through email and speed post on 12.02.2021. However, he has not received any reply from the concerned department till date. Further, the respondent no.1 also chose to remain silent on the said changes in-spite of inquiries made by him from time to time. Hence, the complainant has made the respondent no.2 as a party in this complaint as in case of taking development and marketing right of the said project, it is not only liable to hand over the possession of the said spaces but also liable to pay interest.

C. Relief sought by the complainant:

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

I. Direct the respondents to pay the return on investment as agreed as per the MoU w.e.f. September 2017 till the handing over of possession of the units.

II. Direct the respondents to handover the possession and execute sale deeds in favour of the complainant of the said three spaces/units.

III. Direct the respondents to pay an amount of Rs.5,00,000/- towards cost of litigation.

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

6. No reply has been received from respondent no.1 with regard to the present complaint despite multiple opportunities already granted. Therefore, the respondent no.1 is being proceeded ex-parte and the complaint will be decided as per the documents available on record as well as submissions made by the parties.

7. The respondent no.2 contested the complaint by filing reply dated 09.12.2021 on the following grounds: -

(i) That the complainant had been allotted three spaces in the project named "IT Park Colony" being developed by the respondent no.1 at Sector 48, Gurugram vide three memorandums of understanding (MOUs) executed between the complainant and respondent no.1. The details of the said MOUs are as follows: -

(a) Memorandum of understanding dated 05.12.2005 vide which space admeasuring 2500 sq.ft. (super area) had been allotted to the complainant.

(b) Memorandum of understanding dated 05.12.2005 vide which space admeasuring 2500 sq.ft. (super area) had been allotted to the complainant.

(c) Memorandum of understanding dated 05.04.2014 vide which space admeasuring 800 sq.ft. had been allotted to the complainant.

(ii) That the respondent no.2 has been wrongly impleaded as party in this complaint as there is no privity of contract between the complainant and respondent no.2. Moreover, the three memorandums of

understanding had been executed between the complainant and respondent no.1 way back in the years 2005 and 2014 much before the respondent no.2 had been involved with the project in question. Also, the complainant had made all payments of the consideration amount to respondent no.1 and all approvals for the said project were received by it. In fact, respondent no.2 has come into the picture only in the year 2021 when a public notice dated 01.02.2021 had been taken out by the respondent no.1 pertaining to grant of in principle approval for change in beneficiary interest/joint development and marketing rights from respondent no.1 to respondent no.2 by the office of Director, Town & Country Planning, Haryana, Chandigarh. Moreover, objections had also been invited from the allottees in the said project with respect to the aforesaid change. Hence, the institution of this complaint against respondent no.2 is completely misconceived and is factually and legally unsustainable both in law and on facts.

(iii) That subsequently, development agreement bearing vasika no. 6913 dated 15.02.2021 had been executed between landowners, respondent no.1 and respondent no.2 vide which respondent no.2 had agreed to take over development rights, obligations and responsibilities of development of the said project. However, it had nowhere been incorporated in the aforesaid agreement that respondent no.2 would be liable to indemnify respondent no.1 for the contractual and financial defaults committed by respondent no.1 with the previous allottees.

(iv) That vide order dated 19.05.2021 the DTCP, Haryana approved the request for change in beneficial interest/joint development and marketing rights under policy dated 18.02.2015 for the project land in question from respondent no.1 to respondent no.2. Thereafter,

approval of revised building plans had also been granted to respondent no.2 for the said project by Chief Town Planner, Haryana cum Chairman, Building Plan Approval Committee, Town & Country Planning Department, Haryana vide letter dated 25.06.2021.

(v) That the relief sought by the complainant in this complaint can legally be ordered only against respondent no.1 without casting any liability on respondent no.2.

(vi) All other averments made in the complaint are denied in toto.

8. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of those undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

The respondent raised a preliminary submission/objection that the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

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

E.II Subject matter jurisdiction

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

> ***Section 11*****.....***(4) The promoter shall-*
> *(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
> ***Section 34-Functions of the Authority:***
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

11. 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.

12. **Due date of handing over possession:** As per the documents available on record, no BBA has been executed between the parties and the due date of possession cannot be ascertained. A considerate view has already been taken by the Hon'ble Supreme Court in the cases where due date of possession cannot be ascertained then a reasonable time period of 3 years has to be taken into consideration. It was held in matter ***Fortune Infrastructure v. Trevor d' lima (2018) 5 SCC 442 : (2018) 3 SCC (civ) 1*** and then was reiterated in ***Pioneer Urban land & Infrastructure Ltd. V. Govindan Raghavan (2019) SC 725*** -:

> *"Moreover, a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although*

we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract i.e., the possession was required to be given by last quarter of 2014. Further there is no dispute as to the fact that until now there is no redevelopment of the property. Hence, in view of the above discussion, which draw us to an irresistible conclusion that there is deficiency of service on the part of the appellants and accordingly the issue is answered."

13. Accordingly, the due date of possession is calculated as 3 years from the date of signing of MoUs. Therefore, the due date of handing over of the possession for the space (a) & (b) and for space (c) comes out to be 05.12.2008 and 05.04.2017 respectively.

F. Findings on the objections raised by the respondent no.2.

F. I. Objection regarding maintainability of complaint against respondent no.2.

14. The respondent no.2 vide its reply dated 09.12.2021 contented that it is not concerned with the relief in the present complaint as it is not a party in the said MoUs. However, as per record available the Director, Town and Country Planning, Haryana vide its order dated 19.05.2021 allowed the request for change in beneficial interest/joint development and marketing rights under policy dated 18.02.2015 by granting licence in its favour and made it liable for compliance of all terms and conditions of the Act 1975 & Rules 1976 till granting of the completion certificate. Therefore, respondent no.2 cannot escape from its responsibilities and obligations to the allottees being licensee of the project and is covered under the definition of promoter within the meaning of 2(zk)(i),(v).

15. Promoter has been defined in section 2(zk) of the Act. The relevant portion of this section reads as under: -

*"**2. Definitions**. — In this Act, unless the context otherwise requires —*

(zk) "promoter" means, —

(i) a person who constructs or causes to be constructed an independent building or a building consisting of apartments, or converts an existing building or a part thereof into apartments, for the purpose of selling all or some of the apartments to other persons and includes his assignees; or

(ii) xxx

(iii) xxx

(iv) xxx

(v) any other person who acts himself as a builder, coloniser, contractor, developer, estate developer or by any other name or claims to be acting as the holder of a power of attorney from the owner of the land on which the building or apartment is constructed or plot is developed for sale;"

16. Further, vide clause 1.3, clause 4 and clause 23.1 of the development agreement dated 15.02.2021, the respondent no.2 agreed to take over the development and competition of the project as well as handing over of possession after obtaining completion certificate from the concerned authorities. Also, vide clause 2 of the general power of attorney dated 15.02.2021, it was agreed that the respondent no.2 will execute and sign sale deeds, indentures, deed of transfer etc. of its area in favour of the prospective allottee(s)/buyers.

17. Also, several parameters are prescribed in policy dated 18.02.2015 for making change in beneficial interest, change in developer, assignment of joint development right/marketing rights etc. Relevant portion of it is reproduced as under.

4.1. EXAMINATION OF SUCH REQUEST UNDER THE POLICY:

"All such requests received by the DGTCP under this policy shall be examined on merits and depending upon the nature of request, the DGTCP may direct the applicant/the new entity to furnish/comply with some or all of the following requirements, as applicable, in a period not exceeding ninety days:

i) Fresh Agreement LC-IV, Bilateral Agreement to be executed on behalf of the new entity and bank guarantees to be furnished by the bank on behalf of the new entity against internal development works and external development charges.

ii) An undertaking to abide by the provisions of Act/Rules and all the directions that may be given by the DGTCP in connection with the above said licenses.

iii) A demand draft for the balance 60% of the applicable administrative charges calculated at the rates prescribed under para 3.0 above.

iv) Registered Collaboration agreement between the proposed Developer and land-owning individuals/entities.

v) Clear the outstanding EDC/IDC dues, as specifically directed by the DGTCP.

vi) In projects where third-party rights stand created, objections regarding change in Developer shall be invited from the allottees through public notice as well as notice under registered cover, as per the detailed procedures and proforma prescribed by the DGTCP.

vii) An undertaking to settle all the pending/outstanding issues, if any, in respect of all the existing as well as prospective allottees.

viii) An undertaking to be liable to pay all outstanding dues on account of EDC and interest thereon, if any, in future, as directed by the DGTCP.

ix) An undertaking that all the liabilities of the existing Developer shall be owned by new entity.

x) Original licences and schedule of land.

xi) An undertaking that notwithstanding the assignment of joint development rights and/or marketing rights to a third-party agency, for either entire or part of the colony, the Developer shall continue to be solely responsible for compliance of provisions of the Act/Rules as well as terms and conditions of the licence (applicable in case of assignment of joint development rights and/or marketing rights)."

18. Therefore, as per the aforesaid facts and provisions of law, respondent no. 1 & 2 will be jointly and severally liable for the competition of project as well as other liabilities towards the complainant. Hence, the contention/objection of respondent no.2 stands rejected.

G. Findings on the relief sought by the complainant.

G.I Direct the respondent to pay the return on investment as agreed as per the MoU w.e.f. September 2017 till the handing over of possession of the units.

19. The respondents vide clause 2 of the two MoUs dated 05.12.2005 agreed to give an investment return @Rs.26.09/- per sq.ft. per month i.e., Rs.65,225/- for the space (a) and (b) and vide clause 2 of the MoU dated 05.04.2014 it agreed to give an investment return @Rs.43/- per sq.ft. per month for the space (c) i.e., Rs.34,400/- to the complainant on the amount received till offer of possession of the spaces. However, it failed to pay return on investment for all the three spaces w.e.f. September 2017 and the said default is continuing till date. The total sale consideration of the allotted spaces (a), (b) & (c) was Rs.83,50,000/- and he has paid a sum of Rs.82,43,395.20/- i.e., more than 95% of the total sale price.

20. 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 understandings 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.

21. 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. 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 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. In cases of ***Anil Mahindroo & Anr. v/s Earth Iconic Infrastructure Pvt. Ltd.*** (Company Appeal (AT) (Insolvency) No. 74 of 2017) and ***Nikhil Mehta and Sons (HUF) and Ors. vs. AMR Infrastructure Ltd.*** (CA NO. 811 (PB)/2018 in (IB)-02(PB)/2017) decided on 02.08.2017 and 29.09.2018 respectively, it was held that the allottees are investors and have chosen committed return plans. The builder in turn agreed to pay monthly committed return to the investors. Thus, the amount due to the allottee comes within the meaning of 'debt' defined in Section 3(11) of the I&B Code. 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.

22. 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.

23. The authority under this Act has been regulating the advances received under the project and its various other aspects. So, the amount paid by the complainant to the builder is a regulated deposit accepted by the latter from the former against the immovable property to be transferred to the allottee later on. If the project in which the advance has been received by the developer from an allottee is an ongoing project as per section 3(1) of the Act of 2016 then, the same would fall within the jurisdiction of the authority for giving the desired relief to the complainant besides initiating penal proceedings.

24. Therefore, the authority directs the respondents/promoter to pay assured return from the date the payment of assured return was stopped till offer of possession of the allotted unit/spaces.

G.II Direct the respondents to handover the possession and execute sale deeds in favour of the complainant of the said units.

25. There is nothing on the record to show that the respondents have applied for CC/part CC or what is the status of the development of the above-mentioned project. Hence, the respondents are directed to deliver the possession on payment of outstanding dues if any and to execute the sale deed in favour of the complainant on payment of stamp duty and registration charges within 60 days after obtaining Occupation Certificate from the competent authority.

G.III Direct the respondent to pay an amount of Rs.5,00,000/- towards cost of litigation.

26. The complainant is seeking above mentioned relief w.r.t. cost of litigation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as ***M/s Newtech Promoters and Developers Pvt. Ltd. V/s***

State of Up & Ors. (supra), has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of litigation expenses.

H. Directions of the authority

27. 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 respondents/builder are directed to pay arrears of assured return to the complainant/allottee from September 2017 at the agreed rate till offer of possession as per memorandum of understandings executed between the parties.

ii. The respondents are 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, failing which that amount would be payable with interest @8.70% p.a. till the date of actual realization.

iii. The respondents are directed to handover possession of the unit/spaces in question and execute sale deed in favour of the

complainant on payment of stamp duty and registration charges within 60 days after obtaining Occupation Certificate from the competent authority.

iv. The planning branch of the authority is directed to take necessary action under the provision of the Act of 2016 for violation of proviso to Section 3(1) of the Act.

28. Complaint stands disposed of.

29. File be consigned to registry.

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 09.08.2023