

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

|                      |            |
|----------------------|------------|
| Order reserved on:   | 21.09.2023 |
| Order pronounced on: | 19.10.2023 |

| NAME OF THE BUILDER |             | M/S ADVANCE INDIA PROJECTS LIMITED                                   |  |
|---------------------|-------------|--|--|
| PROJECT NAME        |             | "AIPL JOY CENTRAL"   |  |
| S. No.              | Case No.    | Case title   | APPEARANCE   |
| 1.                  | CR/707/2022 | Manisha Pratap Singh<br>V/S<br>M/s Advance India Projects<br>Limited | Ms. Dagger Malhotra Advocate<br>and<br>Shri Harshit Batra Advocate |
| 2.                  | CR/708/2022 | Manisha Pratap Singh<br>V/S<br>M/s Advance India Projects<br>Limited | Ms. Dagger Malhotra Advocate<br>and<br>Shri Harshit Batra Advocate |

**CORAM:**

**Shri Vijay Kumar Goyal**

**Member**

**ORDER**

1. This order shall dispose of both the complaints titled as above filed before the authority under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "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 its obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se between parties.
2. The core issues emanating from them are similar in nature and the complainant(s) in the above referred matters are allottees of the project, namely, "**AIPL JOY CENTRAL**" (commercial colony) being developed by the

*A*



same respondent/promoter i.e., M/s Advance India Projects Limited. The terms and conditions of the booking application form, agreement to sell and allotment letter against the allotment of units in the upcoming project of the respondent/builder and fulcrum of the issues involved in both the cases pertains to failure on the part of the promoter to deliver timely possession of the units in question, seeking award of assured return till valid offer of possession, to complete the super structure of office block and compensation.

3. The details of the complaints, reply to status, unit no., date of agreement, possession clause, due date of possession, total sale consideration, total paid amount, and relief sought are given in the table below:

|   |  |
|---|--|
| <b>Project Name and Location</b>  | <b>Advance India Projects Limited at "AIPL JOY CENTRAL", Sectors 65, Gurugram.</b> |
| <b>Occupation Certificate: - 24.12.2021</b>   |  |
| <b>Possession Clause: -</b>   |  |
| <b>44. Force Majeure</b>  |  |
| .....   |  |
| <i>Subject to the aforesaid and Subject to the Allottee not being in default under any part of this Agreement including but not limited to the timely payment of the Total Price and also subject to the Allottee having complied with all formalities or documentations as prescribed by the company, the company endeavours to hand over the possession of the Unit to the Allottee within a period of 54 months with a further grace period of 6 months, from 1 September 2017....."</i> |  |
| <b>Assured Return Clause: -</b>   |  |
| <b>32.</b> <i>Where the Allottee has opted for Payment Plan as per annexure A attached herewith and accordingly, the Company has agreed to pay Rs.64,891/- per month by way of assured return to the Allottee from 25.02.2017 till the date of issue of notice of possession of the unit. The return shall be inclusive of all taxes whatsoever payable or due on the return.</i>   |  |

12



| Sr. No | Complaint No., Case Title, and Date of filing of complaint  | Reply status                 | Unit No.  | Date of execution of agreement to sell              | Due date of possession  | Total Consideration /Total Amount paid by the complainants in Rs.   |
|--------|---|------------------------------|---|---|---|---|
| 1.     | CR/707/2022<br><br>Manisha Pratap Singh V/S M/s Advance India Projects Limited.<br><br>Date of Filing of complaint 22.02.2022 | Reply received on 15.07.2022 | 05, Ground floor,<br><br>Area admeasuring 455 sq. ft. (super area)<br><br>[As per page no. 28 of complaint]<br><br>Revised area- 445.11 sq. ft. [Page no. page 66 of the reply] | 15.11.2017<br><br>[As per page no. 23 of complaint] | 01.09.2022<br><br>(Grace period of 6 months are allowed)<br><br>(Note: - calculated from the 01.09.2017 + 6 months grace period mention in the buyer's agreement) | TSC: - 1,16,05,798/-<br><br>AP: - 1,24,50,662/-<br><br>( As per statement of accounts dated 22.02.2022 on page 82 of the reply) |
| 2.     | CR/708/2022<br><br>Manisha Pratap Singh V/S M/s Advance India Projects Limited.<br><br>Date of Filing of complaint 22.02.2022 | Reply received on 15.07.2022 | 96, Ground floor<br><br>Area admeasuring 1386 sq. ft. (super area)<br><br>[As per page no. 60 of complaint]<br><br>Revised area 1385.91 sq. ft. [As per page 65 of reply]       | 15.11.2017<br><br>[As per page no. 55 of complaint] | 01.09.2022<br><br>(Grace period of 6 months are allowed)<br><br>(Note: - calculated from the 01.09.2017 + 6 months grace period mention in the buyer's agreement) | TSC: - 3,85,78,190/-<br><br>AP: - 4,14,98,214/-<br><br>( As per statement of accounts dated 22.02.2022 on page 80 of the reply) |

**The complainant in the above complaints have sought the following reliefs:**

1. Direct the respondent to pay assured return to the complainant from 25.12.2021 till date of valid offer of possession as Rs.10,51,813.62/- per month.
2. Direct the respondent to not illegally offer of possession without completion of construction of the super structure of office block as otherwise the same would be contrary to the terms agreed in the unit buyer's agreement.

ra

3. *Direct the respondent to adhere to the terms mentioned in the unit's buyer's agreement along with the annexure A of the agreement and to make offer of possession in compliance of the said terms.*
4. *Award the litigation cost to the tune of Rs.50,000/- in the favour of the complainant.*

**Note: In the table referred above, certain abbreviations have been used. They are elaborated as follows:**

**Abbreviation Full form**

TSC Total Sale consideration

AP Amount paid by the allottee(s)

4. The aforesaid complaints were filed against the promoter on account of violation of the booking application form, agreement to sell and allotment letter against the allotment of units in the upcoming project of the respondent/builder and for not handing over the possession by the due date, seeking award of assured return till valid offer of possession, to complete the super structure of office block and compensation.
5. It has been decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter/respondent in terms of section 34(f) of the Act which mandates the authority to ensure compliance of the obligations cast upon the promoters, the allottee(s) and the real estate agents under the Act, the rules and the regulations made thereunder.
6. The facts of both the complaints filed by the complainant(s)/allottee(s) are also similar. Out of the above-mentioned case, the particulars of lead case ***CR/707/2022 titled as Manisha Pratap Singh V/S M/s Advance India Projects Limited*** are being taken into consideration for determining the rights of the allottee(s) qua assured return till valid offer of possession, to complete the super structure of office block and compensation.

**A. Project and unit related details**

*Pa*

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

**CR/707/2022 titled as Manisha Pratap Singh V/S M/s Advance India Projects Limited.**

| S. N. | Particulars                    | Details  |
|-------|--------------------------------|--|
| 1.    | Name of the project            | "AIPL Joy Central"   |
| 2.    | Project location               | Sector 65, Gurugram  |
| 3.    | Allotment letter               | 10.04.2017<br>[As per page no. 15 of complaint]  |
| 4.    | Unit No.                       | 05, Ground floor<br>[As per page no. 28 of complaint]  |
| 5.    | Unit Area                      | 455 sq. ft. (super area)<br>[As per page no. 28 of complaint]<br><b>Revised area- 445.11 sq. ft.</b><br>[Page no, page 66 of the reply]  |
| 6.    | Date of agreement for sale     | 15.11.2017<br>[As per page no. 23 of complaint]  |
| 7.    | Possession clause              | <b>44.</b><br>..... <i>The company endeavours to hand over the possession of the unit to the allottee within a period of 54 months with a further grace period of 6 months, from 1 September 2017</i><br>(Emphasis supplied) |
| 8.    | Due date of possession         | <b>01.09.2022</b><br><b>(Grace period of 6 months are allowed)</b>   |
| 9.    | Total sale consideration       | <b>Rs.1,16,05,798/-</b><br>[As per statement of accounts dated 22.02.2022 on page 82 of the reply]   |
| 10.   | Amount paid by the complainant | Rs.1,24,50,662/-<br>[As per statement of accounts dated 22.02.2022 on page 82 of the reply]  |



|     |   |   |
|-----|---|---|
| 11. | Assured return clause                                   | 32.<br><i>Where the allottee has opted for payment plan as per annexure A attached herewith and accordingly, the company has agreed to pay Rs.64,891/- per month by way of assured return to the allottee from 25.02.2017 till the date of issue of notice of possession of the unit.</i> |
| 12. | Amount paid to the complainant by way of assured return | <b>Rs.20,16,873/-</b><br><b>As per calculation sheet annexed at page no 81 of the reply</b><br><b>The complainant has admitted in his complaint that the respondent had stopped paying assured returns to the complainant from 24.12.2021 on page 5 of the complaint</b>                  |
| 13. | Occupation certificate                                  | 24.12.2021<br>[Page 63 of the reply]  |
| 14. | Offer of possession                                     | 22.02.2022<br>[Page 66 of the reply]  |

**B. Facts of the complaint**

8. The complainant has made the following submissions in the complaint: -
- That, the complainant applied for allotment of a retail unit bearing no. 0005 on the ground floor, having super area of 455 sq. ft. in the respondent's project namely, "**AIPL Joy Central.**" The respondent issued an allotment letter dated 10.04.2017, allotted the above-mentioned unit in favour of the complainant and confirmed the payment plan opted by the complainant which stated that the offer of possession shall be made only after completion of the superstructure

A

of the office block. The respondent also confirmed the assured returns plan opted by the complainant.

- b. That on 15.11.2017, the respondent entered BBA with the complainant reiterating the afore-mentioned terms and conditions and payment plan so opted under the allotment letter and assured returns. The total sale consideration of the said unit was Rs.1,18,63,670/- and the complainant has till date paid a total of Rs.1,24,50,662/- to the respondent.
- c. The assured return amount was mutually agreed to be 11% annually (subject to TDS) on all the advance payments (excluding GST amount) made by the complainant to the respondent. The respondent has stopped paying assured return amount Rs.1,05,813.62/- per month to the complainant after 24.12.2021.
- d. That the complainant has been constantly enquiring from the respondent regarding the non-payment of assured returns from the month of 25.12.2021 onwards but all in vain. The respondent has stated that it will pay assured returns till date of receipt of occupation certificate and not beyond that, which is absolutely in contravention of the buyer's agreement, which provides that the respondent is obligated to pay till offer of possession. As per the clause 44 of the buyer's agreement, the respondent was to offer possession to the complainant within 54 months from 01.09.2017 plus 6 months grace period, therefore the due date of possession being 01.09.2022
- e. That, in the said project there were to be constructed a total 23 floors (being ground floor plus 22 floors) out of which ground floor plus 4

A

floors are retail units and 5<sup>th</sup> floor till 22<sup>nd</sup> floor are office units. The entire tower in entirety was the office block. Therefore, completion of construction of the superstructure of the said office block is a pre-requisite to making offer of possession.

- f. That the respondent on the other hand, informed the complainant that the respondent is in the process of offer possession of the unit to the complainant without completion of the construction of the superstructure of the "**Office Block**" to avoid its liability to pay assured returns under clause 32 of the agreement and therefore the same is contradictory and in complete violation of the buyer's agreement. As per buyer's agreement, an offer of possession can be made only after completion of construction of super structure of office block and not before that. The same is necessary in practicality as well as retail unit cannot be operated if there is heavy structural construction going on in the Office Units above the retail units in the office block. The respondent has received the occupation certificate of the retail units, but the office block itself is still under construction and it is not even possible to inspect the retail unit without wearing a helmet to enter the same due to heavy construction going on in the office units above the retail units in the office block.

**C. Relief sought by the complainant: -**

9. The complainant has sought following relief(s)
- a. Direct the respondent to pay assured return to the complainant from 25.12.2021 till date of valid offer of possession as Rs.10,51,813.62/- per month.





- b. Direct the respondent to not illegally offer of possession without completion of construction of the super structure of office block as otherwise the same would be contrary to the terms agreed in the unit buyer's agreement.
- c. Direct the respondent to adhere to the terms mentioned in the unit's buyer's agreement along with the annexure A of the agreement and to make offer of possession in compliance of the said terms.
- d. Award the litigation cost to the tune of Rs.50,000/- in the favour of the complainant.

**D. Reply by the respondent**

10. The respondent contested the complaint on the following grounds: -

- i. That it is vehemently submitted that the due date of possession of the unit in question was 01.09.2022, as has also been noted in the complaint. That filing of the present complaint seeking possession of the unit in question cannot be entertained when the due date of delivery has not been attained yet.
- ii. That, the complainant has filed the present complainant before this authority which is not maintainable. That the complainant is praying for the relief of "Assured Returns" which is beyond the jurisdiction that this authority. That from the bare perusal of the Act of 2016, the said Act provides for three kinds of remedies in case of any dispute between a builder and buyer with respect to the development of the project as per the agreement, as provided under section 18 of the Act, 2016 for

A

violation of any provision of the Act. That the said remedies are of "Refund" in case, the allottee wants to withdraw from the project and the other being "interest for delay of every month" in case the allottee wants to continue in the project and the last one is for compensation for the loss occurred by the allottee.

- iii. That nowhere in the said provision the authority has been dressed in jurisdiction to grant "Assured Returns". Therefore, the present complaint is filed with grave illegalities and lack of jurisdiction and the same is liable to be dismissed at the very outset and the complainant shall be directed to file pursue the complaint before the civil court for any dispute arises from the agreement in the form of investment agreement and lease agreement.
- iv. That, moreover, the payment of assured returns has been banned as per the prevalent laws. On 31.07.2019, *The Banning of Unregulated Deposits Schemes Act, 2019 ("the BUDS Act")* was notified and came into force. That under the said BUDS Act, all the unregulated deposit schemes such as Assured Returns have been banned and made punishable with strict penal provisions. That being a law-abiding company, by no stretch of imagination, the Respondent can continue to make the payments of the Assured Returns in violation of the BUDS Act.
- v. That at the very outset that the instant complaint is untenable both in facts and in law and is liable to be rejected on this ground alone.

A

Moreover, the complaint is filed without any cause of action and hence is liable to be dismissed. It is again submitted that the complaint is premature in nature and the present preliminary submissions/objections may please be read along with the preliminary objections to the maintainability of the complaint.

- vi. That at the outset, it needs to be noted that the development of the project namely "*AIPL Joy Central*" located at Sector 65 Gurugram, Haryana has been done under the Licenses no. 249 of 2007 dated 02.11.2007 and the project is also registered with this authority vide registration no. 183 of 2017 dated 14.09.2017.
- vii. That the complainant being interested in the real estate development project of the respondent applied for an allotment on a possession linked payment plan via application form dated 05.04.2017. The application form was executed willingly and voluntarily between the parties. The complainant understood all and every term and condition of the same and the subsequent buyer's agreement. The complainant categorically noted that a copy of the agreement had been provided to her, hence, it was only after the having perused the same, the application form was executed by the complainant as a pre-requisite for execution of the agreement and for booking of the unit.
- viii. That thereafter, a provisional retail shop unit bearing no. 05, having super area 455 sq. ft. located on ground floor was allotted vide an

12

allotment letter dated 10.04.2017. Accordingly, the buyer's agreement was delivered to be executed, to the complainant vide letter dated 26.06.2017. That upon delay in execution of the agreement, the respondent also served the complainant with a reminder dated 18.08.2017. That it was thereafter that finally, the BBA was executed on 15.11.2017.

- ix. That, the project underwent a change in the building plans, upon which, objections/suggestion for the approval of the building plan was rightly invited from the complainant vide letter dated 21.11.2019, however, none were submitted by the complainant. Thereafter, the unit of the complainant was renumbered from 0005 to GF-05 and the supper area of the unit was reduced to 445.98 sq. ft. and the same was rightly communicated to the complainant on 20.05.2020.
- x. That, as per clause 44 of the agreement, the due date of delivery of possession was subject to the force majeure conditions, timely payment by the allottee and obliging with the other terms and conditions of the agreement and the same was fixed to be 54 months with a further grace period of 6 months from 01.09.2017, accordingly, the subjective due date of delivery of possession of the unit comes out to be **01.09.2022**. That the present complaint is pre mature and not maintainable and hence cannot be continued and is entitled to be dismissed. Accordingly, the contents of the preliminary objections to

A

the maintainability of the complaint may please be read along with and are not repeated herein for the sake of brevity.

- xi. That, even though the respondent was deeply aggrieved with a number of unforeseeable circumstances causing hindrance in the continuous construction of the project, like the ban on construction activities, orders by the NGT and EPCA, demobilisation of labour, the grave effect of the corona virus pandemic etc. being circumstances beyond the control of the respondent and force majeure circumstances. Nonetheless, the respondent completed the construction and rightfully applied for occupancy certificate for Retail + multiplex on 09.05.2021 and rightfully obtained the same on 24.12.2021. Thereafter, the respondent rightly issued the legal and valid notice of offer of possession on 22.02.2022.
- xii. That as per clause 11 of the BBA, the complainant was obligated to take possession of the unit within 30 days from the date of notice of offer of possession which was to be made after the receipt of the occupancy certificate only. That the offer of possession was given as per the settled law according to which, possession can be delivered upon the receipt of occupancy certificate.
- xiii. That, furthermore, it is a matter of fact that the parties agreed for the payment of assured returns as per clause 32 of the BBA. However, the payment of such assured returns was not static and subject to force

A

majeure conditions as per clause 44 of the buyer's agreement, as reiterated hereinabove, which categorically noted that upon force majeure circumstances, the assured returns shall not be paid by the company.

- xiv. That, the authority does not have the jurisdiction to deal with cases pertaining to assured returns and the same lies beyond the purview of the Act and the payment of assured returns has been banned under the BUDS Act. That, without prejudice to the foregoing and the objections to the maintainability of the complaint and the non-existence of jurisdiction of this authority, it is submitted that the true and *bona fide* intent and conduct of the respondent needs to be noted here, as is evident from the fact that the under the electronic clearance system pay out, the respondent has issued a letter dated 17.08.2018 for the pre-payment of assured return confirmation from 01.07.2018 and further from 06.07.2018 till the date of notice of offer of possession. The intent of the respondent has always been to fulfil its contractual obligations.
- xv. That despite the same, the respondent maintained on its commitment of payment of assured return. That on 06.07.2020, the payment of assured returns was divided in two parts of 50% each and the same were made payable in the following manner:

*Part I AR: Due every month from the succeeding date of lockdown period known as AR Restart date.*

*Part II AR: Accruing from succeeding date of lockdown period along with interes@12%.*

The above arrangement was duly informed to the complainant vide letter dated 06.07.2020.

That the respondent has rightly paid the assured return from time to time, as evident from the assured return sheet.

- xvi. That the complainant stands in default of taking the offer of possession and making the due payments. The *malafide* conduct of the complainant is evident from the fact that the complainant has enjoyed the payments of assured returns and failed to comply with their obligations. That as on 22.02.2022, the complainant has to pay Rs.7,38,231/-. That, apart from violating the obligations under the BBA, the complainant stands in violation of sections 19(6) and 19(11) and hence is liable to pay interest under Section 19(7) of the RERA Act, 2016.

11. 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 written submissions made by the parties.

**E. Jurisdiction of the authority**

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



**E.I Territorial jurisdiction**

13. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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**

14. 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) 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.*

15. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the case mentioned above, the authority has the jurisdiction to

A



entertain a complaint seeking refund of the amount and interest on the refund amount.

**F. Findings on the relief sought by the complainant.**

**F.I Direct the respondent to pay assured return to the complainant from 25.12.2021 till date of valid offer of possession as Rs.10,51,813.62/- per month.**

16. The complainant has sought assured return on monthly basis as per clause 32 of agreement to sell dated 15.11.2017, the company has agreed to pay an amount of Rs.2,11,435/- per month by way of assured return to the allottee from 06.05.2017 till the date of issue of notice of possession of the unit. The respondent has not complied with the terms and conditions of the agreement to sell. Though for some time, the amount of assured returns was paid but later on, the respondent refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019. But that Act does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act. However, the plea of respondent is otherwise and who took a stand that though it paid the amount of assured return upto the December 2021 but did not pay assured return amount after coming into force of the Act of 2019 as the same was declared illegal.

17. 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

*Pa*



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

A

execution of conveyance deed of the unit in favour of the allottee. Now, three issues arise for consideration as to:

- i. Whether the authority is within its 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 allottee 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 allottee in pre-RERA cases.
18. 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* (supra), 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

12



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 is 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 an 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. 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

A



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 respondent/builder 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.

19. It is pleaded on behalf of respondent/builder 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*

PA



- 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.*
20. 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 an 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;*
21. 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.



22. 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.
23. It is evident from the perusal of section 2(4)(I)(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.
24. 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

A





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.

25. 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

A



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.

26. The money was taken by the builder as deposit in advance against allotment of immovable property and its possession was to be offered

1a



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.

27. 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 allottee 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 complainant besides initiating penal proceedings. So, the amount paid by the complainant 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.
28. 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 15.11.2017, the possession of the subject unit was to be delivered within a period of 54 months with a grace period of 6 months, from 1 September 2017, therefore, the due date of possession comes out to be i.e., 01.09.2022. The assured return is payable to the allottees on account of provisions in the BBA. The assured return in this



case is payable as per "clause 32 of the agreement". Clause 32 of the agreement to sell clearly mentioned that the company has agreed to pay Rs.64,891/- per month by way of assured return to the allottee from 25.02.2017 till the date of issue of notice of possession of the unit. The said clause further provides that it is the obligation of the respondent promoter to pay the assured returns. It is matter of record that the amount of assured return was paid by the respondent promoter till December 2021 but later on, the respondent refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019. But that Act of 2019 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.

29. The respondent is directed to pay the outstanding accrued assured return amount as per clause 32 of the agreement to sell within 90 days from the date of this order after adjustment of outstanding dues, if any, from the complainant and failing which that amount would be payable with interest @ 8.75% p.a. till the date of actual realization.

- F. II Direct the respondent to not illegally offer possession without completion of construction of the super structure of office block as otherwise the same would be contrary to the terms agreed in the unit buyer's agreement.**
- F. III Direct the respondent to adhere to the terms mentioned in the unit's buyer's agreement along with the annexure A of the agreement and to make offer of possession in compliance of the said terms.**

A



30. The respondent has offered the possession of the unit on 22.02.2022 after receiving the occupation certificate dated 24.12.2021 from the competent authority. The occupation certificate is granted by the competent authority to the promoter only after the completion of the building when the civic infrastructure is complete. Therefore, it is a valid offer of possession.

**F.IV. Award the litigation cost to the tune of Rs.50,000/- in the favour of the complainant.**

31. The complainants are seeking above mentioned relief w.r.t. compensation. Hon'ble Supreme Court of India in case titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. 2021-2022(1) RCR (C), 357* 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 & legal expenses.

**F. Directions of the authority**

32. 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):

*A*

- i. The respondent is directed to pay the arrear of assured return amount as per clause 32 of the agreement to sell from the date the payment of assured return has not been paid i.e., **December 2021 till the date of issue of notice of possession of the unit.**
  - 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 complainant and failing which that amount would be payable with interest @ 8.75% p.a. till the date of actual realization.
  - iii. The respondent shall not charge anything from the complainant which is not the part of the builder buyer agreement.
33. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.
34. Complaints stand disposed of. True certified copy of this order shall be placed in the case file of each matter.
35. File be consigned to registry.

Dated: 19.10.2023

  
(Vijay Kumar Goyal)  
Member  
Haryana Real Estate  
Regulatory Authority,  
Gurugram