BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**2905 of 2021**
Date of filing complaint:	**10.08.2021**
Order Reserve On:	**11.04.2023**
Order Pronounced On:	**30.05.2023**

	Sudesh Bhal **Address:-** R/O: P-9, Hauz Khas Enclave, Southwest Delhi-110016	**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 of the project	"Neo Square", Sector 109, Gurugram
2.	Nature of the project	Commercial
3.	Project area	3.089 acres
4.	DTCP license no. and validity status	102 of 2008 dated 15.05.2008
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	09.12.2016 (Page 31 of complaint)
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	09.12.2016 (Page 21 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	09.12.2019 (Calculated as 36 months from the date of execution of MoU i.e., 09.12.2016) Note:- Due date of possession is calculated from the date of BBA in absence of the date of start of construction.
12.	Assured return	Clause 4 of MoU The Company shall **pay a penalty of Rs. 19,500/- per month on the total amount received with effect from 09.12.2018** 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.
13.	Total sale consideration	Rs. 21,25,829/- (As per SoA dated 04.08.2021 annexed at page 73 of reply)

14.	Amount paid by the complainant	Rs. 19,54,168/- (As per SoA dated 04.08.2021 annexed at page 73 of reply)
15.	Amount paid by respondent as assured return to complainant	Rs. 1,31,000/- (As per SoA dated 04.08.2021 annexed at page 73 of reply)
15.	Occupation certificate /Completion certificate	Not obtained
16.	Offer of possession	Not offered
17.	Lease deed executed on	10.07.2020

B. Facts of the complaint:

3. That the complainant was lured by the advertisement published by respondent in the newspapers and brochure/prospectus provided by it and booked a restaurant space/food court bearing no.46, on fifth floor, having its super area 300 sq. ft. in the project named "Neo Square" at Sector-109, Dwarka Expressway, Gurugram for a total basic sale consideration of Rs.19,32,144/- including IFMS, IDC, EDC and other expenses vide buyer's agreement and memorandum of understanding dated 09.12.2016 and he had paid a sum of Rs.18,64,646/- in all.

4. That the complainant had purchased the above said space/food court on "assured return plan", whereby under clause 4 of the said MOU dated 09.12.2016, the developer has assured him to pay a monthly assured return of Rs.19,500/- with effect from 09.12.2018 until the commencement of first lease on the said unit.

5. That the said unit was sold by the respondent only on the pretext of lifetime investment of assured returns to the respective buyers.

However, the respondent has paid an assured return to him only upto July 2019 and the amount on account of assured return is due from August 2019.

6. That as per clause 3 of the MOU dated 09.12.2016, the respondent-builder was under legal obligation to handover the actual physical possession of the said space/unit within a period of 36 months from the date of execution of the MOU. However, when he visited the project site during the course of construction, he was utterly shocked to find that the construction work has been delayed beyond the possession date.

7. That the developer has delayed the project and also stopped paying the assured returns to him which is illegal and unlawful and further in contravention to the terms and conditions of the MOU dated 09.12.2016. The complainant has taken all possible requests and gestures to persuade the respondent to pay the monthly assured returns and delayed interest, but the respondent has miserably failed to meet his just and fair demands.

8. That the respondent is illegally demanding an amount of Rs.1,34,234/- on account of VAT which he has already paid to it on its demand amounting to Rs.89,524/-. Therefore, subsequent demand on account of VAT is not sustainable and tenable in the eyes of law.

9. That as per section 11 of the Act of 2016, the respondent-builder is under legal obligation to fulfill and comply with the condition of the agreement/MOU executed between the parties. Thus, the respondent is under legal obligation to pay the assured return to him with effect from 09.12.2018 upto commencement of the first lease on the said unit.

C. Relief sought by the complainant:

10. 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 09.12.2016

(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:

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

12. 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 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.

13. That the buyer's agreement dated 09.12.2016 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.

14. 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".

15. 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.

16. 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.

17. 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.

18. 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. It is humbly submitted that the application for grant of Occupation Certificate was made on

29.06.2021. Therefore, it is most humbly submitted that the due date of possession has not arisen and the complaint is premature. In the light of the said fact the reliefs sought by the Complaint are not just out of place and but wholly infructuous. Further it is brought to the attention of this authority that the MOU clearly states stipulated that the complainant had booked the premise only for the purpose of gaining commercial advantage through assured return and not for self-use. It is pertinent to note that, the complainant agreed that it shall not utilise the premises for its own personal use and can be used only for the purposes of leasing through the respondent, in accordance with the terms of the MOU. MOU clearly specifies that the relationship of the complainant with the respondent is not that of a builder-buyer, especially to the extent of timely delivery of possession.

19. 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.

20. 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. That the respondent has already paid, as assured return, an amount of Rs. 1,31,300/- to the complainants till date as per the Statement of accounts.

21. 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").

22. 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.

23. 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.

24. 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.

25. 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. 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.

26. 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:

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

E. I Territorial jurisdiction

28. 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

29. 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.*

30. 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 complainant is investor not consumer.

31. 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.

32. 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. 19,54,168/- 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;"*

33. 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.

F.II Objection regarding complainant in breach of agreement for non-invocation of arbitration clause.

34. The respondent submitted that the complaint is not maintainable for the reason that the MOU contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute and the same is reproduced below for the ready reference:

> *17. That in case of dispute and differences between the parties arising out of or in relation to this MOU, the matter shall be referred for arbitration to a sole arbitrator to be appointed in terms of Arbitration and Conciliation Act, 2015. The award tendered by the arbitrator shall be final and binding upon the parties. The fee of the arbitrator and expenses of the arbitration shall be equally divided between the parties. The proceedings shall be governed by Arbitration and Conciliation Act, 1996. The venue of Arbitration shall be New Delhi alone and the language of arbitration shall be English. The award given by the arbitrator shall be final and binding between the parties.*

35. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.

36. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National

Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainant and builder could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows:-*
>
> *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
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> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.*
>
> *...*
>
> *56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."*

37. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the Hon'ble Supreme Court in **case titled as M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018** has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the

aforesaid view. The relevant para of the judgement passed by the Supreme Court is reproduced below:

> *"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."*

38. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainant is well within right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily. In the light of the above-mentioned reasons, the authority is of the view that the objection of the respondent stands rejected.

G. Findings on the relief sought by the complainant:

G.I Assured return

39. While filing the complaint besides delayed possession charges of the allotted unit as per builder buyer agreement dated 09.12.2016, 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.19,500/- on the total amount received with effect from 09.12.2018 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. 1,31,000/- but did not pay the same amount after coming into force of the Act of 2019 as it was declared illegal.

40. 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.

41. 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.

42. 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.

43. 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;

44. 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.

45. 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.

46. 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.

47. 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.

48. 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.

49. 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.

50. 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

51. 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."

52. A builder buyer agreement dated 09.12.2016 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 09.12.2019. 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.

53. 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.

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

55. 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%.

56. 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;"

57. 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 09.12.2016, the possession of the subject unit was to be delivered within stipulated time i.e.,

09.12.2019. 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?

58. 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 09.12.2018 till the commencement of the first lease on the said unit.

59. The rate at which assured return has been committed by the promoter is Rs. 19,500/-. 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. 19,500/- per month whereas the delayed possession charges are payable approximately Rs. 17,425/- per month. By way of assured return, the promoter has assured the allottee that he 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 09.12.2018 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 his money is continued to be used by the promoter even after the promised due date and in return, he is to be paid either the assured return or delayed possession charges whichever is higher.

60. 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.

61. Hence, the authority directs the respondent/promoter to pay assured return to the complainant at the rate of Rs. 19,500/- per month from the date i.e, 09.12.2018 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.

62. 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

63. 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. 19,500/- per month from the date i.e, 09.12.2018 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.

64. Complaint stands disposed of.

65. 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