BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.:	**6474 of 2022**
First Date of Hearing:	**07.12.2022**
Order reserved on:	**13.07.2023**
Order Pronounced on:	**31.08.2023**

Mr. Ganga Dhar
R/o: - 124-B, Arjun Nagar, Delhi-110029 **Complainant**

Versus

NINANIYA ESTATES LIMITED
Office at: Prism Tower, Tower A, 6th floor, Sector 2, Gwal Pahari, Gurgaon - 122003 **Respondent**

CORAM:
Shri Vijay Kumar Goyal **Member**

APPEARANCE:

Sh. Vikash Singh (Advocate)	Complainant
Sh. Shagun Singla (Advocate)	Respondent

ORDER

1. This complaint has been filed by the complainant/allottees 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 there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project details

2. The particulars of unit, 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. N.	Particulars	Details
1.	Name of the project	PRISM HOTELS & SUITS, Gwal Pahari, Sector-22, Gurgaon
2.	Project area	20876.97 sq. yds
3.	Nature of the project	Commercial
4.	RERA Registered/ not registered	Not registered
5.	Unit no.	1106, 11th floor (Page no. 37 of the complaint)
6.	Unit area admeasuring	825 sq. ft. (super area) (Page no. 37 of the complaint)
7.	Date of application form	12.11.2014
8.	Allotment Letter	12.11.2014
9.	Date of execution of BBA and MoU	12.11.2014 (Page no. 35 and 48 of the complaint)
10.	Possession clause (As per agreement to sell)	**6. "COMPLETION OF THE BUILDING"** **In 6(i) no specific date is mentioned but is written as earliest possible, whereas,** **As per 6 (ii)** In case the building is not completed within 24 months / indefinitely delayed, then it will be

		the Buyer's option whether to accept the cancellation or claim back the amount paid with interest @ 24% (which is being paid on monthly basis)
11.	Total sale consideration	41,25,000/- excluding all applicable tax (Page no. 35 of complaint)
12.	Amount paid by the complainants	Rs.40,00,000/- (As pleaded by the complainant on page no. 34 of complaint, where 29,50,000 is by cash and 10,50,000 by cheque)
13.	Due date of possession	12.11.2016 (Calculated from the date of execution of builder buyer's agreement i.e., 12.11.2014)
14.	Occupation certificate /Completion certificate	20.04.2017 (Page no. 45 of reply)
15.	Offer of possession	Not available

B. Fact of the complaint

3. The complainant has made the following submissions: -

I. That the complainant on 12.11.2014 had booked a suite bearing no. 1106 in the project called as "Prism Hotels & Suits" admeasuring approximately 825 sq. ft. and the respondent was responsible for development and conceptualization of Prism Hotel & Suites claiming to Five Star Hotel and Suites Complex admeasuring 20876.97 sq. yds.

approx. in the revenue estate of Gwal Pahari, Distt. Gurgaon (along the Gurgaon – Faridabad Scheduled Road).

II. That the complainant on the request of the respondent had made the payment of Rs. 40,00,000/- at the time of booking and the respondent had assured that the complainant will get an investment return of Rs. 1,00,000/- per month for a maximum period of 36 months from the date of booking and if there is delay the complainant will get assured return amount till the fully furnished said unit is handed over to the complainant.

III. That the complainant and the respondent has again agreed in MoU dated 12.11.2014 that the complainant would get investment return of Rs. 90,000/- per month till the fully furnished said unit is handed over to him.

IV. That as per the terms and conditions of the buyer's agreement and MoU it was agreed that the complainant have all the rights to transfer the said unit to third party and further the complainant has right to recover the assured investment return till the time of possession is not handed over to the complainant of said unit.

V. That the complainant visited the respondent many a time however the respondent refused to pay the assured return. The respondent neither handed over the possession of the said unit nor paying the amount assured at the time of booking.

VI. That the due date of delivery of possession of the said units in question was November 2016. The complainant after passing of the due date for delivery of possession visited the office of the respondent on various occasions and had requested the respondent's official multiple times to

handover the possession and for the payments of assured investment return in terms of the said agreement and MoU. The respondent's official have kept on evading the queries raised by the complainant on one pretext or the other, in order to leave no option for the complainant to back out of the transaction.

VII. That the aforesaid act of the respondent is violative of Section 13 of the Act, 2016. Furthermore, it is submitted that the aforesaid practice has been adopted by the builders/developer/promoters including the Respondent invariably in order to gain an undue advantage and assume dominance over an intending purchaser. The aforesaid provision has been incorporated in the Act in order to curb such malpractices of obtaining part or full consideration amount prior to execution of the Buyer's Agreement.

VIII. That the complainant on the instructions of the respondent had made around 97% payment as demanded prior of booking the said unit to the respondent.

IX. That the due date for delivery of possession of the said units in terms of the buyer agreement was 11.11.2016. However, the possession has not been offered to complainant by the respondent till date.

X. That the complainant consequently visited the site of the said project in order to ascertain the status of construction on site and possession of the said unit. It was found that the construction of the said project is complete and still the possession of the said suite is not handed over and the amount of assured investment return is also not paid by the respondent to the complainant. The complainant enquired for the status of possession, the respondent had informed that the respondent

has not received occupancy certificate from the competent authority and the same is in process. Further, it was informed that once the occupancy certificate is issued the respondent will hand over the possession and the amount of assured investment return will be paid at the time of final adjustment, if any. The complainant lastly visited the office of the respondent on 25.08.2022 in order to ascertain the status of project, possession and payment towards assured return. However, the complainant again received the same answer about waiting of occupancy certificate from the authority.

XI. That the respondent as per law is liable to fairly and transparently make available and disclose complete information to the complainant about the status of construction, possession and investment return amount but there has been a delay of more than 7 years in delivery of possession of the said unit to the complainant.

XII. That the respondent cannot hold the possession of the said unit for indefinite period without paying the assured return to the complainant.

XIII. That the respondent has deliberately not fulfilling its obligation nor has it complied with the terms and conditions as laid down in the buyer's agreement and MoU dated 12.11.2014. The respondent did not have intention to handover the said unit nor payment towards assured return.

XIV. That the complainant has been subjected to acute monetary loss, inconvenience, mental agony and harassment by aforesaid acts of the respondent. It is submitted that the complainant is entitled to compensation on account of mental agony and harassment caused to the complainant. The complainant reserves his right to seek

compensation apart from the reliefs claimed hereunder from the appropriate forum.

XV. That the complainant had personally inspected the site of the said project on 08.05.2022 and came to know that the said project is complete and still the possession is not handed over.

C. Relief sought by the complainant

4. The complainants have sought the following relief sought: -

i. Direct the respondent to deliver the possession of the said unit in question as per terms in BBA and MOU dated 12.11.2014.

ii. Direct respondent to pay a sum of Rs. 1,10,000/- to complainant as reimbursement of legal expenses.

iii. Direct respondent to pay interest/charges towards delay in possession to the complainant for the period of delay from November 2017.

iv. Direct respondent to pay pending assured investment return as per BBA and MoU dated 12.11.2014

v. Direct respondent to deliver copy of occupancy certificate, Deed of Declaration and copies of all approvals from the competent authorities to the complainant.

vi. Direct respondent not to charge holding charges, maintenance charges, till the delivery of said unit in question, complete in all respects.

D. Reply by the respondent

5. The respondent contested the complaint on the following grounds:

a. That the respondent is a company, registered under the Companies Act, 1956 having its registered office at PRISM TOWER, Tower- A, 6th Floor, Sector- 2, Gwal Pahari, Gurugram - Faridabad Road, Gurugram, Haryana - 122003.

b. That at the very outset it is submitted that the present complaint is not maintainable or tenable in the eyes of law. The complainant has misdirected himself in filing the above captioned complaint before this Authority as the reliefs being claimed by the complainant cannot be said to fall within the realm of jurisdiction of this Authority. It is pertinent to mention here that for the fair adjudication of grievance as alleged by the complainant requires detailed deliberation by leading the evidence and cross-examination, thus only the Civil Court has jurisdiction to deal with the cases required detailed evidence for proper and fair adjudication.

c. That the complainant came to the officials of the respondent for booking a unit in one the most coveted projects of the respondent company and complainant submitted the application form and paid the booking amount accordingly. That at the time of signing the application form, the respondent officials clarified and explained in detail all the terms and conditions of the application form. Thus, the complainant is not entitled for the relief which he is seeking by the way of the present complaint as he is already seeking the claim of assured return in respect of the unit in question and the present petition is not maintainable under the provisions of the Act, 2016.

d. That there is a complete lack of evidence to prove any of the false allegations as raised by the complainant moreover the complainant has already received a sum of Rs. 25,68,351/- towards the payment of

assured return in respect of the unit in question. Thus, the complainant is not entitled for the relief which he is seeking by the way of the present complaint as he is already seeking the claim of assured return in respect of the unit in question.

e. That it is pertinent to mention that the present complaint is not maintainable before this Authority as it is crystal clear from reading the complaint that the complainant is not an 'Allottee', but is an 'Investor', who is only seeking assured return from the respondent, by way of present petition, which is not maintainable under the provisions of the Act, 2016.

f. That in view of the judgment and order dated 16.10.2017 passed by the Maharashtra RERA Authority in the complaint titled ***Mahesh Pariani* vs. *Monarch Solitaire* order, Complaint No: CC006000000000078 of 2017** wherein it has been observed that in case where the complainant has invested money in the project with sole intention of gaining profits out of the project, then the complainant is in the position of co-promoter and cannot be treated as 'allottee'. Thus, in view of the aforesaid decision, the complainant could not and ought not have filed the present complaint being a co-promoter.

g. That in the matter of ***Brhimjeet &Ors* vs. *M/s Landmark Apartments Pvt. Ltd.* (Complaint No. 141 of 2018)**, this Hon'ble Authority has taken the same view as observed by Maharashtra RERA in Mahesh Pariani (supra). Thus, the RERA Act, 2016 cannot deal with issues of assured return. Hence, the complaint deserves to be dismissed at the very outset.

h. That further in the matter of ***Bharam Singh &Ors* vs. *Venetian LDF Projects LLP* (Complaint No. 175 of 2018)**, the Hon'ble Real Estate Regulatory Authority, Gurugram upheld its earlier decision of not entertaining any matter related to assured returns.

i. That it is pertinent to mention that the complainant's act is also violative of the provisions of Banning of Unregulated Deposit Ordinance,2019 as she is falling within the definition of Deposit Takers", as per the section 2(6) of 'The Banning of Unregulated Deposit Schemes Ordinance, 2019 and the said ordinance bans such deposits, thereby also bars such assured returns.

j. That the complainant is attempting to seek an advantage of the slowdown in the real estate sector, and it is apparent from the facts of the present case that the main purpose of the present complaint is to harass the respondent by engaging and igniting frivolous issues with ulterior motives to pressurize the respondent. Thus, the complaint is without any basis and no cause of action has arisen till date in favour of the complainant and against the respondent and hence, the complaint deserves to be dismissed.

k. That from the bare reading of the buyer's agreement executed between the parties, it is clearly visible that the intention of the complainant has never been to take possession and only to gain assured returns. The respondent has already completed the unit/project in question. Moreover, the Respondent has already received the occupation certificate in respect of the unit in question on 20.04.2017 which is much prior to the coming of HRERA rules and regulations.

l. That the sole motive of the complainant is to get profits from the project by the way of assured returns scheme. Thus, the Complainant shall be treated as co-promoter in the project, in no eventuality, the Complainant may be called as the "Allottee" before this Authority under the definition and provisions of RERA Act, 2016 and, thus, on this ground alone, the present complaint is not maintainable in the eyes of law before this Authority and is liable to be rejected.

m. That it further submitted that if there was any alteration in the timeline of the completion of the project, it was beyond the control of the respondent owing to the following reasons:

- Policies regarding availability of FAR based on various factors/ grounds and conditions including TOD and TDR.
- Revised taxation policies including GST, Brokerage Policies.
- Environmental restrictions such as use of untreated water and frequent stoppage of construction due to pollution control measure on environment etc.
- Increase in the cost of construction material.
- Two stage process of environmental clearance which takes 2 to 3 years.
- Labour strikes and shortage of construction workers, construction material and even the contractor hired for the construction works was not performing as per the scope of the project work and the Respondent had to send constant reminders to the contractor regarding slow pace of work and workforce deployed, which was resulting in timeline alterations for the timely completion of project.

- Statutory construction ban across the NCR region during the winter season, resulting in slow down of the project.
- Many investors in the project had defaulted in timely payment of instalments due to which it became difficult for the Respondent to adhere to the timelines for the completion of the project.
- The connecting roads to the project were not timely acquired by the Government authorities, thus the construction equipment, raw material and labour ingress became a difficult task. The same was a major component which lead to the changed timelines in the completion of the project since the construction and development works became slow and delayed.
- Demonetisation also resulted in delaying the timely completion of project. Moreover, in the matter of ***Anoop Kumar Rath Vs M/S ShethInfraworld Pvt. Ltd.*** in appeal no. AT00600000010822 vide order dated 30.08.2019 the Maharashtra Appellate Tribunal while adjudicating points be considered while granting relief and the spirit and object behind the enactment of the Act, 2016 in para 24 and para 25 discussed in detail the actual purpose of maintaining a fine balance between the rights and duties of the promoter as well as the allottee. The Ld. Appellate Tribunal vide the said judgment discussed the aim and object of the Act, 2016.

n. That since the hurdles faced by the respondent company were beyond the control of the respondent, no fault can be found qua the respondent. It is further submitted that, the alteration in the timeline was beyond

the control as indicated in previous paragraph. That it is extremely important to bring to the notice of this Authority that the alteration in the timeline of development of project in question was due to external, unseen, and unavoidable reasons and there was no fault on part of the Respondent Company.

o. That there was an instant decline in the real estate market within the one year of the launch of the project in question. It is important to mention here that while executing the construction of such a large-scale project a continuous and persistent flow of fund is the essence of smooth operations. However, this situation prevailed and continued for a longer period. Moreover, in the year 2018, Non-Banking Financial Company Crisis also led to drying up the source of funding for the sector which further led to alteration in the timeline of the completion of the project.

p. That the alterations in the timeline for the completion of the project cannot be attributed to the respondent company and is result of external factors which were beyond the of control of the respondent, which is completely absurd since, the timeline as postulated within the agreement are intended and tentative and based on the timely payments made by the investors, force majeure etc. That the Clause 5.2 of the buyer's agreement clearly in explicit terms states that the estimated time of the completion of the project may change due to Force Majeure or by the reasons beyond the control of the company.

q. That it is further submitted that the main relief of the Complainant is just for the non-payment of assured returns, interest and compensation, which shows the intent of the Complainant was limited to earn profits

and not to use the unit in question for any personal purpose for herself. Thus, the complainant cannot be held as "Allottee" under definition given in the Act, 2016 and the complaint is also liable to be dismissed.

r. That it is brought to the knowledge of the Authority that the complainant is guilty of placing untrue facts and is attempting to hide the true colour of the intention of the complainant. Before buying the property, the complainant was aware of the status of the project and the fact that the commercial unit was only intended for lease and never for physical possession.

s. That, it is evident that the entire case of the complainant is nothing but a web of lies and the false and frivolous allegations made against the respondent are nothing but an afterthought, hence the complaint filed by the complainant deserves to be dismissed with heavy costs.

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 submission made by the parties.

E. Jurisdiction of the Authority

7. The respondent has raised a preliminary submission/objection the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below

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.

E. 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 complainants at a later stage.

11. Further, the authority has no hitch in proceeding with the complaint and to grant a relief of refund in the present matter in view of the judgement passed by the Hon'ble Apex Court in ***Newtech Promoters and Developers Private Limited Vs State of U.P. and Ors. 2020-2021 (1) RCR (C), 357 and*** *reiterated in case of* ***M/s Sana Realtors Private Limited & other Vs Union of India & others SLP (Civil) No. 13005 of 2020 decided on 12.05.2022***wherein it has been laid down as under:

"86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view

the collective reading of Section 71 read with Section 72 of the Act. if the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

12. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the cases mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest for the delayed delivery of possession.

F. Findings on objections raised by the respondent:

F.I Objection regarding the complainants being investors.

13. The respondent has taken a stand that the complainant is the investor and not consumer. Therefore, he is not entitled to the protection of the Act and are not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumer of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumer of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time the preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a

complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyers and paid total price of Rs.40,00,000/- to the promoter towards purchase of an apartment in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

14. In view of the above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainants are allottees as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred to in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr***. has also held that the concept of investor is not defined or referred to in the Act.

Thus, the contention of the promoter that the allottee being investor is not entitled to protection of this Act also stands rejected.

F. Findings on the relief sought by the complainants:

F.I Assured return

15. While filing the petition besides delayed possession charges of the allotted unit as per memorandum of understanding, the claimant has also sought assured returns on monthly basis as per memorandum of understanding at the rates mentioned therein till the fully furnished suite is handed over to the buyer. It is pleaded that the respondent has not complied with the terms and conditions of the MoU. 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 (herein after referred to as the Act of 2019). But that Act does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act. However, the plea of respondent is otherwise and who took a stand that though it paid the amount of assured returns upto the year 2018 but did not pay the same amount after coming into force of the Act of 2019 as it was declared illegal.

16. The Act of 2016 defines "agreement for sale" means an agreement entered into between the promoter and the allottee [Section 2(c)]. An agreement for sale is defined as an arrangement entered between the promoter and allottee with freewill and consent of both the parties. An agreement defines the rights and liabilities of both the parties i.e., promoter and the allottee and marks the start of new contractual relationship between them. This contractual relationship gives rise to future agreements and transactions

between them. The different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral part of this agreement is the transaction of assured return inter-se parties. The "agreement for sale" after coming into force of this Act (i.e., Act of 2016) shall be in the prescribed form as per rules but this Act of 2016 does not rewrite the "agreement" entered between promoter and allottee prior to coming into force of the Act as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors., (Writ Petition No. 2737 of 2017) decided on 06.12.2017.*** Since the agreement defines the buyer-promoter relationship therefore, it can be said that the agreement for assured returns between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate regulatory authority has complete jurisdiction to deal with assured return cases as the contractual relationship arise out of agreement for sale only and between the same parties as per the provisions of section 11(4)(a) of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the agreement for sale till the execution of conveyance deed of the unit in favour of the 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

17. 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 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 an 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.

18. 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 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.

19. A perusal of the above-mentioned definition of the term 'deposit' shows that it has been given the same meaning as assigned to it under the Companies Act, 2013 and the same provides under section 2(31) includes any receipt by way of deposit or loan or in any other form by a company but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India. Similarly rule 2(c) of the Companies (Acceptance of Deposits) Rules, 2014 defines the meaning of deposit which includes any receipt of money by way of deposit or loan or in any other form by a company but does not include.

i. as a advance, accounted for in any manner whatsoever, received in connection with consideration for an immovable property

ii. as an advance received and as allowed by any sectoral regulator or in accordance with directions of Central or State Government.

20. 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.

21. 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.

22. It is evident from the perusal of section 2(4)(l)(ii) of the above-mentioned Act that the advances received in connection with consideration of an immovable property under an agreement or arrangement subject to the condition that such advances are adjusted against such immovable property as specified in terms of the agreement or arrangement do not fall within the term of deposit, which have been banned by the Act of 2019.

23. Moreover, the developer is also bound by promissory estoppel. As per this doctrine, the view is that if any person has made a promise and the promisee has acted on such promise and altered his position, then the person/promisor is bound to comply with his or her promise. When the builders failed to honour their commitments, a number of cases were filed by the creditors at different forums such as ***Nikhil Mehta, Pioneer Urban Land and Infrastructure*** which ultimately led the central government to enact the Banning of Unregulated Deposit Scheme Act, 2019 on 31.07.2019 in pursuant to the Banning of Unregulated Deposit Scheme Ordinance, 2018. However, the moot question to be decided is as to whether the schemes floated earlier by the builders and promising as assured returns on the basis of allotment of units are covered by the abovementioned Act or not. A similar issue for consideration arose before Hon'ble RERA Panchkula in case ***Baldev Gautam VS Rise Projects Private Limited (RERA-PKL-2068-2019)*** where

in it was held on 11.03.2020 that a builder is liable to pay monthly assured returns to the complainants till possession of respective apartments stands handed over and there is no illegality in this regard.

24. The definition of term 'deposit' as given in the BUDS Act 2019, has the same meaning as assigned to it under the Companies Act 2013, as per section 2(4)(iv)(i) i.e., explanation to sub-clause (iv). In pursuant to powers conferred by clause 31 of section 2, section 73 and 76 read with sub-section 1 and 2 of section 469 of the Companies Act 2013, the Rules with regard to acceptance of deposits by the companies were framed in the year 2014 and the same came into force on 01.04.2014. The definition of deposit has been given under section 2 (c) of the above-mentioned Rules and as per clause xii (b), as advance, accounted for in any manner whatsoever received in connection with consideration for an immovable property under an agreement or arrangement, provided such advance is adjusted against such property in accordance with the terms of agreement or arrangement shall not be a deposit. Though there is proviso to this provision as well as to the amounts received under heading 'a' and 'd' and the amount becoming refundable with or without interest due to the reasons that the company accepting the money does not have necessary permission or approval whenever required to deal in the goods or properties or services for which the money is taken, then the amount received shall be deemed to be a deposit under these rules. However, the same are not applicable in the case in hand. Though it is contended that there is no necessary permission or approval to take the sale consideration as advance and would be considered as deposit as per sub-clause 2(xv)(b) but the plea advanced in this regard is devoid of merit. First of all, there is exclusion clause to section 2 (xiv)(b) which

provides that unless specifically excluded under this clause. Earlier, the deposits received by the companies or the builders as advance were considered as deposits but w.e.f. 29.06.2016, it was provided that the money received as such would not be deposit unless specifically excluded under this clause. A reference in this regard may be given to clause 2 of the First schedule of Regulated Deposit Schemes framed under section 2 (xv) of the Act of 2019 which provides as under:-

(2) The following shall also be treated as Regulated Deposit Schemes under this Act namely:-

(a) deposits accepted under any scheme, or an arrangement registered with any regulatory body in India constituted or established under a statute; and

(b) any other scheme as may be notified by the Central Government under this Act.

25. 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.

26. 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.

27. On consideration of documents available on record and submissions made by parties, the complainants have sought assured return on monthly basis as per one of the provisions of memorandum of understanding at the agreed rates till the fully furnished suite is handed over to the buyer. It was also agreed that as per MoU, the developer would pay assured return to the buyer Rs. 90,000/-per month for a period of 36 months up to 13.11.2017. 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 now, the proposition before it is as to whether the allottee who is getting/entitled for assured return even after expiry of due date of possession, can claim both the assured return as well as delayed possession charges?

28. To answer the above proposition, it is worthwhile to consider that the assured return is payable to the allottees on account of a provision in the BBA or MoU. The assured return has been committed by the promoter is Rs. 90,000/- per month which is more than reasonable in the present circumstances. If we compare this assured return with delayed possession charges payable under proviso to section 18(1) of the Act, 2016, the assured return is much better i.e., assured return in this case is payable a Rs. 90,000/-

per month whereas the delayed possession charges are payable approximately Rs. 35,834/- per month. By way of assured return, the promoter has assured the allottee that he would be entitled for this specific amount till completion of construction of the said building. Accordingly, the interest of the allottees is protected even after the due date of possession is over as the assured returns are payable from the first 3 years after the date of completion of the project or till the date of said unit/space is put on lease whichever is earlier. The purpose of delayed possession charges after due date of possession is served on payment of assured return after due date of possession as the same is to safeguard the interest of the allottees as their money is continued to be used by the promoter even after the promised due date and in return, they are to be paid either the assured return or delayed possession charges whichever is higher.

29. Accordingly, the promoter is liable to pay assured return of the unpaid period as specified under the agreement and MoU dated 12.11.2014.

G. Directions of the authority:

30. 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 promoter as per the function entrusted to the authority under section 34(f):

i. The respondent is directed to pay the arrears of amount of assured return at agreed rate to the complainant(s) from the date the payment of assured return has not been paid till handing over of the possession of fully furnished suite.

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 complainant(s) which is not the part of the agreement of sale.

iv. The respondent is directed to handover possession of the unit/spaces in question and execute sale deed in favour of the complainant on payment of stamp duty and registration charges within 90 days as occupation certificate is already granted by the competent authority and provide copy of occupancy certificate and copy of all approvals from the competent authorities to the complainant.

v. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

31. Complaints stand disposed of.

32. File be consigned to registry.

(Vijay Kumar Goyal)
Member
Haryana Real Estate Regulatory Authority, Gurugram
Dated: 31.08.2023