BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**3065 of 2023**
Date of complaint	**:**	**05.07.2023**
Date of decision	**:**	**03.01.2024**

1. Kusum Lata
2. Arun Kumar

Both R/o: -L 5 Rama Park Road, Opposite Aapka Bazaar, Mohan Garden, Uttam Nagar, West Delhi – 110059. **Complainants**

Versus

M/s Neo Developers Pvt. Ltd.
Office at: 32-B, Pusa Road, New Delhi-110005 **Respondent**

CORAM:
Ashok Sangwan **Member**

APPEARANCE:
Hemant Phogat Advocate for the complainants
Mayank Grover Advocate for the respondent

ORDER

1. The present 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 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 complainants, 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.	Nature of the project	Commercial
3.	Project area	3.089 acres
4.	DTCP license no. and validity status	102 of 2008 dated 15.05.2008
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.	Application for allotment	30.04.2017 (As on page 45 of reply)
7.	Date of execution of Apartment Buyer's Agreement	03.08.2017 (Page 21 of complaint)
8.	Unit no. and area	Priority No.-47, 5th floor 400sq.ft. (super area) (As on page 24 of complaint)
9.	Memorandum of understanding for assured return	03.08.2017 (As on page 43 of complaint)
10.	Possession clause	Clause 3 of MoU: The company shall complete the construction of the said building/complex, within the said space is located within **36 months from date of execution of this agreement or from the start of construction, whichever is later** and

		apply for grant of completion/occupancy certificate. (As on page no 45 of complaint)
11.	Due date of possession	03.02.2021 (Calculated as 36 months from the date of execution of MoU i.e.,03.08.2017+ 6 months Covid grace period)
12.	Assured return	Clause 5 of MoU *The Company shall pay a monthly assured return of* ***Rs.26,000/- (Rupees Twenty Six Thousand Only)*** *before deduction of Tax at Source and service tax, cess and 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 after the entire 24 installment is received by the Company.* (As on page 46 of complaint)
13.	Total basic sale consideration	Rs.24,24,000/- (As on page no. 46 of complaint))
14.	Amount paid by the complainant	Rs.29,27,232/- (As on page no. 5 of complaint stated by the complainant)
15.	Amount paid by respondent as assured return to complainant	No amount paid.
15.	Occupation certificate /Completion certificate	Not obtained
16.	Offer of possession	Not offered
17.	Lease deed executed (Between Respondent and M/s GameZone (72 Mad Street)	10.07.2020

18.	Reminder Letter for signing the lease assignment form	10.12.2020 07.12.2021 (As on page 115-116 of reply)

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint: -

I. That, after going through the advertisement published by respondent in the newspapers and as per the brochure /prospectus provided by it, the complainant booked a food court and entertainment shop bearing no. 47 on 5th floor, in the project of the respondent named "NEO SQUARE" situated in Sector-109, Dwarka Expressway, Gurugram for a total sale consideration of Rs.24,24,000 and the complainants have paid a sum of Rs.29,27,232/- against the same as and when demanded by the respondent.

II. That the builder buyer's agreement and memorandum of understanding were executed between the parties on 03.08.2017. The complainants had purchased the unit on "*Assured Return Plan*", whereby the developer has assured them to pay a monthly assured return of Rs.26,000/- until the commencement of the first lease.

III. That, as per clause–5 of the MOU, the respondent was bound to pay the assured return till receipt of 24 installments from the complainants. The last installment was paid by the complainants on 05.07.2019. Therefore, the respondent was legally entitled to start paying the assured return from August, 2019. However, the respondent has not paid even a single penny to the complainants against the assured return.

IV. That the respondent has also delayed the project and has miserably failed to complete the project till today. The respondent was under

legal obligation to complete the project within 36 months from the execution of the MOU or start of construction, whichever is later. The MOU was executed on a later date from the construction therefore, the project was to be completed by the respondent on or before 03.08.2020. The respondent has still not completed the project and there is no communication or assurance from the respondent as to when the allottees shall be given the possession of their unit.

V. The complainants have on multiple occasions requested and persuaded the respondent to pay the monthly assured return and delayed possession charges, but the respondent miserably failed in doing so and completely ignored the request of the complainants.

VI. That, till today the complainants had not received any satisfactory reply from the respondent regarding payment of monthly assured returns to them and has been suffering a lot of mental, physical & financial agony and harassment.

VII. The respondent has committed grave deficiency in services by not paying assured returns and delayed possession charges amounting to unfair trade practice which is immoral and illegal. The respondent has also acted fraudulently and arbitrarily by inducing the complainants to buy the unit on the basis of its false and frivolous promises and representations about the assured returns.

VIII. The cause of action accrued in favour of the complainants and against the respondent, when complainants had booked the said unit and it further arose when respondent failed/neglected to pay the assured returns and delayed possession charges. The cause of action is continuing and is still subsisting on day-to-day basis.

C. Relief sought by the complainants

4. The complainants have sought following relief(s).

   I. To direct the respondent to pay the assured return as per the terms and conditions of the MOU dated 03.08.2017.

   II. To direct the respondent to pay delayed possession charges as per the HRERA provisions.

5. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent has contested the complaint on the following grounds:-

   I. That the complainants are investors and not allottees. It is submitted that the complainants with the intent to invest in the real estate sector as an investor, approached the respondent and after being fully satisfied with the project, the complainants decided to apply to the respondent by submitting a booking application form dated 30.04.2017, whereby seeking allotment of unit no-47, 5th floor admeasuring 400 sq.ft of super having a basic sale price of Rs.24,24,000/- The complainants, considering the future speculative gains, also opted for the investment return plan being floated by the respondent. That since the complainants had opted for investment return plan, a MoU dated 03.08.2017, was executed between the parties, which was a completely separate understanding between the parties in regards to the payment of assured returns in lieu of investment made by the complainants and leasing of the unit/space thereof.

II. That the allotment of the said unit contained a "lease clause" which empowers the developer to put a unit of complainant along with the other commercial space unit on lease and does not have possession clauses, for handing over the physical possession. Hence, the embargo of the Authority, in totality, does not exist.

III. That the complainants voluntarily executed the builder buyer agreement on 03.08.2017 for allotment of the unit after having full knowledge and being well satisfied and conversant with the terms and conditions of it.

IV. That as per the agreed terms between the complainants and the respondent, the returns were to be paid to the complainants post clearance of the entire 24 instalments to the respondent and were to be paid till execution of the first lease. The last instalment was made on 05.07.2019. Hence, the respondent was ought to pay assured return from the effective date i.e., 05.08.2019. However, on 21.02.2019, the central government passed an ordinance "Banning of Unregulated Deposits, 2019", to stop the menace of unregulated deposits and payment of returns on such unregulated deposits. Thereafter, an act titled as "The Banning of Unregulated Deposits Schemes Act, 2019" came into force. That under the said act all the unregulated deposit schemes have been banned and made punishable with strict penal provisions and accordingly, being a law-abiding company, by no stretch of imagination the respondent was prevented from making payments of assured return. It is also submitted that as per clause 5 of the MOU, the complainants herein had duly authorised the respondent to put the said unit on lease.

V. That as per clause 5 and clause 8(a) of the MoU, the obligation of payment of assured return was only till the commencement of the first

lease on the unit. The first lease of the premises has already been executed with M/s Game Zone (72 Mad Street) on 10.07.2020. After the commencement of the first lease, the respondent has duly intimated the complainants vide letter dated 01.10.2020 and various telephonic conversations regarding the same. The respondent further sent a letter for assignment of lease form to the complainants to come forward and sign the lease assignment. However, the complainants did not come to sign the lease assignment and failed to fulfil their part of the obligations. That since the complainants did not come forward to sign the lease assignment, the respondent further sent reminder letters dated 10.12.2020 and 07.12.2021 to sign the form. However, the complainants blatantly ignored his obligations.

VI. That the memorandum of understanding was executed by the complainants of their own free will and after fully satisfying themselves with the terms and conditions contained thereof. Further, as per the terms of the MOU it was agreed between the parties that the unit would be leased out to the third party as the first lease by the respondent and for the same the complainants would be obligated to sign the lease assignment form as and when demanded by the respondent. However, the complainants despite receipt of repeated reminders from the respondent, deliberately ignored the same and failed to sign the lease assignment form. Also, as per clause 16 of the MoU, if there is any breach of non-compliance of the terms of the MoU, the respondent has the right to terminate the same.

VII. That the complainants in the present complaint are claiming the reliefs on basis of the terms agreed under the MoU between the parties. It is submitted that the authority is exercising its power and jurisdiction as provided under the provisions of the Act, 2016. As per the provisions

of the Act, 2016, the authority has the jurisdiction to adjudicate upon all the complaints arising out of failure of either party to fulfil the terms and conditions of the agreement for sale (Buyer's Agreement). However, in the present matter the complainant is relying upon the terms of MoU which is a distinct agreement than the buyer's agreement and thus, the MoU is not covered under the provisions of the RERA Act, 2016. That the said complaint is not maintainable on this basis that there exists no relationship of builder-allottee in terms of the MoU, by virtue of which the complainants are raising their grievance.

VIII. That the buyer's agreement and the MOU, both contain rights and obligations of parties which are not identical of each other. Therefore, both these documents cannot be treated as a single document enumerating the same rights and obligations.

IX. That, as per the agreement so signed and acknowledged the completion of the said unit was subject to midway hindrances which were beyond the control of the respondent and in case the construction of the said commercial unit was delayed due to such 'force majeure' conditions, the respondent was entitled for extension of time period for completion. The development and implementation of the project have been hindered on account of several orders/directions passed by various authorities/forums/courts. A period of 582 days was consumed on account of circumstances beyond the power and control of the respondent, owing to the passing of orders by the statutory authorities. Since inception, the respondent was committed to complete the project, however the development was delayed due to the reasons beyond the control of the respondent.

E. Jurisdiction of the authority

7. The respondent raised a preliminary submission/objection that 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.

E.I Territorial jurisdiction

8. 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

9. 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.*

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.

F. Findings on the objections raised by the respondent

F. I. Objection regarding the project being delayed because of force majeure circumstances and contending to invoke the force majeure clause.

11. The respondent/promoter has raised the contention that the construction of the tower in which the unit of the complainants are situated, has been delayed due to force majeure circumstances such as orders/restrictions of the NGT as well as competent authorities, High Court and Supreme Court orders etc. However, all the pleas advanced in this regard are devoid of merit. First of all, the possession of the unit in question was to be offered by 03.08.2020. Hence, events alleged by the respondent do not have any impact on the project being developed by the respondent. Moreover, some of the events mentioned above are of routine in nature happening annually and the promoter is required to take the same into consideration while launching the project. Thus, the promoter/respondent cannot be given any leniency on based of aforesaid reasons and it is a well settled principle that a person cannot take benefit of his own wrong.

12. The respondent also took a plea that the construction at the project site was delayed due to Covid-19 outbreak. As per HARERA notification no. 9/3-2020 dated 26.05.2020, the extension of 6 months was granted to the projects having completion date on or after 25.03.2020. In the present case, the due date of possession is calculated as 36 months from the date of execution of the MoU i.e., 03.08.2020 which falls within the

ambit of above-said notification. Therefore, after allowing a grace period of six months on account of covid-19, the due date of possession comes out to be 03.02.2021.

F. II. Objection regarding complainant is Investor not consumer.

13. The respondent has taken a stand that the complainants are investor and not consumers, therefore, they are not entitled to the protection of the Act and thereby 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 observed that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time 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 they have paid total price of **Rs.29,27,232/-** to the promoter towards purchase of an unit in the project of the promoter. 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 above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement cum provisional allotment letter executed between promoter and complainants, it is crystal clear that they are allottee(s) as the subject unit allotted to them by the promoter. The concept of investor is not defined or referred 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 in the Act. Thus, the contention of promoters that the allottees being investors are not entitled to the protection of this Act also stands rejected.

G. Findings on the relief sought by the complainants

G.I Assured Return

15. The complainants submitted that the respondent vide clause 5 of the MoU dated 03.08.2017 agreed to give an investment return of Rs.26,000/- per month and the monthly assured return had to be paid to the complainants until the commencement of the first lease on the said unit and the said amount on account of assured return was to be paid after the receipt of entire 24 instalments by the respondent. However, the respondent has failed to make any payment to the complainants against the assured return in utter contravention of its own commitment from the effective date i.e., 05.08.2019. The total basic sale consideration of the allotted space was Rs.24,24,232/- and the

complainants have paid a sum of Rs.29,27,232/- against the same i.e., more than the total sale price.

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

sale only and between the same parties as per the provisions of section 11(4)(a) of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the agreement for sale till the execution of conveyance deed of the unit in favour of the allottees. Now, two issues arise for consideration as to:

i. Whether authority is within the jurisdiction to vary its earlier stand regarding assured return due to changed facts and circumstances.
ii. Whether the authority is competent to allow assured returns to the allottees in pre-RERA cases, after the Act of 2016 came into operation,
iii. Whether the Act of 2019 bars payment of assured returns to the allottees in pre-RERA cases.

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"*** (complaint no 175 of 2018) decided on 07.08.2018 and 27.11.2018 respectively, it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the issue of assured returns was involved to be paid by the builder to an allottee but at that time, neither the full facts were brought before the authority nor it was argued on behalf of the allottee that on the basis of contractual obligations, the builder is obligated to pay that amount. However, there is no bar to take a different view from the earlier one if new facts and laws have been brought before an adjudicating authority or the court. There is a doctrine of ***"prospective overruling"*** and which provides that the law declared by the court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to

its existence. A reference in this regard can be made to the case of ***Sarwan Kumar & Anr Vs. Madan Lal Aggarwal*** Appeal (civil) 1058 of 2003 decided on 06.02.2003 and wherein the hon'ble apex court observed as mentioned above. The authority can take a different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. It is now well settled preposition of law that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum, memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement for sale defines the builder-buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allottee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arises out of the agreement for sale only and between the same contracting parties to agreement for sale. In the case in hand, the issue of assured returns is on the basis of contractual obligations arising between the parties. In cases of ***Anil Mahindroo & Anr. v/s Earth Iconic Infrastructure Pvt. Ltd.*** (Company Appeal (AT) (Insolvency) No. 74 of 2017) and ***Nikhil Mehta and Sons (HUF) and Ors. vs. AMR Infrastructure Ltd.*** (CA NO. 811 (PB)/2018 in (IB)-02(PB)/2017) decided on 02.08.2017 and 29.09.2018 respectively, it was held that the allottees are investors and have chosen committed return plans. The builder in turn agreed to pay monthly committed return to the investors. Thus, the amount due to the allottee comes

within the meaning of 'debt' defined in Section 3(11) of the I&B Code. Then in case of ***Pioneer Urban Land and Infrastructure Limited & Anr. v/s Union of India & Ors.*** (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019, it was observed by the Hon'ble Apex Court of the land that "*...allottees who had entered into "assured return/committed returns' agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of agreement till the date of handing over of possession to the allottees*". It was further held that 'amounts raised by developers under assured return schemes had the "commercial effect of a borrowing' which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code" including its treatment in books of accounts of the promoter and for the purposes of income tax. Then, in the latest pronouncement on this aspect in case ***Jaypee Kensington Boulevard Apartments Welfare Association and Ors. vs. NBCC (India) Ltd. and Ors.*** (24.03.2021-SC): MANU/ SC/0206 /2021, the same view was followed as taken earlier in the case of ***Pioneer Urban Land Infrastructure Ld & Anr.*** with regard to the allottees of assured returns to be financial creditors within the meaning of section 5(7) of the Code. Then after coming into force the Act of 2016 w.e.f 01.05.2017, the builder is obligated to register the project with the authority being an ongoing project as per proviso to section 3(1) of the Act of 2017 read with rule 2(o) of the Rules, 2017. The Act of 2016 has no provision for re-writing of contractual obligations between the

parties as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.,*** (supra) as quoted earlier. So, the respondents/builders 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 respondents/builders 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 Z(4J 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 properly 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 an advance, accounted for in any manner whatsoever, received in connection with consideration for on 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 (4J 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, 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 (REM-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 abovementioned 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 any 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 allottees is an ongoing project as per section 3(1) of the Act of 2015 and, the same would fall within the jurisdiction of the authority for giving the desired relief to the complainants besides initiating penal proceedings. So, the amount paid by the complainants 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. The money was taken by the builder as a deposit in advance against allotment of immovable property and its possession was to be offered within a certain period. However, in view of taking sale consideration by way of advance, the builder promised certain amount by way of assured returns for a certain period. So, on his failure to fulfil that commitment, the allottee has a right to approach the authority for redressal of his grievances by way of filing a complaint.

28. The authority under this Act has been regulating the advances received under the project and its various other aspects. So, the amount paid by the complainants to the builder is a regulated deposit accepted by the latter from the former against the immovable property to be transferred to the allottee later on. If the project in which the advance has been received by the developer from an allottee is an ongoing

project as per section 3(1) of the Act of 2016 then, the same would fall within the jurisdiction of the authority for giving the desired relief to the complainant besides initiating penal proceedings.

29. Therefore, the authority directs the respondent/promoter to pay assured return from the date the last instalment was paid i.e., 05.07.2019 by the complainants till offer of possession of the allotted unit/spaces.

30. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges however, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under: -

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
>
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

31. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

32. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as

on date i.e., 03.01.2024 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.

33. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
> *(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

25. 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 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.

26. 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 in a MoU having reference of the BBA or an addendum to the BBA or in a MoU or allotment letter. The assured return in this case is payable from the date of 05.07.2019 till the commencement of the first lease on the said unit.

27. The rate at which assured return has been committed by the promoter is Rs.26,000/- 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. By way of assured return, the promoter has assured the allottees that they would be entitled for this specific amount till the commencement of the first lease on the said unit. 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 05.07.2019 after deduction of Tax at Source and service tax, 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. The monthly assured return shall be paid to the allottee(s) until 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.

28. Accordingly, the authority decides that in cases where assured return is reasonable and comparable with the delayed possession charges under section 18 and assured return is payable even after due date of possession till the commencement of the first lease on the said unit. The allottee shall be entitled to assured return or delayed possession charges, whichever is higher without prejudice to any other remedy including compensation. In the present case, the assured return was payable till the commencement of first lease. The project is considered habitable or fit for occupation only after the grant of occupation certificate by the competent authority. However, the respondent has

not received occupation certificate from the competent authority till the date of passing of this order. Hence, the said building cannot be presumed to be fit for occupation. Furthermore, the respondent has put the said premises to lease by way of executing lease deed date 10.07.2020. In the absence of occupation certificate, the said lease cannot be considered to be valid in the eyes of law. In view of the above, the assured return shall be payable till the said premises is put to lease after obtain occupation certificate from the competent authority.

29. Hence, the authority directs the respondent/promoter to pay assured return to the complainant at the rate of Rs.26,000/- per month from the date i.e., 05.07.2019 after deduction of Tax at Source and service tax, cess or any other levy which is due and payable by the allottee(s) to the company till the commencement of the first lease on the said unit as per the memorandum of understanding.

H. Directions of the authority

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

i. Since assured returns being on higher side are allowed than DPC so, the respondent is directed to pay the arrears of amount of assured return at the rate i.e., Rs.26,000/- per month from the date i.e., 05.07.2019 after deduction of Tax at Source and service tax, cess or any other levy which is due and payable by the allottee(s) to the company till the commencement of the first lease on the said unit as per the memorandum of understanding.

ii. The respondent is directed to pay arrears of accrued assured return as per MoU dated 03.08.2017 till date at the agreed rate

within 90 days from the date of this order after adjustment of outstanding dues, if any, from the complainants and failing which that amount would be payable with interest @8.85% p.a. till the date of actual realization.

ii. The respondent shall not charge anything from the complainant which is not the part of the agreement of sale.

31. Complaint stands disposed of.

32. File be consigned to registry.

(Ashok Sangwan)
Member
Haryana Real Estate Regulatory Authority, Gurugram
Dated: 03.01.2024