



**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no. : 3484 of 2020
Date of complaint : 12.11.2020
Date of order : 11.10.2023

Neha Aggarwal,
R/o: - 1001, DB Woods, Tower B
Near Gokuldham, Goregaon (East),
Mumbai-400063.

Complainant

Versus

M/s Parsvnath Developers Ltd.
Regd. Office At: Parsvnath Tower,
Near Shahdara Metro Station, Shahdara,
Delhi-110032.

Respondent

CORAM:
Ashok Sangwan

Member

APPEARANCE:
Nikhil Mittal (Advocate)
Deeptanshu Jain (Advocate)

Complainant
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 provisions of the Act or the

Rules and regulations made thereunder or to the allottees as per the agreement for sale executed *inter se*.

A. Unit and project related details

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

Sr. No.	Particulars	Details
1.	Name of the project	'IT Park Colony" in Sector 48, Gurgaon
2.	Nature of the project	Commercial/IT space
3.	DTPC license no.	47 of 2008 dated 11.03.2008
	Validity status	10.03.2020
	Name of licensee	Dharmander-Karambir & 3 Ors.
	Licensed area	6.45 Acres
4.	RERA registered/not registered	Not registered
5.	Unit no.	No space no. was allotted.
6.	Unit area	Super area of 2000 sq.ft. (page 143 of complaint)
7.	Date of execution of MoU	23.12.2005 (page 142 of complaint)
8.	Due date of possession	23.12.2008 [Calculated as per <i>Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018</i>]
9.	Total sale consideration	Rs.30,00,000/- (page 143 of complaint)
10.	Total amount paid by the complainant	Rs.27,00,000/- (as per MOU on page 144 of complaint)
11.	Assured return clause	<i>"That out of the said total consideration amount the Second Party shall pay to the First Party a sum calculated @ Rs.1350/- per square foot of the entire super area to be allotted, on or before the signing of this Memorandum of Understanding. That</i>

		<p><i>First Party shall after receipt of part consideration. @ Rs.1350/- per square foot of the entire super area ie Rs.2700000 (Rupees Twenty Seven Lakhs only) give an investment return @ Rs. 26.09 per square foot per month i.e. Rs.52180 (Rupees Fifty Two Thousand One Hundred Eighty only) by way of interest (subject to deduction of tax at source) w.e.f. 1/1/2006 on quarterly intervals at the end of every quarter for which it is due. That the First Party shall give an investment return (interest) @ Rs.27.50 per square foot per month of area of the Proposed Premises subject to the timely payment of balance consideration amount @ Rs.150/- per square foot of the space area i.e. Rs.300000 (Rupees Three Lakhs only) by Second Party till the date of offer of possession of space in the Complex."</i></p>
12.	Approval of revised building plans	25.06.2021
13.	Occupation certificate	Not yet received
14.	Offer of possession	Not offered

B. Facts of the complaint

3. The complainant has made the following submissions: -

- I. That, the complainant approached the respondent's representative and broker Mr. Suresh Chand Jain to purchase a commercial space from the respondent admeasuring super area of 2000 sq.ft. for Rs.1,500/- per sq.ft. of super area amounting to a total consideration of Rs. 30,00,000/- . Thereafter, the complainant and the respondent agreeing on the abovementioned price entered into a Memorandum Of Understanding (MOU) dated 23.10.20005, wherein the detailed terms and conditions of the sale was incorporated which was to be followed by both the



parties. As per the MOU, the respondent after receipt of part consideration of Rs.27,00,000/- was obligated to give an investment return of every quarter at Rs.26.09 per sq.ft. i.e., Rs.52,180/- starting from 01.01.2006 and further the respondent was to give investment on return @Rs.27.50 per sq.ft. per month on timely payment of balance consideration amount which was to be demanded by the respondent two months prior to the delivery of possession.

- II. That, the respondent on 24.03.2006, issued a letter along with 4 post-dated cheques dated 07.04.2006, 07.07.2006, 07.10.2006 and 07.01.2007 respectively amounting to Rs.1,40,573/- of the same amount towards the quarterly returns each in favour of the complainant with reference to the MOU dated 23.10.2005.
- III. That on 01.12.2006, the complainant wrote a letter to Suresh Chand Jain and Sons stating that the said cheque/demand draft no. 009203 for Rs.1,40,573/- dated 07.04.2006 could not be deposited in her account as expired and requested for a fresh cheque/demand draft. Thereafter, the respondent sent a fresh cheque for Rs.1,40,573/- dated 27.12.2006 along with a letter dated 29.12.2006.
- IV. That, the respondent sent regular cheques quarterly of returns upon the investment amounting to Rs.1,40,416/- per quarter along with a covering letter till April 2014 but thereafter till date no payment has received by the complainant from the respondent inspite of repeated reminders for payment of outstanding dues vide letters dated 30.03.2015, 07.05.2015, 07.06.2015, 20.08.2015, 13.01.2016, 25.07.2016 and finally on 08.10.2016. However, the respondent did not pay any heed to the repeated reminders sent by her and the possession of the office space is also awaited.

- V. That, the complainant after being aggrieved by the respondent's ill-will and continuous dishonest intentions finally served a legal notice dated 02.12.2016 through its counsel to the respondent demanding a pending payment of Rs.15,49,746/- which was the total for the period of April 2014 to September 2016 and also demanded the possession of the office space booked by her.
- VI. That, the complainant after not receiving any reply to the said legal notice, filed a complaint bearing C.C No. 79 of 2018 under Section 17 a (i) of the Consumer Protection Act, 1986 before the State Disputes Redressal Commission, New Delhi praying to get her pending dues of Rs.21,91,560/-.
- VII. That, as per the recent update on the construction site of this particular project the complainant found that one tower is near completion which is the first tower of the project and the complainant is one of the initial investors/buyers of this project and is entitled to get possession of the commercial space in the said tower.
- VIII. That, the complainant and her father were approached by the representative of the respondent namely Mr. Amit Jain on 03.09.2020 for resolving the present dispute amicably and a ledger for the pending dues was acknowledged by him including the interest accrued and loss upon rental amounting to Rs. 1,25,80,089/-. Further, the respondent's representative was also told by the complainant's representative to grant the possession of the commercial unit as earliest possible as the same is delayed since the year 2005, towards which he informed that the commercial Tower No.1 consisting of the complainant's commercial unit is almost complete and the possession can be sought in the month of November 2020. However, in the end respondent's representative

said that he is helpless and is unable to clear the complainant's legitimate due and losses being incurred since the year 2014, including the interest accrued and loss upon rental. Hence, the grievance before this Hon'ble Authority.

- IX. That the present complaint was dismissed in default by this Authority vide order dated 14.09.2021 stating that the matter is sub-judice before the State Commission, Delhi and the matter cannot be pursued before two authorities. Accordingly, the complaint before the State Commission, Delhi was withdrawn vide order 17.12.2021. Subsequently, the complainant approached the Hon'ble Real Estate Tribunal, Chandigarh to set aside the order dated 14.09.2021 passed by this Authority and to restore this complaint. Consecutively, the Hon'ble Tribunal allowed the appeal vide order dated 23.11.2022 giving direction to move an application for restoration of complaint before this Authority. Accordingly, the present complaint was restored by this Authority vide order dated 05.04.2023.

C. Relief sought by the complainant:

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

- I. Direct the respondents to pay the return on investment as agreed as per the MoU w.e.f. April 2014 till offer of possession of the unit.
- II. Direct the respondents to handover the possession of the said unit.
- III. Direct the respondents to pay an amount of Rs.2,00,000/- towards cost of litigation.

5. The respondent/promoter put in appearance through its counsel and marked attendance on 05.04.2023, 12.07.2023 and 23.08.2023. Despite giving specific directions it has failed to comply with the orders of the authority. It shows that the respondent is intentionally delaying the

procedure of the court by avoiding filing of the written reply. Therefore, vide proceeding dated 23.08.2023, the defence of the respondent was ordered to be struck off for not filing reply.

6. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the complainant.

D. Jurisdiction of the authority

7. The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

D.I Territorial jurisdiction

8. 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.

D.II Subject matter jurisdiction

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

Section 11.....(4) The promoter shall-

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;



Section 34-Functions of the Authority:

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

10. 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.

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

"Moreover, a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract i.e., the possession was required to be given by last quarter of 2014. Further there is no dispute as to the fact that until now there is no redevelopment of the property. Hence, in view of the above discussion, which draw us to an irresistible conclusion that there is deficiency of service on the part of the appellants and accordingly the issue is answered."

12. Accordingly, the due date of possession is calculated as 3 years from the date of signing of MoU. Therefore, the due date of handing over of the possession for the space/unit comes out to be 23.12.2008.

E. Findings on the relief sought by the complainant.

E.I Direct the respondent to pay the return on investment as agreed as per the MoU w.e.f. April 2014 till offer of possession of the unit.

13. That the present complaint was dismissed in default by this Authority vide order dated 14.09.2021 stating that the matter is sub-judice before the State Commission, Delhi and the matter cannot be pursued before two authorities and therefore, an opportunity was granted to the complainant to come after withdrawal of complainant from State Commission if she so desires. Accordingly, the complaint before the State Commission, Delhi was withdrawn vide order 17.12.2021. Subsequently, the complainant approached the Hon'ble Real Estate Tribunal, Chandigarh vide appeal bearing no. 117/2022, to set aside the order dated 14.09.2021 passed by this Authority and to restore this complaint. Consecutively, the Hon'ble Tribunal allowed the appeal vide order dated 23.11.2022 giving directions to move an application for restoration of complaint before this Authority. Thereafter, the present complaint was restored by this Authority vide order dated 05.04.2023.
14. The respondents vide clause 2 of the MoU dated 23.10.2005 agreed to give an investment return @Rs.26.09/- per sq.ft. per month i.e., Rs.52,180/- to the complainant on the amount received till offer of possession of the space. However, it failed to pay return on investment for the space w.e.f. April 2017 and the said default is continuing till date. The total sale consideration of the allotted space was Rs.30,00,000/-

and the complainant has paid a sum of Rs.27,00,000/- i.e., more than 95% of the total sale price.

15. An MOU can be considered as an agreement for sale interpreting the definition of the agreement for "agreement for sale" under section 2(c) of the Act and broadly by taking into consideration the objects of the Act. Therefore, the promoter and allottee would be bound by the obligations contained in the memorandum of understandings and the promoter shall be responsible for all obligations, responsibilities, and functions to the allottee as per the agreement for sale executed inter-se them under section 11(4)(a) of the Act. An agreement defines the rights and liabilities of both the parties i.e., promoter and the allottee and marks the start of new contractual relationship between them. This contractual relationship gives rise to future agreements and transactions between them. Therefore, different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral parts of this agreement is the transaction of assured return inter-se parties. The "agreement for sale" after coming into force of this Act (i.e., Act of 2016) shall be in the prescribed form as per rules but this Act of 2016 does not rewrite the "agreement" entered between promoter and allottee prior to coming into force of the Act as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.***, (Writ Petition No. 2737 of 2017) decided on 06.12.2017. Since the agreement defines the buyer-promoter relationship therefore, it can be said that the agreement for assured return between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate



regulatory authority has complete jurisdiction to deal with assured return cases as the contractual relationship arise out of agreement for sale only and between the same parties as per the provisions of section 11(4)(a) of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the agreement for sale till the execution of conveyance deed of the unit in favour of the allottees. Now, two issues arise for consideration as to:

- i. Whether authority is within the jurisdiction to vary its earlier stand regarding assured return due to changed facts and circumstances.
 - ii. Whether the authority is competent to allow assured returns to the allottees in pre-RERA cases, after the Act of 2016 came into operation,
 - iii. Whether the Act of 2019 bars payment of assured returns to the allottees in pre-RERA cases.
16. While taking up the cases of *Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd. (complaint no 141 of 2018)*, and *Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP*" (complaint no 175 of 2018) decided on 07.08.2018 and 27.11.2018 respectively, it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the issue of assured returns was involved to be paid by the builder to an allottee but at that time, neither the full facts were brought before the authority nor it was argued on behalf of the allottee that on the basis of contractual obligations, the builder is obligated to pay that amount. However, there is no bar to take a different view from the earlier one if new facts and laws have been brought before an adjudicating authority or the court. There is a doctrine of "*prospective overruling*" and which provides that the law



declared by the court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. A reference in this regard can be made to the case of **Sarwan Kumar & Anr Vs. Madan Lal Aggarwal** Appeal (civil) 1058 of 2003 decided on 06.02.2003 and wherein the hon'ble apex court observed as mentioned above. The authority can take a different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. It is now well settled preposition of law that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum , memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement for sale defines the builder-buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allottee 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. In cases of **Anil Mahindroo & Anr. v/s Earth Iconic Infrastructure Pvt. Ltd.** (Company Appeal (AT) (Insolvency) No. 74 of 2017) and **Nikhil Mehta and Sons (HUF) and Ors. vs. AMR Infrastructure Ltd.** (CA NO. 811 (PB)/2018 in (IB)-02(PB)/2017)



decided on 02.08.2017 and 29.09.2018 respectively, it was held that the allottees are investors and have chosen committed return plans. The builder in turn agreed to pay monthly committed return to the investors. Thus, the amount due to the allottee comes within the meaning of 'debt' defined in Section 3(11) of the I&B Code. Then in case of **Pioneer Urban Land and Infrastructure Limited & Anr. v/s Union of India & Ors.** (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019, it was observed by the Hon'ble Apex Court of the land that "*...allottees who had entered into "assured return/committed returns" agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of agreement till the date of handing over of possession to the allottees*". It was further held that 'amounts raised by developers under assured return schemes had the "commercial effect of a borrowing' which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code" including its treatment in books of accounts of the promoter and for the purposes of income tax. Then, in the latest pronouncement on this aspect in case **Jaypee Kensington Boulevard Apartments Welfare Association and Ors. vs. NBCC (India) Ltd. and Ors.** (24.03.2021-SC): MANU/ SC/0206 /2021, the same view was followed as taken earlier in the case of **Pioneer Urban Land Infrastructure Ld & Anr.** with regard to the allottees of assured returns to be financial creditors within the meaning of section 5(7) of the Code.

Then after coming into force the Act of 2016 w.e.f 01.05.2017, the builder is obligated to register the project with the authority being an ongoing project as per proviso to section 3(1) of the Act of 2017 read with rule 2(o) of the Rules, 2017. The Act of 2016 has no provision for re-writing of contractual obligations between the parties as held by the Hon'ble Bombay High Court in case *Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.*, (supra) as quoted earlier.

17. The money was taken by the builder as a 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.
18. The authority under this Act has been regulating the advances received under the project and its various other aspects. So, the amount paid by the complainant to the builder is a regulated deposit accepted by the latter from the former against the immovable property to be transferred to the allottee later on. If the project in which the advance has been received by the developer from an allottee is an ongoing project as per section 3(1) of the Act of 2016 then, the same would fall within the jurisdiction of the authority for giving the desired relief to the complainant besides initiating penal proceedings.
19. Therefore, the authority directs the respondent/promoter to pay assured return from the date the payment of assured return was stopped till offer of possession of the allotted unit/spaces.

E.II Direct the respondent to handover the possession of the said unit.

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

E.III Direct the respondent to pay an amount of Rs.2,00,000/- towards cost of litigation.

21. The complainant is seeking above mentioned relief w.r.t. cost of litigation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. (supra)*, has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation. Therefore, the complainant is advised to approach the adjudicating officer for seeking the relief of litigation expenses.

F. Directions of the authority

22. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):



- i. The respondent/builder is directed to pay arrears of assured return to the complainant/allottee from April 2014 at the agreed rate till offer of possession as per memorandum of understanding executed between the parties.
 - 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, failing which that amount would be payable with interest @8.75% p.a. till the date of actual realization.
 - iii. The respondent is directed to handover possession of the unit/space in question and execute sale deed in favour of the complainant on payment of stamp duty and registration charges within 60 days after obtaining Occupation Certificate from the competent authority.
 - iv. The planning branch of the authority is directed to take necessary action under the provision of the Act of 2016 for violation of proviso to Section 3(1) of the Act.
23. Complaint stands disposed of.
24. File be consigned to registry.


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 11.10.2023