BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.:	**502 of 2022**
Date of filling of complaint:	**15.02.2022**
Oder reserved on:	**02.05.2023**
Date of pronouncement:	**08.08.2023**

Mrs. Sudesh yadav
R/o House No. 41, Village Ramgarh, Kheri (4-N), Kanwali, Rewari, Haryana-123411 **Complainant**

Versus

M/s Neo Developers Pvt Ltd
Registered Address at: 32B Pusa Road, New Delhi-110005
Communication Address at- 1205 B, Signature Towers, South City-1 NH-8, Gurugram-122002 **Respondent**

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

APPEARANCE:
Sh. Abhimanyu Rao (Proxy) (Advocate) Complainant
Sh. Pankaj Chandola (Advocate) Respondent

ORDER

1. This 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 there under or to the allottees as per the agreement for sale executed *inter se*.

A. Unit and project details

2. The particulars of unit, sale consideration, the amount paid by the complainants, 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	"Neo Square", Sector 109, Gurugram
2.	Nature of the project	Commercial
3.	Project area	2.71 acres
4.	DTCP license no. and validity status	102 of 2008 dated 15.05.2008 valid upto 14.05.2024
5.	RERA Registered/ not registered	109 of 2017 dated 24.08.2017 valid upto 23.08.2021 plus 6 months of extension due to COVID-19 = 23.02.2022
6.	Application for allotment	N/A
7.	Date of execution of Apartment Buyer's Agreement	03.10.2020 (Page 25 of reply)
8.	Unit no. and area	138, 3rd floor admeasuring 500 sq. ft. (super

		area) (As per BBA at page 28 of reply)
9.	Memorandum of understanding for assured return	03.10.2020 (Page 57 of complaint)
10.	Possession clause	Clause 3 of MoU: The company shall complete the construction of the said building/complex, within the said space is located within **36 months from date of execution of this agreement or from the start of construction, whichever is later** and apply for grant of completion/occupancy certificate.
11.	Due date of possession	03.10.2023 (Due date of possession is calculated from the date of execution of agreement in absence the date of stat of construction)
12.	Assured return	Clause 4 of MoU The Company shall **pay a penalty of Rs. 61,875/- per month on the said unit, on total amount received with effect from 01.10.2021 (effective date-II) subject to TDS, taxes, cess or any other levy which is due and payable by the Allottee(s) and which shall be adjusted in Total Sale Consideration;** the balance total sale consideration shall be payable by the Allottee(s) to the company in accordance with the payment schedule annexed as annexure-I. The penalty shall be paid to the allottee(s) from end of effective date II until

		the offer of possession letter date, on prorate basis.
13.	Total sale consideration	Rs. 25,24,500/- (As per payment plan on page 44 of the complaint)
14.	Amount paid by the complainant	Rs. 30,92,852/- (As per SOA on page 59 of reply)
15.	Occupation certificate /Completion certificate	**Not obtained**
16.	Offer of possession	**Not offered**

B. Fact of the complaint

3. The complainant has made the following submissions: -

i. That On 18.09.2020 the Complainant through a duly filled application along with a booking amount of Rs. 50,000/- applied for a Food Court Unit in the upcoming project of Respondent namely "NEO SQUARE" at Sector 109, Gurugram, Haryana. That on the same day i.e 18.09.2020, the Respondent issued a *welcome letter* to the complainant, the size of the unit along with the floor of the Food court was mentioned in the welcome letter but surprisingly the exact unit number was not mentioned.

ii. That the Respondent compelled the complainant to pay up a hefty amount immediately, and that too without issuing any demand letter in writing. On the repeated insistence of the Respondent , the complainant had no option but to comply in giving Rs.

30,42,852/- within a short time span of 12 days.

iii. That on 03.10.2020, A pre-printed one-sided arbitrary Builder Buyer agreement (hereinafter called the BBA) was signed in which it was stated that the complainant has been allotted an area for food court without specifying the unit's name and number. The said unit has a super area of approx. 500 Sq. Feet and covered area of 250 Sq. Feet, in the commercial complex named NEO Square.

iv. That till date Respondent has not issued any exact Unit Number, instead of this one Priority Number bearing 138 have been provided. That as per clause 5.2 of BBA, the possession of the said unit was agreed to be given, within 36 months from the date of execution of the Agreement or from the start of construction, whichever is later. That the BBA clearly mentioned the Size of the Unit as admeasuring 500 Square feet Super area and the basic sales price of the unit was arrived at Rs.25,24,500/- and as per Annexure 1 of the BBA, the total price of the unit inclusive of EDC, IDC and GST, IFMS and Other charges was arrived as Rs. 32,05,380.

v. That the Complainant has already paid an amount of Rs.30,42,852/- . This payment was paid as per the Down Payment Plan, as agreed between the parties. That on 03.10.2020, i.e., on the same date on which BBA was executed the Respondent also made a Memorandum of Understanding (hereinafter called the MOU) with the complainant. As per the terms and conditions agreed between both the parties that the contents of MOU shall prevail

over the contents of buyer's agreement in case of conflict between the two, otherwise the contents of the buyer's agreement and MOU will be interpreted harmoniously. That the Respondent under clause no. 4 of the said MOU, acknowledged that it has received a sum of Rs. 30,92,852/-.

vi. That clause 4 of the MOU states that the Respondent will pay a penalty/assured return of Rs. 61,875/- per month on the said unit, with effect from 01.10.2021 until the offer of possession. That it is pertinent to note that as per Payment plan annexed in Annexure 1 of the BBA and also Annexure 1 of the MOU, the Final Payment on possession is due amounting to Rs. 1,12,500/- Only so this makes the Respondent liable to Pay the Penalty / Assured return amount to the Complainant on the monthly basis till the legal possession offer on the obtaining of the Occupation Certificate.

vii. That as per the Clause 8(a) of the MOU, the assured return will continue till the commencement of the first lease of the said unit. That clause 8(a) is reproduced hereunder,

> *"That the responsibility of assured returns to be paid by the Company shall cease on commencement of the first lease the said unit whereupon the Allottee(s) shall be entitled to receive the lease rentals at assured lease of Rs. 101.25/- Per Sq. Ft. per month".*

viii. That it is pertinent to note from the relevant clause mentioned above that the main source of earning for the complainant is in the form of Assured return and lease rentals, and even after taking a huge sum from the Complainant, the respondent is not

providing the due Assured return to the complainant

ix. That for the first-time cause of action for the present complaint arose on 03.10.2020 when BBA and MOU was signed. The cause of action again arose on various occasions, till date, when the verbal protests were lodged with the Respondent when he stopped paying the Penalty amount of Rs. 61,875/- as stated in MOU. The cause of action is alive and continuing and will continue to subsist till such time as this Authority restrains the Respondent by an order of injunction and/or passes the necessary orders.

C. Relief sought by the complainant

4. The complainant has sought the following relief sought: -

i. Direct the respondent to pay Penalty/ Assured payment as stated in Memorandum of Understanding.

D. Reply by the respondent

5. The respondent contested the complaint on the following grounds :

(i) That the Complainants were in search of making an investment in the real estate sector and came to know about the project of the Respondent. That the Complainants after making deliberate inquiries about the Project and the Respondent and after being completely satisfied with their inquiries, decided to book a commercial space in the project of the Respondent. Accordingly, a Builder Buyer Agreement (hereinafter referred to as "**BBA**") dated 03.10.2020 was executed between the Complainant and the Respondent.

(ii) That the Complainants had purchased the commercial space, not for their personal use but to invest the money and to earn a return on the same by leasing the said space through the Respondent. Accordingly, a Memorandum of Understanding (hereinafter referred to as "MOU") dated 03.10.2020 was executed between the Complainant and the Respondent. That in recital 4 of the MOU it is clearly agreed by the Complainants that they are not the end users and are investors

(iii) That the Complainants agreed to opt for the "Down Payment Plan". That the MOU dated 03.10.2020 governed the terms of paying the penalty and leasing thereof. Since, the Complainants had purchased the commercial space for earning a return through leasing the space, therefore, it is clear that the Complainants are investors. Thus, no cause of action arises for filing of the present Complaint nor any visible understanding to book the Respondent for any legal charges.

(iv) It is important to mention here that the Complainants had entered into two different and separate agreements with the Respondent, namely BBA and MOU. Both these agreements are two distinct and different agreements. That Buyer's Agreement is the Builder Buyer Agreement which casts various obligations on the Promoter to complete and deliver a Real Estate Project. Whereas the MOU only pertains to assured return and leasing. That there may be cross-reference between two agreements or certain clauses may be superseding each other. However, such cross-reference or supersession does not amount to the novation

and thus both these agreements cannot be read to be one single agreement. Each agreement has its own distinct liability, obligations and terms and conditions imposed on the parties and are confined to that specific agreement only.

(v) It is noted herein that the Real Estate (Regulation & Development) Act, 2016 (hereinafter referred to as "RERA Act, 2016") is only applicable in relation to a Promoter with respect to his project and his obligation toward the allottees. A person can file a Complaint with RERA regarding their grievances under Section 31 of the RERA Act, on violation or contravention of the provisions of the RERA Act. It is noteworthy that amongst various other sections, Section 11 of the RERA Act lays down the obligations of the Promoter which has no reference regarding the assured return.

(vi) It is submitted that Section 2(d) which defines "allottee" as well as Section 2 (zk) which defines "Promoter" does not include any transaction regarding "assured return". Therefore, the Assured Return scheme is beyond the jurisdiction of the Ld. Authority.

(vii) It is also noteworthy that the grievances of the Complainants are arising from the MOU which is not within the jurisdiction of the Hon'ble Authority and thus cannot be adjudicated thereon. Therefore, there arise no grounds that can be adjudicated by this forum. Therefore, the Complaint deserves to be dismissed at the very outset for want of jurisdiction.

(viii) That in the matter of ***"Daldeej Kaur Gill vs M/s Sushma Buildtech Limited"*** bearing ***"Complaint Number 1417 of 2019"***

the Hon'ble Real Estate Regulatory Authority, Punjab *vide* Judgment dated 30.06.2020 held that the payment of assured return does not fall within the ambit of the RERA Act, 2016. Thus, any relief pertaining to assured return claimed thereof, is not covered under the provisions of the RERA Act, 2016. **The Hon'ble Real Estate Regulatory Authority, Punjab, further held that allowing the payment of both interest on delay in handing over possession and payment of assured return would amount to unjust enrichment of the complainant.** The relevant part of the judgment is reiterated below for ready reference::

"6 .....In this account, the complainant has sought continuation of the payment of the "assured returns" promised by the respondent at the time of initial allotment. However, this is a matter not covered under the provisions of the Act. Under Section thereof, any delay in possession is to be compensated by the payment of interest and the claimed relief of "assured return" cannot be allowed under this Act. Further, allowing the payment of both interest and "assured return" would amount to unjust enrichment of the complainant. ....."

(ix) That in terms of its findings, the Hon'ble Real Estate Regulatory Authority, Punjab, passed the following directions:

"7 iii. The amount paid by the respondent to the complainant by way of 'assured return' would be allowed to set off against the payment of interest as above."

(x) It is paramount to mention that the Hon'ble National Consumer Dispute Resolution Commission has held in plethora of judgement

pertaining to assured return matters, that when the nature of the transaction is that of commercial in nature then the same cannot fall within the meaning of a consumer and thus no relief can be sought under the Consumer Protection Act. They have to avail remedies before an appropriate forum. This has been also held in the matter of **MRS. PRITI ARORA VS. M/S ARN INFRASTRUCTRE INDIA PVT. LTD (CC. 246 OF 2013)** order dated 06.04.2017 and in the matter of RISHI MALHOTRA VS, BLUE COAST INFRASTRUCTURE DEVELOPMENT PVT. LTD & ORS (CC. 369 OF 2015) order dated 08th February 2017.

(xi) It is noteworthy in the present situation, that in order to provide a comprehensive mechanism to ban the unregulated deposit schemes, other than the deposits taken in the ordinary course of business, Parliament has passed an act titled as "The Banning of Unregulated Deposit Schemes Act, 2019" (hereinafter referred to as "BUDS Act"). As per Sub-Section 4 of Section 2 of the BUDS Act provides that deposit means:

> *"An amount of money received by way of an advance or loan or in any other form, by any deposit taker with a promise to return whether after a specified period or otherwise, either in cash or in kind or in the form of a specified service, with or without any benefit in the form of interest, bonus, profit or in any other form but does not include—*
> *(a) amounts received as loan from a scheduled bank or a co-operative bank or any other banking company as defined in section 5 of the Banking Regulation Act, 1949;*
> *(b) amounts received as loan or financial assistance from the Public Financial Institutions notified by the Central Government in consultation with the Reserve Bank of India or any non-banking financial company as defined in clause (f) of section 45-I*

of the Reserve Bank of India Act, 1934 and is registered with the Reserve Bank of India or any Regional Financial Institutions or insurance companies;

(c) amounts received from the appropriate Government, or any amount received from any other source whose repayment is guaranteed by the appropriate Government, or any amount received from a statutory authority constituted under an Act of Parliament or a State Legislature; (d) amounts received from foreign Governments, foreign or international banks, multilateral financial institutions, foreign Government owned development financial institutions, foreign export credit collaborators, foreign bodies corporate, foreign citizens, foreign authorities or person resident outside India subject to the provisions of the Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder; (e) amounts received by way of contributions towards the capital by partners of any partnership firm or a limited liability partnership;

(f) amounts received by an individual by way of loan from his relatives or amounts received by any firm by way of loan from the relatives of any of its partners;

(g) amounts received as credit by a buyer from a seller on the sale of any property (whether movable or immovable);

(h) amounts received by an asset re-construction company which is registered with the Reserve Bank of India under section 3 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(i) any deposit made under section 34 or an amount accepted by a political party under section 29B of the Representation of the People Act, 1951;

(j) any periodic payment made by the members of the self-help groups operating within such ceilings as may be prescribed by the State Government or Union territory Government;

(k) any other amount collected for such purpose and within such ceilings as may be prescribed by the State Government;

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

(i) payment, advance or part payment for the supply or hire of goods or provision of services and is repayable in

the event the goods or services are not in fact sold, hired or otherwise provided;

(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;

(iii) security or dealership deposited for the performance of the contract for supply of goods or provision of services; or

(iv) an advance under the long-term projects for supply of capital goods except those specified in item (ii): Provided that if the amounts received under items (i) to (iv) become refundable, such amounts shall be deemed to be deposits on the expiry of fifteen days from the date on which they become due for refund:

Provided further that where the said amounts become refundable, due to the deposit taker not obtaining necessary permission or approval under the law for the time being in force, wherever required, to deal in the goods or properties or services for which money is taken, such amounts shall be deemed to be deposits.."

(xii) It is also provided that in respect of a Respondent, "*deposit*" shall have the same meaning as assigned to it under the Companies Act, 2013. Sub Section 31 of Section 2 of the Companies Act provides that "deposit" includes any receipt of money by way of deposit or loan or in any other form by a Respondent but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India. The Companies (Acceptance of Deposits) Rules, 2014(herein after referred to as "***deposit rules***") in sub – rule 1(c) of Rule 2 sets out what is not included in the definition of deposits.

(xiii) One of the amounts as set out in sub rule (1)(c)(xii)(b) of Rule 2 of the Deposit Rules (i.e. which is not a deposit) is an advance, accounted for in any manner whatsoever, received in connection with consideration for an immovable property under an agreement or arrangement, provided that such advance is adjusted against such property in accordance with the terms of the agreement or the arrangement.

(xiv) Therefore, the Agreements of these kinds, may, after coming into force of the Act, and if any assured return is paid thereon or continued therewith may be in complete contravention of the BUDS Act. It is submitted that for this very reason post coming into force of the said BUDS Act in 2019, the Respondent was forced to stop payment of any assured return.

(xv) The BUDS Act provides for two forms of deposit schemes, namely Regulated Deposit Schemes and Unregulated Deposit Schemes. Thus, for any deposit scheme, for not to fall foul of the provisions of the BUDS Act, must satisfy the requirement of being a 'Regulated Deposit Scheme' as opposed to Unregulated Deposit Scheme. Hence, the main object of the BUDS Act is to provide for a comprehensive mechanism to ban Unregulated Deposit Scheme.

(xvi) Further, any orders or continuation of payment of any assured return or any directions thereof may be completely contrary to the subsequent act passed post RERA Act, which, is not violating the obligations or provisions of the RERA Act. Therefore, enforcing an obligation on a Promoter against a Central Act which

is specifically banned, may be contrary to the central legislation which has come up to stop the menace of unregulated deposits.

(xvii) It is noted herein that the Respondent adhering to the terms and conditions of the MOU informed the Complainant that the leasing process has started at the project and invited the Complainant to execute the lease deed and registered BBA& MOU. Thereafter, the Respondent in accordance with Clause 9 (a) and Clause 10 (b) of the MOU wherein the Complainants have given authority to the Respondents to execute the lease agreement on their behalf, signed the lease agreement. That Clause 9 (a) and Clause 10 (b) of the MOU is reproduced herein below for the convenience of the Authority:

"9 (a) That the Allottee(s) herein authorizes the Company to finalise the terms for leasing the said unit with any prospective lessee. The Allottee(s) undertakes not to object to the terms of the lease and further undertakes not to object as to whom the Lessee shall be or what shall be the lease amount or usage...."

"10 (b) The Allottee(s) hereby has granted his irrevocable rights to Company to finalize the Lease Agreement with any lessee and all the terms agreed by Company shall be binding on the Allottee(s)."

(xviii) That the Respondent being a responsible Developer has already executed the first lease in terms of the MOU for the benefits of the Complainant. Therefore, the responsibility of the Respondent to pay the penalty/ assured return to the Complainants had ended on the execution of the first lease deed.

6. 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 these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

7. 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 completed 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 complainants at a later stage.

F. Findings on the objections raised by the respondent

F.I Objection regarding complainant is investor not consumer.

11. The respondent submitted that the complainant is investor and not consumer/allottee, thus, the complainant is 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 complainant is an allottee/buyer and he has paid total price of Rs. 30,92,852/- 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 complainant:

G.I Assured return

14. While filing the petition, the complainant has sought assured returns on monthly basis as per clause 4 of the MOU the Company shall pay a monthly assured return of Rs. 61,875/- per month on the said unit, on the total amount received with effect from 01.10.2021 (effective date-II) subject to TDS, taxes, cess or any other levy which is due and payable by the Allottee(s) and which shall be adjusted in Total Sale Consideration; the balance total sale consideration shall be payable by the Allottee(s) to the company in accordance with the payment schedule annexed as annexure-I. The penalty shall be paid to the allottee(s) from end of effective date II until the offer of possession letter date, on prorate basis. It is pleaded that the respondent has not complied with the terms and conditions of the agreement and the MOU. Though for some time, the number 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 2018 but did not pay the same amount after coming into force of the Act of 2019 as it was declared illegal.

15. The Act of 2016 defines "agreement for sale" means an agreement entered into between the promoter and the allottee [Section 2(c)]. An agreement for sale is defined as an arrangement entered between the

promoter and allottee with freewill and consent of both the parties. An agreement defines the rights and liabilities of both the parties i.e., promoter and the allottee and marks the start of new contractual relationship between them. This contractual relationship gives rise to future agreements and transactions between them. The different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral part of this agreement is the transaction of assured return inter-se parties. The "agreement for sale" after coming into force of this Act (i.e., Act of 2016) shall be in the prescribed form as per rules but this Act of 2016 does not rewrite the "agreement" entered between promoter and allottee prior to coming into force of the Act as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.,*** (Writ Petition No. 2737 of 2017) decided on 06.12.2017. Since the agreement defines the buyer-promoter relationship therefore, it can be said that the agreement for assured returns between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate regulatory authority has complete jurisdiction to deal with assured return cases as the contractual relationship 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 returns due to changed facts and circumstances.

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

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

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.

26. On consideration of documents available on record and submissions made by parties, the complainant has sought assured return on monthly basis as per clause 4 of MOU the Company shall pay a penalty of Rs. 61,875/- per month on the said unit, on total amount received with effect from 01.10.2021 (effective date-II) subject to TDS, taxes, cess or any other levy which is due and payable by the Allottee(s) and which shall be adjusted in Total Sale Consideration the balance total sale consideration shall be payable by the Allottee(s) to the company in accordance with the payment schedule annexed as annexure-I. The penalty shall be paid to the allottee(s) from end of effective date II until the offer of possession letter date, on prorate basis. Though for some time, the number 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. 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.

27. Accordingly, the promoter is liable to pay assured return of the unpaid period as specified under the Memorandum of understanding for assured return dated 03.10.2020.

H. Directions of the authority

28. 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 arrears of amount of assured return at agreed rate 8.75% to the complainant(s) from the date the payment of assured return has not been paid till the actual handing over of possession after obtaining occupation certificate from the competent authority.

ii. The respondent is also directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of order after adjustment of outstanding dues, if any, from the complainant and failing which that amount would be payable with interest @8.75% p.a. till the date of actual realization.

iii. The respondent shall not charge anything from the complainant(s) which is not the part of the agreement of sale.

29. Complaints stand disposed of.

30. File be consigned to registry.

(Sanjeev Kumar Arora)
Member

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

08.08.2023