BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**265 of 2022**
Date of filing	**:**	**28.01.2022**
Date of decision	**:**	**09.01.2024**

1. Alok Varma
2. Anita Varma

R/o: 29, Sector 15 Part-I, Gurugram, Haryana-122001. **Complainants**

Versus

M/s Sana Realtors Pvt. Ltd.

Office address: H-69, Upper Ground Floor, Outer Circle, Connaught Place, New Delhi-110001 **Respondent**

CORAM:

Shri Ashok Sangwan **Member**

Shri Sanjeev Kumar Arora **Member**

APPEARANCE:

Mr. Alok Varma Complainant in person

Mr. Abhijeet Gupta Counsel for the complainants

Mr. Gaurav Raghav Counsel for the respondent

ORDER

1. The present complaint has been filed by the complainants/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 as provided under the provision 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. Project and unit related details

2. The particulars of the project, the amount of 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:

Sr. No.	Particulars	Details
1.	Name of the project	Precision Soho Tower, Sector-67, Gurugram, Haryana.
2.	Nature of the project	Commercial complex
3.	DTCP License No.	No.- 72 of 2009 dated 26.11.2009. Valid/renewed up to- 25.11.2019. Licensee- Sh. Hari Singh Licensed area- 2.456 acres
4.	Building plans approved on	25.07.2011
5.	RERA Registered/ Not	Not registered
6.	Unit no.	B-411, 4th floor, tower B (Page 34 of complaint)
7.	Unit admeasuring	525 sq. ft. (super area) (Page 34 of complaint)
8.	Date of execution of builder buyer agreement	12.10.2013 (Page 32 of complaint)
9.	Possession clause as per builder buyer agreement	**15.** That the possession of the said premises is proposed to be delivered by the

		DEVELOPER to the ALLOTTEE(S) **within Three years from the date of this Agreement....** **(Emphasis supplied).** (Page 42 of complaint)
10.	Due date of delivery of possession	12.10.2016 **(Calculated from the date of buyer's agreement)**
11.	MoU executed on	07.11.2013 (Page 62 of complaint)
12.	Assured return as per MoU	After receipt of consideration of Rs.23,62,500/- (Rupees Twenty Three lacs Sixty Two Thousand Five Hundred only) the Developer shall give an investment return @ Rs. 30,975 /- per month (Rupees Thirty Thousand Nine Hundred Seventy Five Only) (Less TDS applicable) with effect **from** November 2013 on or before 15th day of every month for which it is due **till** the Completion of two years from the possession of the said property is offered to the buyer or the offer of lease to the second party whichever is earlier on ratio of 50:50. [Page 63 of complaint]
13.	Total sale consideration as per clause 1 of builder buyer agreement dated 12.10.2013	Rs. 25,88,250/- (Page no. 34 of complaint)
14.	Total amount paid by the complainant as per clause 3 of MoU dated 07.11.2013	Rs. 23,62,500/- (Page 63 of complainant)
15.	Occupation Certificate	· 18.07.2017 [Tower A and C] · 10.10.2019 [Tower B] [As per DTCP, Haryana website]
16.	Offer of possession	24.07.2017 [Page 35 of reply]

B. Facts of the complaint

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

a. That the complainants were allotted a unit bearing no. B-411 on 4th Floor, Tower B in the project of the respondent namely "Precison Soho Tower" at Sector 67 Gurugram vide buyer's agreement dated 12.10.2013 for a total sale consideration of Rs.23,62,500/- and the complainants have paid an amount of Rs.5,00,000/- as earnest money at the time of application on 29.08.2013 and the balance amount of Rs.18,62,500/- was paid against the same on 12.10.2013. Thereafter, a Memorandum of Understanding was executed between the parties on 07.11.2013.

b. That as per the said MoU, the respondent had to pay Rs. 30,975/- every month as assured investment return, on or before 15th of every month from the date of the agreement till the completion of two years from the date of offering of possession to the buyer. However, the respondent has only paid assured return to the complainants for a period of 29 months i.e., until April 2016. Thereafter, no amount was paid by it.

c. That on 24.07.2018 and 02.11.2018, the complainants served notices through their counsel to the respondent to pay the due assured return. However, the respondent has neither replied to the said notice nor paid any amount to the complainants against the same even after receipt of the total sale consideration.

d. That the complainants contacted the representative of the respondents to find out the status of unit of the complainants, but no assurance was given by it and still the project has not been completed.

e. That it is abundantly clear by the act and conduct of the respondent that it has not only defrauded the complainants but also have violated the terms of the MoU by not paying the monthly assured investment return.

f. That the respondent has caused monetary losses to the complainants and has denied them the right to enjoy the property for which they have already paid the entire price consideration. Furthermore, the respondent has caused immense mental agony, confusion, insecurity and pain to the complainants. Therefore, the complainants are constrained and left with no option but to file this present complaint seeking the agreed and stipulated assured return @Rs.30,975/- against their booked unit.

C. Relief sought by the complainants:

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

a. Direct the respondent to pay assured return as promised as per MoU till the date of possession.

5. On the date of hearing, the authority explained to the respondent/ promoters about the contraventions 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 by way of written reply made the following submissions:

a. That the present complaint is liable to be dismissed as the respondent has already paid the assured return as per the Memorandum of Understanding. Subsequently the complainant was offered possession and also the proposal to the lease out the premises, but the complainant failed to get the sale deed registered after making the balance payment on Rs.4,17,561/- and hence the unit could not be leased out.

b. That the present complaint filed by the complainant is liable to be dismissed, as per the MOU only the Courts at Delhi shall have Jurisdiction and the dispute resolution mechanism is Arbitration only. As per the provisions of the Arbitration and Conciliation Act the present complaint is not maintainable.

c. That the respondent had way back on 18.05.2015 applied with the concerned authority i.e., DTCP for the grant of the occupation certificate and the concerned authority on 18.07.2017 prior to the commencement of the Rules had granted the respondent with the occupation certificate. It is pertinent to state the said Rules mentioned herein above were notified only on 28.07.2017 and therefore, cannot applied retrospectively to a project which stands completed before the Rules coming into force. The respondent had obtained the occupation certificate for its project despite which was an "ongoing project" even prior to the notification of the rules. Hon'ble Bombay High Court in the case of *Neelkamal Realtors Suburban Pvt. Ltd. v. Union of India reported in SCC Online Bom 9302*, wherein the collective reading of Rules 2(o) and 2(Zn) of the Rules

have been interpreted and it was held that the rules of RERA are not applicable retrospectively.

d. That the specific agreements entered into between the respondent and the complainant are prior to coming into force of the Act and Haryana Rules, hence the provisions of HRERA are not applicable to the present complaint.

e. That the present complaint filed by the complainant is liable to be dismissed as there is no agreement in respect of the unit of the complainant and as such there are no terms that were settled. MOU can't be kept at par with the flat buyer agreement as the MOU is referring to the returns on investment but has nothing about the allotment of unit. As the flat buyer agreement was not signed, hence the present matter does not come within the ambit of the Act.

f. That the present complaint filed by the complainant is liable to be dismissed as in the projects wherein the occupation certificate is issued prior to the enactment of HRERA (RERA in Haryana was set up on 29 July 2017), the complaints are not maintainable.

g. That no flat buyer agreement was entered between the parties and the complainant even failed to make the payment as per the MOU. The complainant preferred to make payments as per the construction linked plan, have failed to make the outstanding payments. For the sake of brevity, the misconduct of the complaint is reflected herein below:

Total consideration Cost of the Unit (At the time of offer of possession)	**Amount Paid by the Complaint**	**Amount Outstanding on the Date of Offer Of Possession i.e. 24/07/2017**
Rs. 34,84,608/-	Rs. 26,00,000/-	Rs. 9,33,190/-

h. That the complaint before the authority is beyond the limitation period and hence the present application is liable to be dismissed. The complainants were time and again requested for signing the flat buyer agreement but the complainant neither signed the agreement nor took the possession which was offered way back on 24.07.2017. The complaint of the complainant is only with malice and is nothing more than malicious prosecution. Referring to the provisions of Limitation Act, the maximum period as per Article 113 of the Limitation Act is three years and the same has already elapsed.

i. That the present complaint filed by the complainant is not maintainable as the occupancy certificate is already issued on 18.07.2017 i.e., prior to the commencement of the rule. No buyer's agreement was executed hence there is no actual allotment of any unit in favour of the complainant and the MOU was nothing more than an agreement of advancement of some amount. There was no agreement between the parties and hence, there was even no timeline ever fixed in respect of the construction. The complainant except the initial amount didn't make any further payment and even also failed to execute any flat buyer agreement.

j. That initially there were high tension wires passing through the project land and the work got delayed as the agencies did not remove the same within time promised and since the work was involving risk of life, even the respondent could not take any risk and waited for the cables to be removed by the Electricity Department and the project was delayed for almost two years at

the start. Initially, there was a 66 KV Electricity Line which was located in the land wherein the project was to be raised. Subsequently an application was moved with the HVPNL for shifting of the said Electricity Line. HVPNL subsequently demanded a sum of Rs. 46,21,000/- for shifting the said Electricity Line and lastly even after the deposit of the said amount HVPNL took about one and half years for shifting the said Electricity Line. It is pertinent to mention here that until the Electricity Line was shifted the construction on the plots was not possible and hence the construction was delayed for about two years. It is pertinent to note here that the diligence of the respondent to timely complete the project and live up to its reputation can be seen from the fact that the respondent had applied for the removal of high-tension wires in the year 2008 i.e., a year even before the license was granted to the respondent so that the time can be saved and project can be started on time. It is submitted that the contractor M/s Acme Techcon Private Limited was appointed on 08.07.2011 for development of the project and it started development on war scale footing. It is submitted that in the year 2012, pursuant to the Punjab and Haryana High Court order, the DC had ordered all the developers in the area for not using ground water and the ongoing projects in the entire area seized to progress as water was an essential requirement for the construction activities and this problem was also beyond the control of the respondent, which further was duly noted by various media agencies and documented in the government department. Further since the development

process was taking lot of time and the contractor had to spend more money and time for the same amount of work, which in normal course would have been completed in almost a year, due to the said problems and delay in the work, the contractor working at the site of the respondent also refused to work in December, 2012 and the dispute was settled by the respondent by paying more to the earlier contractor and thereafter appointing a new contractor M/s Sensys Infra Projects Pvt. Ltd. in January, 2013 immediately to resume the work at the site without delay. Further, the project is complete since 2015 and the respondent has also applied for the occupancy certificate in May 2015. Lastly, in July 2017, occupancy certificate was issued and the delay of two years was on account of the delay at the end of DTCP.

k. That the present complaint filed by the complainant is liable to be dismissed as the complainant is having no locus standi and had made false allegations against the respondent without any substantial evidence, hence the present complaint is not maintainable and is liable to be dismissed with heavy cost. All other averments made in the complaint were denied in toto.

7. Copies of all relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided based on these undisputed documents and submissions made by parties.

E. Jurisdiction of the authority

8. The plea of the respondents 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

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by the 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 completed territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

10. 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 promoter, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

11. 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 respondent

F.I Objection regarding complainants are in breach of agreement for non-invocation of arbitration

12. The respondent had raised an objection that the complainant has not invoked arbitration proceedings as per the provisions of flat buyer's agreement which contains provisions regarding initiation of arbitration proceedings in case of breach of agreement. The following clause has been incorporated w.r.t arbitration in the buyer's agreement:

> *"33. Dispute Resolution by Arbitration*
> *All or any dispute arising out of or touching upon or in relation to the terms of this Agreement including the interpretation and validity of the terms thereof and the respective rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be adjudicated upon and settled through arbitration by a sole arbitrator. The arbitration shall be governed by the Arbitration and Conciliation Act, 1996 or any statutory amendments/ modifications thereto for the time being in force. The Arbitration proceedings shall be held at an appropriate location at New Delhi by a sole arbitrator who shall be appointed by the Managing Director of the Seller and whose decision shall be final and binding upon the parties. The Purchaser(s) shall not raise any objection on the appointment of sole arbitrator by the Managing Director of the Seller/Confirming Party."*

13. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble

Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.

14. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builders could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows:-*
>
> > *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
>
> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.*
>
> *...*
>
> *56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainants and the Builder cannot circumscribe*

the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

15. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the hon'ble Supreme Court **in case titled as M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 decided on 10.12.2018** has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant para of the judgement passed by the Supreme Court is reproduced below:

"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."

16. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainants are well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has

the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

G. Findings on the relief sought by the complainants.

G.I. Direct the respondent to pay assured return as promised as per MoU till the date of possession.

17. The complainants in the present matter are seeking assured return as per MoU dated 07.11.2013, vide clause 2 of the MOU the respondent company agreed to pay a monthly investment return @ ₹30,975/- per sq. ft. w.e.f. November 2013 till the completion of two years from the possession of the said is offered to the buyer or offer of lease whichever is earlier. The relevant clause is produced for the ready reference:

> *"After receipt of consideration of **Rs.23,62,500/-** (Rupees Twenty three Lakhs sixty two thousand five hundred only), the developer shall give an investment return @ **Rs.30,975/-** (Rupees thirty Thousand nine Hundred Seventy five Only) with effect from **November 2013** on or before 15th day of every month for which it is due **till the completion of two years from the possession of the said is offered to the buyer or the offer of lease to the second party whichever is earlier on ratio of 50:50**."*

18. It is pleaded that the respondent has not complied with the terms and conditions of the agreement and the MOU. Though for some time, i.e., till April 2016 the assured return were paid by the respondent. The authority while going by the facts of the case is of the view that since the respondent executed the MoU with the complainants therefore, he cannot deny his contractual liabilities now as the Act of 2016 does not rewrite the "agreement" entered between promoter and allottee prior to coming into force of the Act as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.,*** (Writ Petition No. 2737 of 2017) decided on 06.12.2017.

Since the agreement defines the buyer-promoter relationship therefore, it can be said that the agreement for assured returns between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate regulatory authority has complete jurisdiction to deal with assured return cases as the contractual relationship arise out of agreement for sale only and between the same parties as per the provisions of section 11(4)(a) of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the agreement for sale till the execution of conveyance deed of the unit in favour of the allottees. Now, three issues arise for consideration as to:

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

19. 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 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. So, now the plea raised with regard to maintainability of the complaint in the face of earlier orders of the authority is not tenable. The authority can take a different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. It is now well settled preposition of law that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum , memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. 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 allotment letter only and between the same contracting parties to the MoU. 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 respondents/builders can't take a plea that there was no contractual obligation to pay the 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 assured returns, then he can't wriggle out from that situation by taking a plea of the enforcement of Act of 2016 or any other law.

20. 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.

21. 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.

22. 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 2016 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.

23. In the present complaint, the occupation certificate for tower B was granted by the competent authority on 10.10.2019. However, the offer of possession was made by the respondent to the complainant on 24.07.2017. It is settled principle of law that the offer of possession without receiving occupation certificate cannot be termed as valid offer of possession. Thus, the offer of possession vide letter dated 24.07.2017 is not valid offer of possession. Further, section 19(10) of the Act obligated the allottee to take possession within 2 months of receipt of occupation certificate issued for the said apartment. Moreover, the complainants are at liberty to approach the appropriate authority if any grievance subsists regarding the issuance of occupation certificate in respect of the tower where the unit of the complainant is located.

24. Accordingly, the respondent is liable to pay the monthly assured return of ₹ 30,975/- as agreed by both the parties vide clause 2 of the MoU dated 07.11.2013 from the date on which the said amount was made due by the respondent i.e., April 2016 till the date of occupation certificate plus two months and two years i.e., 10.12.2021 along with interest @ 8.85% p.a. till the date of actual realization.

H. Directions of the authority

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

    a. The complainant is entitled monthly assured return of ₹ 30,975/- as agreed by both the parties vide clause 2 of the MoU dated 07.11.2013 from the date on which the said amount was made due by the

respondent i.e., April 2016 till the date of occupation certificate plus two months and two years i.e., 10.12.2021 along with interest @ 8.85% p.a. till the date of actual realization.

b. The respondent is directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of this order after adjustment of outstanding dues, if any.

c. The promoter shall not charge anything which is not part of the buyer's agreement.

26. The complaint stands disposed of.

27. File be consigned to registry.

(Sanjeev Kumar Arora)
Member

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 09.01.2024