BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**3577 of 2020**
Date of filing complaint:	**09.11.2020**
Order Reserve On:	**11.04.2023**
Order Pronounce On:	**30.05.2023**

	Rajani R/O: RZF-71, Street No. 4, Mahavir Enclave-I, New Delhi	**Complainant**
	Versus	
	M/s Neo Developers Private Limited **Regd. office:** 32-B, Pusa Road, New Delhi, Corporate Office at:- 157, Tower-D, Global Business Park, Gurugram, Haryana	**Respondent**

CORAM:	
Shri Vijay Kumar Goyal	**Member**
Shri Ashok Sangwan	**Member**
Shri Sanjeev Kumar Arora	**Member**
APPEARANCE:	
Sh. Hemant Phogat (Advocate)	Complainant
Sh. Pankaj Chandola and Gunjan Kumar (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules

and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. N.	Particulars	Details
1.	Name and location of the project	"Neo Square", Sector 109, Gurugram
2.	Nature of the project	Commercial
3.	Project area	2.71 acres
4.	Unit no.	67, 3rd floor (As per BBA at page 35 of complaint)
5.	Unit area admeasuring	200 sq. ft. (super area) (As per BBA at page 35 of complaint)
6.	Application for allotment	N/A
7.	Date of execution of Apartment Buyer's Agreement	19.02.2016 (Page 30 of complaint)
8.	Memorandum of understanding for assured return	19.02.2016 (Page 21 of complaint)
9.	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.
10.	Due date of possession	09.02.2019 (Calculated as 36 months from the date of execution of BBA) Note:- Due date of possession is calculated from the date of BBA in absence of the date of start of construction.
11.	Assured return	**Clause 4 of MoU** That against the total basic sale consideration of Rs. 12,00,000/- determined as per Clause 3 above, the Allottee (s) has, paid unto Company upon and/or prior to the execution of this MOU, an amount of Rs.12,50,400/-(Rupees Twelve Lacs Fifty Thousand Four Hundred only) vide cheque No. 000067 & 000078 dated 10.06.2015 & 18.02.2016 drawn on HDFC Bank, towards advance/ part consideration of the unit, the receipt whereof, Company hereby admits and acknowledges. **The Company shall pay a monthly assured return of Rs.18,000/-(Rupees Eighteen Thousand Only)on the total amount received with effect from 19Feb2016 after deduction of Tax at Source and service tax, cess or any other levy which is due and payable by the Allottee(s) to the Company and the balance sale consideration shall be payable by the Allottee(s) to the Company in accordance with the Payment Schedule annexed as Annexure I. The monthly assured return shall be paid to the Allottee(s) until the commencement of the first lease on the said unit. This shall be paid from the effective date.**

12.	Total sale consideration	Rs. 12,00,000/- As per the payment plan, page 56 of the complaint
13.	Amount paid by the complainant	Rs. 12,00,000/-
14.	Amount paid by respondent as assured return to complainant	Rs. 7,27,200/- as per additional written arguments on behalf of the respondent
15.	Occupation certificate /Completion certificate	Not obtained
16.	Offer of possession	Not offered

B. Facts of the complaint:

3. That after going through the advertisement published by the respondent in the newspapers and as per the broacher/prospectus provided by them, complainant had booked a restaurant space/food court bearing no. 67, on third floor, having its super area 200 sq. ft. in their upcoming project named "Neo Square" situated in sector-109, Dwarka Expressway, Gurugram for a total basic sale consideration of Rs. 12,00,000/-, and she had paid a sum of Rs. 12,50,400/- on 18.02.2016.

4. That the respondent is in right to exclusively develop, construct and build residential building, transfer or alienate the unit's floor space and to carry out sale deed, agreement to sell, conveyance deeds, letters of allotments etc.

5. That the buyer's agreement and memorandum of understanding were executed between the respondent and the complainant on 19.02.2016.

6. That the complainant had purchased the above said space/food court on "assured return plan", whereby the developer has assured the complainant to pay a monthly assured return of Rs. 18,000/- until the commencement of first lease on the said unit.

7. That as per clause 4 of the MOU dated 19.02.2016, the developer is under legal obligation and is bound to pay the assured return of Rs. 18,000/- to the complainant until the commencement of first lease on the said unit.

8. That the builder has stopped paying the assured return to the complainant and the amount is due from November 2019.

9. That as per the clause no. 3 of the MOU, the builder/developer was under legal obligation to complete the construction of the building/complex and handover the actual physical possession of the said space/unit within a period of 36 month from the date of execution of the MOU.

10. That the developer has delayed the project and has also stopped paying the assured return to the complainant which is illegal and unlawful and further in contravention to the terms and conditions of the MOU.

11. That the complainant visited the site during the course of construction and acknowledged that the construction work is delayed way beyond the possession date and since then she has been trying to communicate with the respondent by visiting their office and through telephonic conversations.

12. That the complainant has taken all possible requests and gestures to persuade the developer by requesting him to pay the monthly assured return amount, but the developer has failed to meet the just and fair

demand of the complainant and has completely ignored the request of her.

13. That, till today the complainant had not received any satisfactory reply from the respondent regarding the completion of the project and payment of monthly assured return to her and has been suffering a lot of mental, physical and financial agony and harassment.

C. Relief sought by the complainant:

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

(i) Direct the developer to pay the assured return as per the terms and conditions of the MOU dated 19.02.2016.

(ii) Direct the developer to pay the monthly delayed interest till actual physical possession of the space/food court alongwith prevailing interest as per the provisions of the RERA Act.

(iii) Direct the developer to pay Rs. 30,000/- as litigation expenses.

D. Reply by respondent:

15. The respondent by way of written reply made following submissions:

16. That the present complaint, filed by the complainants, is a bundle of lies and hence liable to be dismissed as it is filed without any cause of action.

That the complainants have concealed facts which are detrimental for the adjudication of this complaint and has not come with clean hands before this forum. That the present complaint is an abuse of the process of this Hon'ble Authority and is not maintainable. The complainants are trying to suppress material facts relevant to the matter. The complainants are making false, misleading, frivolous, baseless, unsubstantiated allegations against the respondent with malicious

intent, with the sole purpose of extracting unlawful gains from the respondent.

17. That the buyer's agreement dated 19.02.2016 was executed between the complainant and the respondent prior to coming into force of the Act, 2016 .The terms of this agreement were as per the applicable laws at that point of time.

18. That the delay penalty, if any, that can be claimed from the respondent is only as per the terms and conditions of the buyer's agreement. If delay penalty is awarded in addition to the prescribed rate as per the buyer's agreement, then the differential amount will be in the nature of "Compensation".

19. That new enactment of Laws is to be applied prospectively as held by the Hon'ble Supreme Court in number of cases, in particular, in the matter of ***CIT vs. Vartika Township (P) Ltd.*** **[(2015)1SCC1].** The Apex Court held that the new legislations ought not to change the character of any past transaction carried out upon the faith of the then existing law. In fact, it is well settled that the retrospective operation of statute may introduce such elements of unreasonableness. Therefore, the Act being a substantial new legislation ought to operate prospectively and not retrospectively and accordingly no cation can be lawfully initiated for anything before the Authority related to period prior to registration of project under the RERA.

20. That in the matter of ***Neel Kamal Realtor Suburban (P) Ltd. Vs. UOI & Ors*** **(SCC Online Bom 9302),** the Hon'ble High Court of Bombay held that the provisions of RERA are prospective in nature and not retrospective. It is further submitted that retrospective application of the provisions of the Act, 2016 is unconstitutional. Therefore, the

parties to the agreements should be solely govern by the terms and conditions as laid down in these agreements.

21. That if a project registered with RERA, it can be held liable only for future deadlines, those it might breach after registration with the Authority. Any default before the registration is beyond the ambit of RERA and beyond the purview of the RERA Act, 2016 and hence beyond the jurisdiction of the Ld. Authority. In this particular case the obligation of the Promoter to complete the project as per RERA Registration is valid upto 23.08.2021.

22. That as per clause 5.2 of the buyer's agreement, it was agreed between the complainant and the respondent that the construction completion date shall be deemed to be the date when the application for grant of completion/occupancy certificate is made.

23. That the respondent herein has already applied for the issuance of the occupation certificate by way of application dated 24.02.2020 and the same is pending before the concerned competent authority. Further, the respondent has received "approval of firefighting scheme" on 24.04.2020. Therefore, it cannot be concluded by any stretch of imagination that the respondent has not shown due prudence in the timely execution of the project. But the complainant has conveniently ignored all these facts and has chosen to harp upon baseless and ill-founded allegations in the present complaint in order to take the benefit of his own wrong. Therefore, the said complaint is liable to be dismissed with costs.

24. That as per clause 3 of the memorandum of understanding dated 19.02.2016 the construction of the said building/complex, within which the space of the complainant is located, is to be completed within 36

months from the date of execution of the MOU or from start of construction, whichever is later, subject to force majeure conditions. Therefore, it is most humbly submitted that the due date of possession has not arisen, and the complaint is premature.

25. Further it is brought to the attention of this authority that the MOU dated 19.02.2016 clearly states at recital 4 that the complainant herein "warrants and represents that he is not an end user and is an investor".

26. That the complainant had entered into two different agreements with the respondent, namely, buyer's agreement and memorandum of understanding. both the agreements are two distinct and different agreements. buyer's agreement is a builder buyer agreement which casts various obligations on the promoter to complete and deliver a real estate project. However, the MOU only pertains to the assured return. That there may be cross references between two agreements or certain clauses maybe superseding each other. However, such cross reference or supersession does not amount to novation and thus both these agreements cannot be read to be one single agreement. Each agreement has their own distinct liability, obligations and terms and conditions imposed on the parties and are confined to that specific agreement only.

27. That Real Estate (Regulation & development) Act, 2016 (hereinafter referred to as "RERA Act") is only applicable in relation to a promoter in 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 assured return.

28. That it is submitted that the complaint at hand is not maintainable before this hon'ble authority, as this authority is barred by the presence of an arbitration clause i.e., clause 17 of the MOU.

29. That the buyer's agreement in clause 4.4, 4.5 and 4.6 executed between the parties clearly stipulates that the entire relationship of the builder and the complainant herein is founded on timely payments by the complainant and the complainant being in default of the same cannot complain about the incapacity of the respondent to timely complete the project. Further it is brought to the attention of the authority that though the complainant may have cleared the basic sale price of the said commercial property, there exist vast outstanding amounts to the tune of Rs. 3,75,041/- inclusive of GST, EDC/IDC & VAT, that stand due and payable on part of the complainant till date. The same can be perused from the statement of accounts. In the light of the facts mentioned herein, the complainant cannot be allowed to take the benefit of his own wrong. Therefore, the complaint shall be dismissed right at the very outset.

30. That the respondent has already paid, as assured return, an amount of Rs. 7,27,200/- to the complainants till date as per the Statement of accounts.

31. 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").

32. 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.

33. 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.

34. Therefore, the agreements of these kinds, may, after 2019, and if any assured return is paid thereon or continued therewith may be in complete contravention of the BUDS Act.

35. 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.

36. 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 deposit.

37. 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:

38. The authority has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

39. 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

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

Section 11(4)(a)

> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case*

may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

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

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

F. Findings on the objections raised by the respondent

F.I Objection regarding handing over possession as per declaration given under section 4(2)(l)(C) of RERA Act.

42. The counsel for the respondent submitted that the registration of the project is valid till 23.08.2021 no cause of action can be construed to have arisen in favour of the complainant to file a complaint for seeking any interest as alleged. Therefore, next question of determination is whether the respondent is entitled to avail the time given to him by the authority at the time of registering the project under section 3 & 4 of the Act.

43. It is now settled law that the provisions of the Act and the rules are also applicable to ongoing project and the term ongoing project has been defined in rule 2(1)(o) of the rules of 2017. The new as well as the ongoing project are required to be registered under section 3 and section 4 of the Act.

44. Section 4(2)(l)(C) of the Act requires that while applying for registration of the real estate project, the promoter has to file a declaration under section 4(2)(l)(C) of the Act and the same is reproduced as under: -

> ***"Section 4: - Application for registration of real estate projects***
>
> *(2)The promoter shall enclose the following documents along with the application referred to in sub-section (1), namely: —.....*
>
> *(l): -a declaration, supported by an affidavit, which shall be signed by the promoter or any person authorised by the promoter, stating: —*
>
> *.....*
>
> *(C) the time period within which he undertakes to complete the project or phase thereof, as the case may...."*

45. The authority observes that the time period for handing over the possession is committed by the builder as per the relevant clause of buyer's agreement and the commitment of the promoter regarding handing over of possession of the unit is taken accordingly. The new timeline indicated in respect of ongoing project by the promoter while making an application for registration of the project does not change the commitment of the promoter to hand over the possession by the due date as per the buyer's agreement. The new timeline as indicated by the promoter in the declaration under section 4(2)(l)(C) is now the new timeline as indicated by him for the completion of the project. Although, penal proceedings shall not be initiated against the builder for not meeting the committed due date of possession but now, if the promoter fails to complete the project in declared timeline, then he is liable for penal proceedings. The due date of possession as per the agreement remains unchanged and promoter is liable for the consequences and obligations arising out of failure in handing over possession by the due

date as committed by him in the apartment buyer agreement and he is liable for the delayed possession charges as provided in proviso to section 18(1) of the Act. The same issue has been dealt by hon'ble Bombay High Court in case titled as ***Neelkamal Realtors Suburban Pvt. Ltd. and anr. vs Union of India and ors***. and has observed as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter..."*

F.II Objection regarding complainant is investor not consumer

46. 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.

47. 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 she has paid total price of Rs. 12,00,000/- 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;"

48. 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

49. While filing the complaint besides delayed possession charges of the allotted unit as per builder buyer agreement dated 09.02.2016, the complainant has also sought assured returns on monthly basis as per clause 4 of the MOU the Company shall pay a monthly assured return of Rs.18,000/- on the total amount received with effect from 19Feb2016 after deduction of Tax at Source and service tax, cess or any other levy

which is due and payable by the Allottee(s) to the Company and the balance sale consideration shall be payable by the Allottee(s) to the Company in accordance with the Payment Schedule annexed as Annexure I. The monthly assured return shall be paid to the Allottee(s) until the commencement of the first lease on the said unit. This shall be paid from the effective date. 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 was pay of Rs. 7,27,200/- but did not pay the same amount after coming into force of the Act of 2019 as it was declared illegal.

50. 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.

51. 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.

52. 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.

53. 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;

54. 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.

55. 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.

56. 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.

57. 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.

58. 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.

59. 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.

60. 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

61. In the present complaint, the complainant intends to continue with the project and is seeking possession of the subject unit and delay possession charges as provided under the provisions of section 18(1) of the Act which 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."

62. A builder buyer agreement dated 19.02.2016 was executed between the parties. The possession clause 3 of the MOU is stated that 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. Therefore, the possession was to be handed over by 19.02.2019. The relevant clause is reproduced below:

"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.

63. Admissibility of delay possession charges at prescribed rate of interest: The complainant is seeking delay possession charges. However, 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.*

64. The legislature in its wisdom in the subordinate legislation under the rule 15 of the rules has determined the prescribed rate of interest.

65. 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., 30.05.2023 is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.

66. 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;"*

67. On consideration of documents available on record and submissions made by the complainant 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 19.02.2016, the possession of the subject unit was to be delivered within stipulated time i.e., 19.02.2019. However now, the proposition before it is as to whether the allottee who is 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?

68. To answer the above proposition, it is worthwhile to consider that the assured return is payable to the allottee 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 19.02.2016 till the commencement of the first lease on the said unit.

69. The rate at which assured return has been committed by the promoter is Rs. 18,000/-. Per month. If we compare this assured return with delayed possession charges payable under proviso to section 18(1) of the Act, 2016, the assured return is much better i.e., assured return in this case is payable a Rs. 18,000/- per month whereas the delayed possession charges are payable approximately Rs. 10,700/- per month. By way of assured return, the promoter has assured the allottee that she would be entitled for this specific amount till the commencement of the first lease on the said unit. Accordingly, the interest of the allottee is protected even after the due date of possession is over as the assured returns are payable from the 19.02.2016 after deduction of Tax at Source and service tax, cess or any other levy which is due and payable by the Allottee(s) to the Company and the balance sale consideration shall be payable by the Allottee(s) to the Company in accordance with the Payment Schedule. The monthly assured return shall be paid to the

Allottee(s) until the commencement of the first lease on the said unit. The purpose of delayed possession charges after due date of possession is served on payment of assured return after due date of possession as the same is to safeguard the interest of the allottee as her money is continued to be used by the promoter even after the promised due date and in return, she is to be paid either the assured return or delayed possession charges whichever is higher.

70. Accordingly, the authority decides that in cases where assured return is reasonable and comparable with the delayed possession charges under section 18 and assured return is payable even after due date of possession till the commencement of the first lease on the said unit. The allottee shall be entitled to assured return or delayed possession charges, whichever is higher without prejudice to any other remedy including compensation. In the present case, the assured return was payable till the commencement of first lease. The project is considered habitable or fit for occupation only after the grant of occupation certificate by the competent authority. However, the respondent has not received occupation certificate from the competent authority till the date of passing of this order. Hence, the said building cannot be presumed to be fit for occupation. Furthermore, the respondent has put the said premises to lease by way of executing lease deed date 10.07.2020. In the absence of Occupation Certificate, the said lease cannot be considered to be valid in the eyes of law. In view of the above, the assured return shall be payable till the said premises is put to lease after obtain occupation certificate from the competent authority.

71. Hence, the authority directs the respondent/promoter to pay assured return to the complainant at the rate of Rs. 18,000/- per month from the date i.e, 19.02.2016 after deduction of Tax at Source and service tax,

cess or any other levy which is due and payable by the Allottee(s) to the Company till the commencement of the first lease on the said unit as per the memorandum of understanding.

F.II Direct the respondent to pay Rs. 30,000/- as litigation expenses.

72. The complainant in the aforesaid relief are seeking relief w.r.t compensation. 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.*** **(Decided on 11.11.2021),** has held that an allottee is entitled to claim compensation 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 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 complainants are advised to approach the adjudicating officer for seeking the relief of compensation.

H. Directions of the authority

73. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act:

i. Since assured returns being on higher side are allowed than DPC so, the respondent is directed to pay the arrears of amount of assured return at the rate i.e., Rs. 18,000/- per month from the date i.e, 19.02.2016 after deduction of Tax at Source and service tax, cess or any other levy which is due and payable by the Allottee(s) to the company till the commencement of the first lease on the said unit as per the memorandum of understanding.

ii. The respondent is directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of this order after adjustment of outstanding dues, if any, from the complainants and failing which that amount would be payable with interest @ 8.70% p.a. till the date of actual realization.

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

74. Complaint stands disposed of.

75. File be consigned to registry.

Sanjeev Kumar Arora (Member) | Ashok Sangwan (Member) | Vijay Kumar Goyal (Member)

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 30.05.2023