BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : **741 of 2022**
Date of filing complaint : **22.02.2022**
Date of decision : **05.12.2023**

	Mr. Kaushlendra Pandey & Mrs. Rima Pandey **Both R/O:** - 2850/69, E-2, Molarband Extension, Badarpur, New Delhi-110044.	**Complainant**
	Versus	
	M/s Neo Developers Private Limited (through its Managing Director and other Directors) **Regd. Office at:** 1205-B, 12th Floor- B, Signature Tower, South City – 1, NH-8, Gurugram- 122001	**Respondent**

CORAM:	
Shri Ashok Sangwan	**Member**
Shri Sanjeev Kumar Arora	**Member**
APPEARANCE:	
Ms. Daggar Malhotra	Advocate for the complainants
Ms. Ankita Saikia, Sh. Gunjan Kumar and Sh. Pankaj Chandola	Advocates for the respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottees as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. N.	Particulars	Details
1.	Name of the project	"Neo Square", Sector 109, Gurugram
2	Project area	2.71 acres
3	Nature of the project	Commercial complex
4	DTCP license no. and validity status	102 of 2008 dated 15.05.2008 valid upto 14.05.2024
5	RERA Registered/ not registered	109 of 2017 dated 24.08.2017 valid upto 23.08.2021 plus 6 months of extension due to COVID-19 = 23.02.2022

6	Unit no.	Priority no. 62, 5th floor or similar (As per page no. 58 of complaint)
7	Unit area admeasuring	550 sq. ft.
8	Date of execution of agreement to sell	11.08.2017 (Page 55 of the complaint)
9	Date of execution MoU	11.08.2017 (As per page no. 51 of reply)
10	Possession clause as per MoU	3. The company shall complete the construction of the said **Building / Complex, within which the said space is located within 36 months from the date of execution of this Agreement or from the start of construction, whichever is later and apply for grant of completion Occupancy Certificate**. The Company on grant of Occupancy. Completion Certificate, shall issue final letters to the Allottee(s) who shall within 30 (thirty) days, thereof remit all dues
11	Date of start of construction	The Authority has decided the date of start of construction as 15.12.2015 which was agreed to be taken as date of start of construction for the same project in other matters. CR/1329/2019.

12	Due date of possession	11.08.2020 (Calculated from date of execution of MoU being later)
13	Assured Return Clause	4. The Company shall pay a monthly assured return of **Rs.35,750/-** on the total amount received with effect from **12-August-2019** before deduction of Tax at Source, cess or any other levy which is due and payable by the Allottee(s) to the Company and the balance sale consideration shall be payable by the Allottee(s) to the Company in accordance with the Payment Schedule annexed as Annexure-I. The monthly assured return shall be paid to the Allottee(s) until the commencement of the first lease on the said unit. This shall be paid from the effective date.
14	Total sale consideration	Rs. 20,54,400/- (As per payment schedule at page no. 82 of the complaint)
15	Amount paid by the complainant	Rs. 25,88,432/- (As stated by the complainant)
16	Assured return amount paid	Rs.2,60,700/- till March 2020 (As per page 13 of complaint)

17	Occupation certificate	Not obtained
18	Offer of possession	Not offered

B. Facts of the complaint

3. That on 28.04.2017, the complainant booked a Food Court unit in the said project by paying an amount of Rs. 10,000/- vide instrument bearing no. 050387 dated 28.04.2017.

4. That on 29.06.2017, The complainants paid an amount of Rs1,00,000/- /- vide NEFT no. 693689978A1 dated 29.06.2017(HDFC Bank) towards the said purchase of the food court space in the area designated for the food court having super area of Approx. 550 Sq.Ft. and covered area of about 275 sq.ft. and thereafter the company had agreed to allot the said space to the complainant vide the said allotment a unit Priority no.62 having super area 550 (sq ft) in Food Court Area in the project of the respondent.

5. That the complainant contacted the respondent on several occasions regarding wrongful demand of EDC, IDC, VAT etc and also some unfair and arbitrary clauses in the agreement. Also, a clarification was sought on the development of project and the date of delivery. However, no answer was received from the respondent.

6. That from 28.04.2017-till now, As per demand raised by the respondent and as per the payment plan, the complainant paid a sum of Rs. 25,88,432/- towards the said Food Court space from 28.04.2017 till date.

7. That as per the MOU dated 11.08.2017 it was agreed that the possession of the said unit shall be delivered within a period of 36 months from the date of execution of MOU dated 11.08.2017 i.e., by 11.08.2020.

8. That on 19.08.2020, the complainant visited the site and was shocked to see the status of the project as no construction was going on as per the promises and representations made by the respondent and the project was nowhere near completion.

9. That on 12.08.2019-till now, the respondent paid an amount of Rs. 2, 60,700/- till March, 2020 and a sum of Rs. 7,86,500/- is still remain unpaid on account of the assured return.

10. The complainant kept pursuing the matter with the representatives of the respondent over due course of time named Mr. Vivek Dhar, Ms. Maninder , Piyush Gupta, Ms. Neelam, , Mrs. Manpreet Saini, Mr. Avik Bhatia as to when will the project and why construction is going on at such a slow pace, but to no avail. But the respondent did not furnish any response in this regard and also failed to make the payment on account of assured return to the complainant. Later complainant tried to contact directors of respondent Mr. Amit Bhola, Mr. Ashish Anand & Mr. Manish Bhola over phone call & email but no response has been received by the Complainant.

11. That till now, the respondent failed in handling over the possession and monthly assured return of the food court space till date as per agreed terms and conditions despite being received the sale consideration amount. hence the present complaint.

12. That as per MOU, the respondent had agreed to pay a monthly assured return of Rs. 35,750/- on the total amount received with effect from 12.08.2019 as per MOU as well as buyer agreement dated 11.08. 2017. The respondent failed to pay a monthly assured return of Rs. 35,750/- per month from dated 12.08.2019 till now. Even after so many request and emails by the complainant regarding the matter. However, the respondent did not furnish any response in this regard.

13. That the complainant booked space 550 sq ft in food court area in presence of sales partner namely Mr. Ankit Vashist and company and made all required payment including GST. The complainant was in touch with respondent regarding their booking through email and phone. The agreement was signed based on the complainant specific choice of space in food court. But on 29.07.2021, the respondent claimed that the complainant does not possess any space in food court rather, the complainant has space booked in entertainment zone and upon hearing the same, and the complainant got shocked. The complainant then requested the respondent to handover the possession of the booked unit as per agreement to sale and MOU. The e-mail in this regard is also sent to respondent but no answer was received from the respondent.

14. That the respondent has made representations and tall claims that the project will be completed on time. On the contrary, the respondent has failed in adhering to the representations made by him and retained in adhering to the representations made by him and retained the hard-earned money paid by the complainant for so many months

thereby causing wrongful loss to the complainant and wrongful gain to the respondent.

15. That the respondent simply duped the complainant of their hard earned money and life savings. The aforesaid arbitrary and unlawful acts on the part of respondent have resulted in to extreme kind of financial hardship, mental distress, pain and agony to the complainant

16. That the present complaint has been filed in order to seek possession of said food court unit along with interest on account of delayed possession along with other relief as mentioned in the relief clause of the complaint.

C. Relief sought by the complainant:

The complainant has sought the following relief:

i) Direct the respondent to handover the possession of the said food court premise no.: priority no. 62; Food Court Area; 550 sq. ft Super Area as per the Agreement was signed based on the complainant specific choice of space in food court.

ii) Direct the respondent to pay delayed possession charges on the principal amount paid by the complainant towards the said space at prescribed rate of interest from the due date of possession, i.e., till actual handing over possession.

iii) Direct the respondent to pay a monthly assured return of Rs 35,750/- on the total amount received along with

applicable Interest with effect from 12.08.2019 till the commencement of the first lease on the said unit.

D. Reply by the respondents

The respondents by way of written reply made the following submissions.

17. It is most humbly submitted that the complainants while booking the space vide the original booking form, clearly opted for premises no. 62 on the fifth floor or similar. Thereby, subsequently, the Complainants were allotted space bearing no. Priority No.62 on the **5th Floor or similar,** admeasuring 550 sq.ft., which was earmarked for the use of either Food Court/Office/ Entertainment/ Retail and strictly as per building plans approved by the Director of Town and Country Planning. This has been clearly agreed by complainants in clause 2.1 and clause 3.1 of the builder buyer dated 11.08.2017 executed between the complainants and the respondent.

18. It is further submitted that as per original approvals of the building plans by DTCP, which were reviewed and agreed upon by the Complainants during the booking, it was clearly mentioned that the fifth floor of the project is for entertainment zone while the food court is to come up on the third floor.

19. It is also pertinent to mention herein that for referring to the space allotted to the complainant, the company has been using the terms entertainment zone and food court interchangeably. It is also submitted that the nature, character or placement of the space has not been changed and is as per the approved plans.

20. That the complainants despite being in knowledge that they have booked a space in the entertainment zone are alleging to have booked the space on food court, in order to extract illegitimate monetary benefits from the respondent.

21. It is submitted that the complainants were in search of making an investment in the real estate sector and came to know about the project of the respondent. That the complainants after making deliberate inquiries about the project and the respondent and after being completely satisfied with their inquiries, decided to book a commercial space in the project of the respondent. Accordingly, a builder buyer agreement (hereinafter referred to as **"BBA"**) dated 11.08.2017 was executed between the complainant and the respondent.

22. It is noteworthy that the complainants had purchased the commercial space, not for their personal use but to invest the money and to earn a return on the same by leasing the said space through the respondent. Accordingly, a Memorandum of Understanding (hereinafter referred to as **"MOU")** dated 11.08.2017 was executed between the complainant and the respondent. That in recital 4 of the MOU it is clearly agreed by the complainants that they are not the end users and are investors. That Recital 4 of the MOU dated 11.08.2017 is reproduced herein below for the convenience of the Ld. Authority:

"AND WHEREAS the Allottee(s) has approached the Company and shown interest in the said Project. The allottee(s) further

warrants and represents that he is not an end user and is an investor..."

That a mere reading of the above-mentioned clause makes it crystal clear that the relationship between the complainants and the respondent is not that of a builder-buyer.

23. Furthermore, it is submitted that the complainants agreed to opt for the **"Assured Return Plan"**. That the MOU dated 11.08.2017 governed the terms of paying the assured return and leasing thereof. Since, the complainants had purchased the commercial space for earning a return through leasing the space, therefore, it is clear that the complainants are investors. Thus, no cause of action arises for filing of the present complaint nor any visible understanding to book the respondent for any legal charges.

24. It is important to bring it to the knowledge of the Hon'ble Authority that the MOU clearly stipulates that the complainants had booked the commercial space only for the purpose of gaining commercial advantage and not for self-use. It is to be noted that the complainants had agreed that they shall not use the commercial space for their own personal use and that the said space can only be used for the purpose of leasing through the respondent, in accordance with the terms and conditions of the MOU. That a mere perusal of the Clauses of the MOU clearly specifies that the relationship of the complainant and the respondent is not that of a builder and buyer.

25. It is important to mention here that the complainants had entered into two different and separate agreements with the respondent,

namely BBA and MOU. Both these agreements are two distinct and different agreements. That buyer's agreement is the builder buyer agreement which casts various obligations on the promoter to complete and deliver a real estate project. Whereas, the MOU only pertains to assured return and leasing. That there may be cross-reference between two agreements or certain clauses may be superseding each other. However, such cross-reference or supersession does not amount to the novation and thus both these agreements cannot be read to be one single agreement. Each agreement has its own distinct liability, obligations and terms and conditions imposed on the parties and are confined to that specific agreement only.

26. All other averments made in the complaint were denied in toto.

27. 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 those undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority

28. The respondents have raised an objection regarding jurisdiction of authority to entertain the present complaint. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. E. I Territorial jurisdiction

29. 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

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

> ***Section 11(4)(a)***
>
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be.*

Section 34-Functions of the Authority:

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

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

F. Findings on the objections raised by the respondents.

F. I Direct the respondent to handover the possession of the said Food Court Premise no.: Priority no. 62; Food Court Area; 550 sq. ft Super Area as per the Agreement was signed based on the complainant specific choice of space in food court.

F.II Direct the respondent to pay delayed possession charges on the principal amount paid by the complainant towards the said space at prescribed rate of interest from the due date of possession, i.e., till actual handing over possession.

F.III Direct the respondent to pay a monthly assured return of Rs 35,750/- on the total amount received along with applicable Interest with effect from 12.08.2019 till the commencement of the first lease on the said unit.

The above mentioned reliefs no. F.I, F.II & F.III as sought by the complainant is being taken together as the findings in one relief will definitely affect the result of the other reliefs and these reliefs are interconnected.

31. While filling the claim petition besides delay possession charges of the allotted unit builder buyer agreement dated 11.08.2017, the complainant also sought monthly assured returns of Rs. 35,750/- from 12.08.2019 until the commencement of the first lease on the said unit. It is pleaded that respondent has not complied with the terms and conditions of the agreement. Though for some time the amount of assured return 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.

32. 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:

a) Whether authority is within the jurisdiction to vary its earlier stand regarding assured returns due to changed facts and circumstances.

b) Whether the authority is competent to allow assured returns to the allottees in pre-RERA cases, after the Act of 2016 came into operation,

c) Whether the Act of 2019 bars payment of assured returns to the allottees in pre-RERA cases

33. 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.

34. 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.

35. 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;*

36. 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.

37. 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.

38. 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.

39. 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 builder 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 complainant till possession of apartments stands handed over and there is no illegality in this regard.

40. 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.*

41. 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.

Delay Possession Charges/Assured Return:

42. The complainant is seeking unpaid assured returns on monthly basis as per MoU at the rates mentioned therein. It is pleaded that the respondent has not complied with the terms and conditions of the agreement. 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 that the same is not payable in view of enactment of the Banning of Unregulated Deposit Schemes Act, 2019 (hereinafter referred to as the Act of 2019), citing earlier decision of the authority (*Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd., complaint no 141 of 2018*) whereby relief of assured return was declined by the authority. The authority has rejected the aforesaid objections raised by the respondent in ***CR/8001/2022 titled as Gaurav Kaushik and anr. Vs. Vatika Ltd.*** wherein the authority while reiterating the principle of prospective ruling, has held that the authority can take 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 and it was held 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 the Act of 2019 does not create a bar for payment of assured returns even after coming into operation as the payments made in this regard are protected as per section 2(4)(l)(iii) of the Act of 2019. Thus the plea advanced by the respondent is not sustainable in view of the aforesaid reasoning and case cited above

43. A builder buyer agreement and MoU dated 11.08.2017 were executed between the parties. As per clause 3 of the MoU, the company shall complete the construction of the said **Building /**

Complex, within which the said space is located within 36 months from the date of execution of this Agreement or from the start of construction, whichever is later and apply for grant of completion Occupancy Certificate. The Authority has decided the date of start of construction as 15.12.2015 which was agreed to be taken as date of start of construction for the same project in other matters. CR/1329/2019. So, the due date is calculated from the date of execution of buyer's agreement being later. The due date of possession comes out to be 11.08.2020.

44. It is worthwhile to consider that the assured return is payable to the allottees on account of a provision in the MoU. The assured return in this case is payable from from 12- **August-2019** till the commencement of the first lease on the said unit. The rate at which assured return has been committed by the promoter is Rs. **Rs.35,750/-** per month. If we compare this assured return with delayed possession charges payable under proviso to section 18(1) of the Act, 2016, the assured return is higher. The assured return in this case is payable a **Rs.35,750/-** per month whereas the delayed possession charges are payable approximately Rs. 23,188/- per month. By way of assured return, the promoter has assured the allottee that he would be entitled for this specific amount till the commencement of the first lease on the said unit. 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.

45. Therefore, considering the facts of the present case, the respondent is directed to pay the arrears of amount of assured return at the rate i.e., Rs. 35,750/- per month to the complainant from the date the payment of assured return which has not been paid i.e., March 2020 till the commencement of the first lease on the said unit. The respondent is directed to pay the outstanding accrued assured return amount till the commencement of the first lease on the said unit at the agreed rate within 90 days from the date of this order after adjustment of outstanding dues paid by it to the complainant and failing which that amount would be payable with interest @ 10.75% till the date of actual realization.

F. Directions of the Authority:

46. 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 functions entrusted to the Authority under Section 34(f) of the Act of 2016:

i) The respondent is directed to pay the arrears of amount of assured return at the rate i.e., Rs. 35,750/- per month to the complainant from the date the payment of assured return has not been paid i.e., March 2020 till the commencement of the first lease on the said unit.

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 @10.75% p.a. till the date of actual realization.

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

47. Complaint stands disposed of.

48. File be consigned to the Registry.

(Sanjeev Kumar Arora)
Member

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 05.12.2023