BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**4151-2022**
Date of filing:		**15.06.2022**
Date of decision	:	**23.08.2023**

Sh. Madhusudan Kumra
Both R/O: - Bxx-2951, Gurdev Nagar, Ludhiana **Complainant**

Versus

M/S Elan Buildcon Pvt. Ltd.
Regd. Office: H. No. L-1-1100, G/F Sangam Vihar,
Gali No. - 25, New Delhi **Respondent**

CORAM:
Shri. Ashok Sangwan **Member**

APPEARANCE:
Sh. Gaurav Bhardwaj Advocate for the complainant
Sh. Ashwarya Hooda Advocate for the respondent

ORDER

1. The present complaint dated 15.06.2022 has been filed by the complainant/allottee in Form CRA 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 to the allottee as per the agreement for sale executed inter-se the parties.

A. Project and unit 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, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Name and location of the project	ELAN Miracle , Sector 84 , Gurugram
2.	Nature of the project	Commercial
3.	Area of the project	5.92 acre
4.	DTCP License	34 of 2014 dated 12.06.2014
	Valid upto	11.06.2019
	Licensee name	Bajaj Motors Ltd.
5.	RERA registered/ not registered	Registered 190 of 2017 dated 14.09.2017 Valid up to 13.09.2023
6.	Allotment letter	24.09.2019 (page 24 of complaint)
7.	Unit no.	G -004 , ground floor (As per alleged by the complainant.)
8.	Unit admeasuring	1104 sq. ft. (As per alleged by the complainant page 24 of complaint)
9.	Total Area	1403.38 sq. ft.
10.	Application form	19.12.2017 (Page 25 of complaint)
11.	Buyers' agreement	12.03.2020
12.	Possession clause	7.1 The promoter assures to handover possession of the said premises/unit along with ready and complete

		common areas with all specifications, amenities and facilities of the project in place within a period of 48 months from the date of this agreement with an extension of other 12 months.....
11.	Due date of handing over possession	12.03.2024 As the possession clause says 48 months from the date of this agreement on page 47 of complaint
12.	Total sale consideration	Rs.78,35,440 /-
13.	Total amount paid by the complainant	Rs.74,69,147 /- (As alleged by the complainant)
14.	Occupation certificate	15.03.2023 (As per page 21 of the written submission annexure R-17)
15.	Offer of possession for fit outs	07.09.2021 (Page 97 of reply)

B. Facts of the complaint

3. That somewhere around 2017, the respondent advertised about development of its new commercial colony project namely "Elan Miracle" situated in Sector-84, Gurugram Haryana. Believing the representations of the respondent, the complainant booked a unit in the project of the respondent and paid an amount of Rs.5,00,000/- towards the booking of the unit in question.

4. That the respondent on 24.09.2019 issued an allotment letter of retail and commercial unit no. G-004, ground floor admeasuring 1104 sq.ft. of super area was allotted to the complainant under special fixed return payment plan. On 19.07.2017, a letter consisting of terms and conditions

for fixed amount on provisional booking was given by the respondent to the complainant in which a fixed amount of Rs. 42,391/- per month was agreed to be given to the complainant by the respondent. However post-dated cheques upto 31.03.2018 shall be handed over to the applicant upon signing and accepting the letters. On expiry of 31.03.2018, the company would pay fixed amount to the applicant through post-dated cheque subject to clearance of dues as per the payment plan.

5. That the complainant during the period of 2019 contacted the respondent to execute the builder buyer agreement but the respondent failed to execute the same and kept on demanding the money on account of purchase of the said unit. The complainant even vehemently asserted that failing execution of agreement, the complainant shall not make any further payment to the respondent, but the respondent threatened the complainant to cancel the allotment of the said unit and to forfeit the deposited amount. Left with no other option, the complainant kept on paying the amount as and when demanded by the respondent.

6. That almost after more than two year from the date of booking, a builder buyer agreement dated 12.03.2020 was executed between the complainant and the respondent. It is pertinent to mention here that all the payment within 12 months of booking have been paid by the complainant. The total amount paid so far is Rs.74,69,157 against the total sale consideration of Rs. 78,35,440/-.

7. That the respondent issued a letter of assurance in which the respondent stated that the respondent will pay a fixed amount of Rs 40.00 per sq. ft per month after the completion of 36 months with a grace period of 6

months from 01.01.2018 i.e., w.e.f July 2021 to the applicant till the time of offer of possession and if applicant does not make the payment as per the attached plan, then the respondent shall also be entitled to charge interest 21% p.a. for first 60 days and interest @24% after 60 days from the due date of installments. The rate of interest is totally arbitrary and high.

8. That on 07.09.2021, the respondent issued an offer of possession for fit-outs and settlement of dues for the unit no. 004 at the ground floor in which the respondent has stated that the construction has been completed and the occupation certificate for said project has been applied for which means it is not a genuine offer of possession. It is further to note that no offer of possession can be made to the allottee without obtaining occupation certificate from concerned department. The respondent in the said letter also stated the final measurements. The super area of the said unit has been revised from earlier communicated 1104 sq. ft. to 1393 sq. ft. and all the sums payable shall be calculated on the basis of the super area of the said unit i.e., 1393 sq. ft. This provision is clear violation of builder buyer agreement along with the rules made under the RERA Act as no information regarding change in the layout plan has been provided to the complainant.

9. That the complainant on 19.09.2021 sent a mail to the respondent stating that the respondent has intimated an increase in the super area without any prior notice to the complainant and on 09.01.2022, the complainant has communicated that the total amount payable is Rs. 78,35,440/- which includes basic sale price (Rs 66,24,000/-), EDC/IDC, IFMS, car parking out of which Rs.74,69,147 has already been

paid. The only difference of Rs.3,66,293/- remain payable which will be paid only when OC will be received.

10. That the complainant has always been ready to pay the balance amount but due to the increase in the super area without any prior notice and not yet receiving the valid offer of possession, the complainant is not paying the balance amount and rather asking for the clarifications regarding change in the carpet area and also an illegal offer of possession without obtaining occupation certificate.

11. That the respondent has advertised the said unit/ shop as double height shop and the respondent has not changed any floor dimensions or shop height (as per original letter of allotment and RERA BBA) but still unjustifiable raising demand for the incremental super area which is not a part of builder buyer agreement. The complainant after receiving the offer of possession approached the respondent to see the unit in the project and further to enquire about the dimension and calculation of the unit size upon which the respondent representative said that they have constructed a mezzanine floor in the shop due to which carpet area of the unit has been increased. The complainant then asked the respondent to restore the said shop as neither the mezzanine floor was included in the layout plan of the unit nor complainant was informed in regard to the said change in the layout plan. The respondent clearly failed to answer the queries raised by the complainant and rather kept on demanding the balance consideration and further to take possession of the unit.

12. That the complainant requested the respondent to issue fresh letter of offer of possession as per builder buyer agreement and further to make the payment of Rs. 4,41,600/- along with interest on account of assured return at the rate of Rs. 40/- per sq.ft. for the period of 01.07.2021 till 01.05.2022 or its realization and further to make the payment of Rs. 5,06,754/- along with interest on account of fixed amount return at the rate of Rs. 56,306/- per month from August 2021 till April 2022. Hence, this complaint.

C. Relief sought by the complainant:

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

i. **Direct the respondent to issue fresh offer of possession after obtaining occupation certificate from the concerned authority and further to revise the offer of possession by calculating the area of the unit as per builder buyer agreement.**

ii. **Direct the respondent to withdraw the illegal demand on account of increase in super area without any corresponding increase in shop dimensions as per the builder buyer agreement.**

iii. **Direct the respondent to make the payment on account of delay possession charges.**

iv. **Direct the respondent to make the payment of Rs. 40 per sq ft. per month w.e.f July 2021 (as per letter of assurance dated 18.06.2018) amounting to Rs. 4,41,6000/- till actual**

handing over of possession after receiving occupation certificate.

v. **Direct the respondent to make payment on account of fixed amount of Rs. 56,306/- pm till handing over of possession after obtaining occupation certificate.**

D. Reply by the respondent:

14. The respondent has filed the reply on the basis of the following grounds:

15. That the complainant has approached the respondent expressing an interest in the purchase of a commercial unit in the commercial complex being developed by the respondent known as "Elan Miracle", situated in Sector -84, Gurugram and had opted for a special fixed return payment plan.

16. That thereafter, the complainant was allotted a commercial unit measuring 1104 sq. ft. forming part of unit no. G-004 on the ground floor of the Project- ELAN MIRACLE in Sector- 84, Gurugram by the respondent, subject, inter alia, to increase or decrease on the basis of variation in calculation of actual super area of the premises which was to be determined at the time of offer of possession of the premises. The terms and conditions forming part of the application form were duly understood and accepted by the complainant.

17. That the unit no G-004, located on the ground floor of the project was provisionally allotted in favour of the complainant vide allotment letter dated 24.09. 2019. That the buyer's agreement containing detailed terms and conditions of allotment was executed between the respondent and the complainant on 12.03.2020 and duly registered on 13.03.2020.

18. That the construction at site is complete and the respondent has already applied for grant of occupation certificate before Town and Country Planning Department Haryana. Vide letter dated 19.06.2021, the complainant was informed that the respondent had applied for the occupation certificate in respect of the project on 09.06.2021. The complainant was further informed that the final statement of account would be sent by the respondent shortly.

19. That vide offer of possession letter dated 07.09.2021, the respondent offered possession of the unit to the complainant for fit-outs and settlement of dues. The complainant was informed that there was an increase in the super area of the unit allotted, from 1104 sq. ft. to 1393 sq. ft. Consequently, the payments to be made by the complainant stood revised due to the increase in super area. It is pertinent to mention that the respondent has offered the possession of the unit in the project for fit outs at their end so that as and when the occupation certificate is issued by the Town and Country Planning Department, Haryana, the commercial operations from the units can be commenced without there being any loss of time, therefore, keeping in view the interest of all the allottees in mind, the respondent issued offer of possession for fit outs to the allottees in the complex including the complainant.

20. That since the complainant did not come forward to take possession, reminders dated 12.10.2021, second reminder dated 12.,11.2021, third reminder dated 28.12.2021, final reminder dated 08.02.2022, 10.03.2022, 05.04.2022, 09.05.2022, 06.06.2022 and 04.07.2022 for possession were issued by the respondent. That during various meetings when the complainant had visited the office of the respondent, it was

conveyed to the complainant that the super area of the unit is 1403.38 sq. ft. and not 1393 sq. ft.

21. That in terms of Clause 7 of the buyer's agreement, possession of the unit was agreed to be offered to the complainant within 48 months from the date of execution of the buyer's agreement, with grace period of 12 months and subject to force majeure conditions and events beyond the power and control of the respondent. The buyer's agreement was executed on12.03.2020. Hence the respondent has offered possession of the unit to the complainant, well before the agreed timelines for delivering possession.

22. That it is pertinent to mention that at the time of allotment of the said unit, the height of the said unit was initially conceived to be of 4.5 meters. However, the unit is constructed has a Mezzanine Floor and height of the unit is now 6.35 meters. While issuing the letter dated 07.09.2021, the respondent informed the complainant that super area of the unit in question stands revised from 1104 sq. ft. to 1393 sq. ft.

23. That that the super area of the unit is tentative and that the same is determined upon completion of construction. In case of any increase in the super area, the allottees shall have to make payment for such increase and in the event of decrease in super area, the proportionate amount shall stand refunded. The complainant has consented to any additions, amendments, modification of the size, location, dimensions etc. of the unit on account of revision in building plans and have undertaken not to raise any objections to the same. The complainant has conveyed his no objection vide letter dated 16.07.2020 to the revised

plans as well as the resultant increase in area, units, height, number of floors, ground coverage etc.

24. That on account of the increased height of the unit and the existence of a mezzanine level, the super area and the carpet area of the unit have increased. The complainant is liable to make payment for increase in super area of the unit in accordance with the terms and conditions of the buyer's agreement executed by the complainant. The respondent had informed the complainant about the increase in carpet/usage area of the unit in question vide its letter dated 07.09.2021. It is reiterated that the respondent had during his meetings with the respondent had conveyed to the complainant that the super area for the allotted unit is 1403.38 sq. ft. and not 1393 sq. ft.

25. That the complainant was conscious and aware that the respondent was in the process of applying for revision of the building plans with the competent authority and that the dimensions, location, area etc. of the unit allotted to them might undergo a change. In fact, the complainant has conveyed his no objection vide letter dated 16.07.2020 to the revised plans as well as the resultant increase in area, units, height, number of floors, ground coverage etc. The complainant is contractually bound to make payment of the demanded amounts and take possession of the unit in question. The false and frivolous complaint is liable to be dismissed with costs.

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.

E. Jurisdiction of the authority

27. The authority observed that it 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 allottees as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

> ***Section 11(4)(a)***
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
> *The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.*

Section 34-Functions of the Authority:

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

30. So, in view of the provisions of the Act of 2016 quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.'

F. Findings on the relief sought by the complainant:

F.I Direct the respondent to issue fresh offer of possession after obtaining occupation certificate from the concerned authority and further to revise the offer of possession by calculating the area of the unit as per builder buyer agreement.

31. The authority would express its views regarding the concept of a "valid offer of possession". It is necessary to clarify this concept because, after a valid and lawful offer of possession, the liability of the promoter for the delayed offer of possession comes to an end. On the other hand, if the possession is not valid and lawful, the liability of the promoter continues till a valid offer is made and the allottee remains entitled to receive interest for the delay caused in handing over of possession. The Authority after a detailed consideration of the matter has concluded that a valid offer of possession must have the following components:

a. The possession must be offered after obtaining an occupation certificate/completion certificate.

b. The subject unit must be in a habitable condition.

c. Possession should not be accompanied by unreasonable additional demands.

32. In the proceedings of the day dated 23.08.2023, it was inadvertently mentioned that the offer of possession is not dependent upon grant of completion certificate and occupation certificate. Whereas it shall be read as that *'the offer of possession is dependent upon grant of completion certificate and occupation certificate'*.

33. In the present case, the first and foremost condition of a valid offer of possession is not fulfilled. The occupation certificate in respect of the project in question where the subject unit is situated was granted by the concerned authority on 15.03.2023 and the same is evident from page 21 of the written submissions filed by the respondent. The respondent offered the possession for fit out of the allotted unit before obtaining occupation certificate i.e., on 07.09.2021. Hence, the said offer is not a valid offer of possession. Therefore, the respondent is directed to offer the possession to the complainant within 30 days from the date of this order.

F.II Direct the respondent to withdraw the illegal demand on account of increase in super area without any corresponding increase in shop dimensions as per the builder buyer agreement.

34. In the present case, the respondent allotted the unit of area admeasuring 1104 sq. ft. but while offering the possession for fit outs to the complaint on 07.09.2021, the super area of the unit was revised from 1104 sq. ft. to 1304 sq. ft. by 26%. Thereafter, the respondent has admitted in its reply that during the meetings, the respondent had conveyed to the complainant that the super area for the allotted unit is 1403.38 sq. ft. and

not 1393 sq. ft. Thus, the area of the allotted unit has been increased by 27.11%.

35. In the present case, clause 31 deals with alteration/modification and the same is reproduced as under for ready reference:

> **"31. ALTERATION/MODIFICATION**
>
> *In case of any alteration / modifications resulting in change in the Super Area of the Said Unit any time prior to and up on the grant of occupation certificate is more than *20%, the Developer shall Intimate In writing to the Allotte.(s) the changes thereof and the resultant change, if any, In the Total Consideration of the Said Unit to be paid by the Allottee(s) and the Allottee(s) agrees to deliver to the Developer written consent or objections to the changes within thirty (30) days from the date of dispatch by the Developer. In case the Allottee(s) does not send his written consent, the Allottee(s) shal be deemed to have given unconditional consent to all such alterations / modifications and for payments, if any, to be pald in consequence thereof. If the Allottee(s) objects in wriling indicating his non-consent / objections to such alterations / modifications then in such case alone the Developer may at Its sole discretion decide to cancel this Agreement without further notice and refund the money received from the Allottee(s) (less eamest money & non-refundable amounts) within ninety (80) days from the date of receipt of funds by the Developer from resale of the said unit. Upon the decision of the Developer to cancel the Said Unit, the Developer shall be discharged from all its obligations and liabilitles under this Agreement and the Allottee(s) shall have no right, interest or claim of any nature whatsoever on the Said Unit and the Parking Space(s), it allotted. Should there be any addition of a Floor or part thereof In the Unit, consequent to the provisions of the Clause-18 of this BBA, then the Actual Area and consequently the Super Area of the said Unit shall stand increased accordingly and the Allottae hereby gives his uncondlional acceptance to the same"*

36. As per letter dated 16.07.2020 which is placed by the respondent in his reply at page 115, the complainant has conveyed that the he has no objection with regard to revision of layout plan / Building Plans of the said Project with/without increase in FAR.

37. Clause 31 of the buyer's agreement is in the utter violation of the model agreement laid down in the Rules of 2016 and has been included by the

respondent- builder being in a dominant position as the same has been held in a similar matter in its judgement by the Hon'ble Supreme Court of India in civil appeal no. 5785 of 2019 titled as ***IREO Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna & Ors. dated 11.01.2021*** .

38. The authority observes that the builder buyer agreement in the present case was executed on 12.03.2020 i.e., after coming into force of the Act. Any increase in area beyond 5% of the carpet area is not justified keeping in view clause 1.7 of the model agreement laid down in the Haryana Real Estate (Regulation and Development) Rules, 2017. Thus, the authority does not place reliance on the letter dated 16.07.2020 signed by the complainant. Accordingly, the complainant shall be liable to make the payment for increase in area up to 5% of carpet area and for any increase beyond 5% of the super area, the complainants cannot be made liable to make payment.

F.III Delay possession charges

39. In the present complaint, the complainant intends to continue with the project and is seeking possession of the subject unit and delay possession charges. The buyer's agreement was executed between the parties on 12.03.2020. According to clause 7.1 of the agreement, the promoter assured to handover possession of the said premises/unit along with ready and complete common areas with all specifications, amenities and facilities of the project in place within a period of 48 months from the date of this agreement with an extension of other 12 months and the due date comes out to be 12.03.2024. Therefore, from the due date, it is understood that there is no delay in the present

complaint. Hence, no case of delay possession charges is made out under proviso to section 18(1) of the Act.

F.IV Assured return

40. While filing the petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 12.03.2020, the complainant has also sought assured returns on monthly basis as per terms and conditions for fixed amount of Rs. 42,391/- per month, till the date of issuance of offer of possession by the company. It was also agreed according to the letter of assurance dated 18.06.2018 (Page 74 of complaint) that the company would pay a fixed amount of Rs. 40 per sq. ft. per month after the completion of 36 months with a grace period of 6 months from 01.01.2018 i.e w.e.f July 2021 (If possession is not offered by July 2021) to the applicant till the time of offer of possession. It is pleaded by the complainant that the respondent has not complied with the terms and conditions of the agreement.

41. 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 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 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

42. 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 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.

43. 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.

44. 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.

45. It is not disputed that the respondent is a real estate developer, and it had 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 complainant. 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.

46. 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 12.03.2020, the possession of the subject unit was to be delivered within stipulated time i.e., 12.03.2024. The assured return in this case is payable on monthly basis for fixed amount of Rs. 42,391/- per month, till the date of issuance of offer of possession by the company. It was also agreed according to the letter of assurance dated 18.06.2018 that the company would pay a fixed amount of Rs. 40 per sq. ft. per month after the completion of 36 months

with a grace period of 6 months from 01.01.2018 i.e w.e.f July 2021 (If possession is not offered by July 2021) to the applicant till the time of offer of possession subject to timely payment.

47. Hence, the authority directs the respondent/promoter to pay assured return of Rs. 42,391/- per month, till the date of valid offer of possession plus two months after obtaining occupation certificate or the date of actual handing over of possession, whichever is earlier; by the company and would pay a fixed amount of Rs. 40 per sq. ft. per month w.e.f. July 2021 to the applicant till the time of offer of possession subject to timely payment.

G. Directions of the authority

48. Hence, the Authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

i. The respondent is directed to pay the arrears on amount of assured return on monthly basis as per terms and conditions for fixed amount of Rs. 42,391/- per month till the date of valid offer of possession plus two months after obtaining occupation certificate or the date of actual handing over of possession, whichever is earlier. Further, the company would pay a fixed amount of Rs. 40 per sq. ft. per month after the completion of 36 months with a grace period of 6 months from 01.01.2018 i.e w.e.f July 2021 to the applicant till the time of offer of possession subject to timely payment.

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

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

49. Complaint stands disposed of.

50. File be consigned to registry.

(Ashok Sangwan)
Member
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 23.08.2023