

**BEFORE THE HARYANA REAL ESTATE REGULATORY  
AUTHORITY, GURUGRAM**

<b>Complaint no.</b> :	<b>6119 of 2022</b>
<b>Date of pronouncement of order</b> :	<b>27.10.2023</b>
Suraj Prakash Sharma R/o - 505A, Plot no. 47, Sector- 56, Gurugram, Haryana	<b>Complainant</b>
<b>Versus</b>	
JMK Holdings Pvt. Ltd., R/o: - 1302, Dr. Gopal Das Bhawan, 28 Barakhamba Road, Cannaught Place, Delhi - 110001	<b>Respondent</b>
<b>CORAM:</b>	
Shri Sanjeev Kumar Arora	<b>Member</b>
<b>APPEARANCE:</b>	
Ms. Arushi Kochhar Proxy Counsel (Advocate)	<b>Complainant</b>
Mr. Niraj Kumar (Advocate)	<b>Respondent</b>

**ORDER**

1. The present complaint dated 22.09.2022 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 allottee 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	"Signum", Sector 103, Gurugram
2.	Nature of project	Commercial component in Affordable Group Housing Colony
3.	Licensed area	9 acres
4.	DTPC License no.	157 of 2014 dated 11.09.2014 and valid up to 05.05.2021
	Name of licensee	JMK Holdings Pvt. Ltd.
5.	HARERA Registration no.	Registered 13 of 2017 dated 03.07.2017 and valid up to 28.03.2021 <b>Registration expired</b>
6.	Unit no.	Shop no. SF-30 [pg. 26 of the complaint]
7.	Carpet area	277.350 sq. ft. [pg. 26 of the complaint]
8.	Date of buyer's agreement	08.06.2018

		[pg. 19 of the complaint]
9.	Possession Clause	<p>8.</p> <p><i>Schedule for possession of the said Unit - The Developer agrees and understands that timely delivery of possession of the Unit to the Allottee and the Common Areas to the association of allottees or the Governmental Authority, as the case may be, is the essence of the Agreement. The Developer assures to hand over possession of the Unit along with ready on May-2020, unless there is delay or failure due to Force Majeure events. If, however, the completion of the Project is delayed due to the Force Majeure conditions then the Allottee agrees that the Developer shall be entitled to the extension of time for delivery of possession of the Unit for residential usage. The Allottee agrees and confirms that, in the event it becomes impossible for the Developer to implement the Project due to Force Majeure conditions, then this allotment shall stand terminated and the Developer shall refund to the Allottee the entire amount received by the Developer from the allotment within 90 (ninety) days from that date on which Allottee confirms that it has become impossible for the Developer to implement the Project. The Developer shall intimate the Allottee about such termination at least 30 (thirty) days prior to such termination of the Agreement. After refund of the money paid by the Allottee, the Allottee agrees that he/ she shall not have any rights, claims etc. against the Developer and that the Developer shall be released and discharged from all its obligations and liabilities under this Agreement.</i></p> <p><i>(Emphasis supplied)</i></p>
10.	Due date of possession	30.11.2020

		(30.05.2020 + 6 months grace period of COVID)
11.	Sale consideration	₹ 28,98,308/- [As per BBA at page 26 of the complaint]
12.	Amount paid by the complainant	Rs. 27,53,576/- [As per CD dated 07.03.2022 at page 67 of the complaint]
13.	Offer of possession	04.10.2021 [pg. 57 of the complaint]
14.	Addendum to BBA	22.06.2018 (page 52 of complaint)
15.	Assured return clause	2. developer offered to pay a fixed amount of Rs. 13,284/- per month w.e.f. 24.05.2018 till offer of possession As per documents available on page 86-89 of the complaint, the assured return has been paid to the complainant till January 2021
16.	Possession certificate	07.03.2022 [pg. 59 of the complaint]
17.	Occupation certificate	20.04.2021 (As per DTCP website)
18.	Conveyance deed	07.03.2022 [pg. 62 of the complaint]

**B. Facts of the complaint**

3. That the Respondent is the developer of "Signum 103" situated at Sector 103, Gurugram, Haryana. In May 2016, while searching for a commercial shop, the Complainant came across the Project being developed by the Respondent. Intrigued by the rosy advertisements of the Project, the Complainant approached the Respondent office to enquire about the same. The respondent officials promised them that they would be provided with the possession of the Unit by or before May 2020. It was further informed to them that they were eligible for a payment of INR 13,284/- per month as Assured Return from the date of the execution of the Builder Buyer Agreement till the possession of the Unit was provided to them.
4. That solely relying on the representations, promises and personal guarantees of the Respondent officials, the Complainant decided to purchase a shop in the said project. Subsequently, the Complainant booked the Unit (Shop bearing no. SF 30) in the Project vide Application form and paid an amount of INR 17,22,957/- as the booking amount for the same, out of the total sale consideration of INR 30,94,117/-. That subsequently, a Builder Buyer Agreement dated 24.06.2016 ("BBA") was also executed between the parties for the said purchase of the shop.
5. The said statement came as shock to the Complainant as it was contrary to their earlier statement that the amount of Assured Return would be provided to them each month from the day of the execution of BBA till the possession of the unit was provided to them.

6. That the Complainant expressed their concerns to the officials of the Respondent, and the officials of the Respondent assured the Complainant that they would continue to receive the said Assured Return amount even after June 2019, however, due to official purposes they were compelled to get the addendum executed
7. That based on the promises and personal guarantees of the officials of the Respondent. The Complainant signed on the said Addendum dated 22.06.2018 (Addendum to BBA") That subsequently, the Respondent paid the Assured Return of INR 13,284/- (after deducting TDS) to the Complainant per month from May 2018. The Respondent continued paying the Assures Return to the Complainant for the Unit till Jan 2021, however, to the utter dismay of the Complainant, without any intimation or notice. The Respondent stopped paying the Assured Return for the Unit from March 2021. Shocked by the same, the Complainant approached your officials to raise their grievances, to which, the Respondent officials assured the Complainant that they should not worry about anything as the said concern of the Complainant would be enquired into and taken care of by your management at the earliest. Based on the said promises, the Complainant patiently waited for a relief by your management.
8. It is pertinent to mention that in accordance with the Respondent promises and the terms of BBA, the possession of the Unit of the Complainant was to be provided to them by or before May 2020. That the misery of the Complainant did not end there, as the Respondent deficient disposition continued, and the Respondent failed to provide the

possession of the Unit by or before the stipulated time period. That the Complainant made multiple follow up visits to your office as well as made several communications with the Respondent officials with respect to the handover of possession of the Unit to the Complainant, however, no concrete response was provided to the Complainant by the Respondent officials with respect to date of possession and/or the payment of pending Assured Return.

9. That after a wait of more than 1.5 years, in October 2021, vide offer of possession dated 04.10.2021, the Complainant was finally provided with the possession of the Unit. However, it is pertinent to mention that the Respondent have till date, not provided the Complainant with any compensation for the delay in handing over the possession of the Unit.
10. That the Respondent is liable to pay INR 92,988/- as assured return to the Complainant from February 2021 to October 2021 along with interest per annum as per RERA rate of interest. Furthermore, the Respondent is liable to pay INR 4,48,846/- as delay possession charges on the amount paid by the Complainant i.e. INR 30,94,117/- for a delay of 17 months from May 2020 to October 2021.
11. That the Complainant also issued a Legal Notice dated 21.05.2022 to the Respondent with respect to their concerns. However, the Respondent did not pay any heed to the same.
12. That the sole intention of the Respondent, from the very beginning was to make wrongful gains at the expense of the Complainant. That for personal gains, they have caused the Complainant grave mental agony

and have made the Complainant suffer exceedingly owing to the illimitable financial burden they have been placed with.

### **C. Relief Sought**

13. This Authority may be pleased to direct the respondent as follows:

- a) Direct the Respondent to pay the Assured Returns of INR 92,988/- (excluding TDS) along with interest per annum as per the prevailing RERA rate of interest to them for the purchase of the unit from February 2021 to October 2021;
- b) Direct the Respondent to pay the delay possession charges of INR 4,48,846/- to the Complainant for delay in handing over the possession of the unit; and
- c) Direct the Respondent to compensate the complainant to the tune of INR 2,00,000/- for extreme mental anguish and harassment caused to the Complainant due to the Respondent illegal, unethical and unprofessional conduct;
- d) Direct the respondent to pay litigation cost to the tune of Rs. 1,00,000/-

### **D. Reply by the respondent**

14. That complainant has paid only an amount of Rs. 15,49,059/- towards basic cost of the shop. It is denied that the possession was to be delivered by May,2020 as the delivery of possession was subject to Force Majeure



Events and the Complainant has agreed for such extension time if the Project is delayed due to Force Majeure conditions. In this respect the relevant Clause VIII of the BBA is reproduced herein below for sake of brevity.

*"VIII. POSSESSION:*

*That the Possession will be delivered to the Allottee, on or before May-2020 subject to Force Majeure Circumstances."*

15. It is respectfully submitted the Project has been delayed on account of Force Majeure circumstances which was beyond the control of the Respondent. It is submitted that the Project has been delayed on account of following Force Majeure events:
- a). That in fact, almost the entire world had struggled to cope with the Coronavirus menace. The Novel Coronavirus had been declared as a pandemic by World Health Organization. Following the declaration of the World Health Organization, the Ministry of Home Affairs, Government of India vide notification 40-3/2020-DM-I(A) dated 24.03.2020 under the Disaster Management Act, 2005, had imposed lockdown for whole of India for 21 days with effect from 25.03.2020 wherein all the commercial and private establishments was directed to be closed down including transport services besides others. Further, the lockdown was extended vide direction dated 17.05.2020 up to 31.05.2020.
  - b). That it is respectfully submitted the Hon'ble Haryana Real Estate Regulatory Authority vide order no.9/3-2020 HARERA/GGM (Admn) dated 26.05.2020 extended the date of completion for all Real Estate

Projects registered under Real Estate Regulation and Development Act, where completion date, revised completion date or extended completion date was to expire on or after 25<sup>th</sup> of March, 2020 automatically by 6 months, due to outbreak of the COVID -19 (Corona Virus), which is calamity caused by nature and is adversely affecting regular development of real estate projects by invoking "force majeure" clause.

e). That thereafter, during the second wave of Covid-19 the Hon'ble Haryana Real Estate Regulatory Authority, Panchkula by way of resolution in the meeting held on 2<sup>nd</sup> of August 2021 ordered for extension of three months from 01.04.2021 to 30.06.2021 due to second wave of Covid-19 as a force majeure event. The Hon'ble Authority observed that the second wave of Covid-19 has adversely hit all sections of the society and it being a case of natural calamity, the Authority pursuant to Section-37 of the Real Estate Regulations & Development Act, 2016, decides to grant three months general extension from 01.04.2021 to 30.06.2021, considering it as a force majeure event.

h). That the Respondent had also suffered devastatingly because of blanket ban on raising of construction, advisories etc. The concerned statutory authorities had earlier imposed a blanket ban on raising of construction, advisories had been issued by the statutory authorities to the developers to ensure that no retrenchment of staff/labour are done and further to ensure that the staff/labour were adequately fed and provided for. That it is pertinent to mention that the Agreement of sale notified under the Haryana Real Estate (Regulation and Development) Rules, 2017

categorically excludes any delay due to "force majeure", Court orders, Government policy/ guidelines, decisions **affecting the regular development of the real estate project**. That in addition to the aforesaid period, the following period also deserves to be excluded for the purpose of computation of period available to the Respondent to deliver physical possession of the apartment to the Complainant as permitted under the Haryana Real Estate (Regulation and Development) Rules, 2017:-

**1. Date of Orders:-** 9<sup>th</sup> of November 2017 and 17<sup>th</sup> of November 2017

**Directions:-** National Green Tribunal had passed the said order dated 9<sup>th</sup> of November 2017 completely prohibiting the carrying on of construction by any person, private or government authority in the entire NCR till the next date of hearing (7<sup>th</sup> of November 2017).

**Period of Restriction/ Prohibition:-** 9<sup>th</sup> of November 2017 to 17<sup>th</sup> of November 2017

**Days Affected:-** 9 days

**2. Date of Order:-** 29<sup>th</sup> of October 2018

**Directions:-** Haryana State Pollution Control Board, Panchkula had passed the order dated 29<sup>th</sup> of October 2018 in furtherance of directions of Environment Pollution (Prevention and Control) Authority dated 27<sup>th</sup> of October 2018.

**Period of Restriction/ Prohibition:-** 1<sup>st</sup> November 2018 to 10<sup>th</sup> November 2018

**Days Affected:-** 10 Days

**3. Date of Order:-** 11<sup>th</sup> of October 2019

**Directions:-** Commissioner, Municipal Corporation, Gurugram had passed order dated 11<sup>th</sup> of October 2019 whereby construction activity had been prohibited from 11<sup>th</sup> of October 2019 to 31<sup>st</sup> of December 2019.

**Period of Restriction/ Prohibition:-** 11<sup>th</sup> of October 2019 to 31<sup>st</sup> of December 2019

**Days Affected:-** 81 days

**4. Date of order:** November 01,2019

Environment Pollution (Prevention & Control) Authority, for the National Capital Region vide direction dated November 01,2019 imposed complete ban on the construction activities in Delhi, Faridabad, Gurugram, Ghaziabad, Noida and Greater Noida until morning of November 05,2019.

**Period of Restriction/ Prohibition:-** November 01, 2019 to morning of November 05, 2019

**Days Affected:-** 4 days

**5. Date of order: 04<sup>th</sup> of November,2019**

Hon'ble Supreme Court vide order dated 04.11.2019 in the W.P.(Civil) No.13029/1985 M.C.Mehta vs Union of India & ors; directed for stoppage of all the constructions work till further order.

**Period of Restriction/Prohibition:-** 04.11.2019 to 14.02.2020.

**Days affected: -**102 days.

**Overlap period:** 04.11.2019 to 31.12.2019 i.e. 58 days

16. Therefore, no. of days affected on account of Hon'ble Supreme Court Order is  $103-58$  days= $45$  days. That the period of 240 days in addition to the period affected by Covid-19 ( $6+3=9$  months) mentioned hereinabove was

consumed on account of circumstances beyond the power and control of the Respondent owing to passing of orders by statutory authorities affecting the regular development of the real estate project. Since, the Respondent was prevented for the reasons stated above from undertaking construction activity within the periods of time already indicated hereinbefore, the said period ought to be excluded, while computing the period availed by the Respondent for the purpose of raising construction and delivering possession.

17. That it is respectfully submitted that in a recent judgment Hon'ble RERA Authority of Guatam Budh Nagar has provide benefit of 116 days to the Developer on account of various orders of NGT and Hon'ble Supreme Court directing ban on construction activities in Delhi and NCR, 10 days for the period 01.11.2018 to 10.11.2018, 4 days for 26.10.2019 to 30.10.2019, 5 days for the period 04.11.2019 to 08.11.2019 and 102 days for the period 04.11.2019 to 14.02.2020. The Hon'ble Authority was also pleased to consider and provided benefit of 6 months to the Developer on account of effect of Covid also.
18. That it is also in public domain that the third wave of Covid-19 had also badly hit all the activities not only in Haryana but also in India and rest of the world. Haryana Government had imposed lockdown for varying periods owing to Covid19 third wave resulting in virtual closure of construction activities in their entirety within the state of Haryana.
19. That the complainant was entitled to assured returns until 30.06.2019 as specifically provided in the addendum at Cl.3 in following terms:

*"3. The Developer further assures the Investor (s) that they will continue to pay the Discount amount of ...../- (Rupees) per quarter from 1 July 2016 till 30 June 2019 irrespective of possession of the unit being handed over to the Allottee(s) or not."*

20. In view of the above, the complaint deserves to be dismissed.
21. All other averments made in the complaint are denied in toto.
22. Copies of all the relevant documents have been duly filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

#### **E. Jurisdiction of the authority**

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**

23. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

##### **E.II Subject matter jurisdiction**

The 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.*

24. 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 delay due to force majeure circumstances.**

25. The respondent-promoter raised a contention that the construction of the project was delayed due to force majeure conditions such as various orders passed by the Haryana State Pollution Control Board from 01.11.2018 to 10.11.2018, lockdown due to outbreak of Covid-19 pandemic which further led to shortage of labour and orders passed by National Green Tribunal (hereinafter, referred as NGT). Further, the authority has gone through the possession clause of the agreement and observed that the respondent-developer proposes to handover the

possession of the shop be ready on May-2020. So, the due date of subject shop comes out to be 30.05.2020. Further as per HARERA notification no. 9/3-2020 dated 26.05.2020, an extension of 6 months is granted for the projects having completion/due date on or after 25.03.2020. The completion date of the aforesaid project in which the subject shop is being allotted to the complainant is 30.05.2020 i.e., after 25.03.2020. Therefore, an extension of 6 months is to be given over and above the due date of handing over possession in view of notification no. 9/3-2020 dated 26.05.2020, on account of force majeure conditions due to outbreak of Covid-19 pandemic. So, in such case the due date for handing over of possession comes out to 30.11.2020.

**G. Findings on the relief sought by the complainant:**

**G.I Assured return**

26. While filing the petition besides delayed possession charges of the allotted shop as per builder buyer agreement dated 08.06.2018, the complainant has also sought assured returns on monthly basis as per addendum to the agreement at the rate of Rs. 13,284/- per month from 24.05.2018 till the offer of possession. It is pleaded that the respondent has not complied with the terms and conditions of the agreement. Though it has also been averred by the complainant that assured return has been paid till Jan 2021 and the same has been duly confirmed by the respondent.
27. 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 shop/unit in favour of the allottees. Now, three issues arise for consideration as to:

- i. Whether authority is within the jurisdiction to vary its earlier stand regarding assured returns due to changed facts and circumstances.
  - ii. Whether the authority is competent to allow assured returns to the allottees in pre-RERA cases, after the Act of 2016 came into operation,
  - iii. Whether the Act of 2019 bars payment of assured returns to the allottees in pre-RERA cases
28. 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 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. 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. 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.

#### **G. II Delay possession charges**

29. In the present complaint, the complainant intend to continue with the project and is seeking possession of the subject floor and delay possession charges as provided under the provisions of section 18(1) of the Act which reads as under.

**"Section 18: - Return of amount and compensation**

*18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*

*.....  
Provided 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 the possession, at such rate as may be prescribed."*

30. A builder buyer agreement dated 08.06.2018 was executed between the parties. The due date is calculated as per clause 8 of BBA i.e., till May 2020 along with a grace period of 6 months on ground of COVID-19. Therefore, the possession was to be handed over by 30.11.2020. The relevant clause is reproduced below:

8.

*Schedule for possession of the said Unit - The Developer agrees and understands that timely delivery of possession of the Unit to the Allottee and the Common Areas to the association of allottees or the Governmental Authority, as the case may be, is the essence of the Agreement. The Developer assures to hand over possession of the Unit along with ready on May-2020, unless there is delay or failure due to Force Majeure events. If, however, the completion of the Project is delayed due to the Force Majeure conditions then the Allottee agrees that the Developer shall be entitled to the extension of time for delivery of possession of the Unit for residential usage. The Allottee agrees and confirms that, in the event it becomes impossible for the Developer to implement the Project due to Force Majeure conditions, then this allotment shall stand terminated and the Developer shall refund to the Allottee the entire amount received by the Developer from the allotment within 90 (ninety) days from that date on which Allottee confirms that it has become impossible for the Developer to implement the Project. The Developer shall intimate the Allottee about such termination at least 30 (thirty) days prior to such termination of the Agreement. After refund of the money paid by the Allottee, the Allottee agrees that he/ she shall not have any rights, claims etc. against the Developer and that the Developer shall be released and discharged from all its obligations and liabilities under this Agreement.*

*(Emphasis supplied).*

31. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainant not being in default under any provisions of this agreement and compliance with all

provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions is not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottees that even a single default by him in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject floor and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottees is left with no option but to sign on the dotted lines.

32. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is 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.*

33. The legislature in its wisdom in the subordinate legislation under the rule 15 of the rules has determined the prescribed rate of interest.

34. 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., 27.10.2023 is 8.75%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75%.
35. 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;"*
36. On consideration of documents available on record and submissions made by the complainant and the respondent, the authority is satisfied that the respondent is in contravention of the provisions of the Act. The agreement executed between the parties on 08.06.2018, the possession of the subject floor was to be delivered within stipulated time i.e., 30.11.2020. However now, the proposition before it is as to whether the allottee who is getting/entitled for assured return even after expiry of due date of possession, can claim both the assured return as well as delayed possession charges?
37. 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 an addendum to the BBA. The assured return in this case is payable

from the date of making 100% of the total sale consideration till completion of the building. The rate at which assured return has been committed by the promoter is Rs. 13,284/- per month from 24.05.2018 till the offer of possession. If we compare this assured return with delayed possession charges payable under proviso to section 18(1) of the Act, 2016, the delayed possession is much higher i.e., assured return in this case is payable a Rs. 13,284/- per month whereas the delayed possession charges are payable approximately Rs. 24,667/- per month. By way of assured return, the promoter has assured the allottee that he would be entitled for this specific amount till offer of possession. They are to be paid either the assured return or delayed possession charges whichever is higher.

38. 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 offer of possession, then the allottees shall be entitled to assured return or delayed possession charges, whichever is higher without prejudice to any other remedy including compensation. Hence, the authority directs the respondent/promoter to pay delayed possession charges from the due date of possession(30.11.2020) till offer of possession(04.10.2021) plus two months i.e., 04.12.2021 after deducting amount of assured return of two months i.e., 01.12.2020 to 31.01.2021 which is Rs. 26,568/- as the same has been paid during the period delayed possession charges have been due.

**G.III Direct the respondent to award compensation of Rs. 2,00,000+Rs. 1,00,000/-**



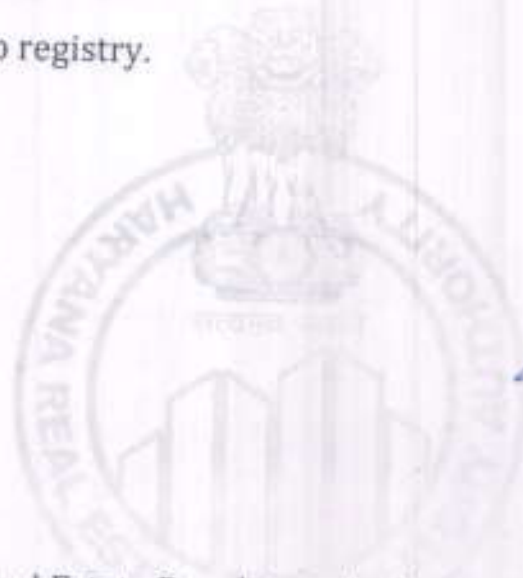
28. The complainant is seeking relief w.r.t. compensation in the above-mentioned relief. *Hon'ble Supreme Court of India in civil appeal titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors.(supra)*, has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, for claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before the Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

#### **H. Directions of the authority**

29. 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. The respondent is directed to pay delayed possession charges at the prescribed rate of interest i.e., 10.75% p.a. for every month of delay on the amount paid by him from the due date of possession i.e., 30.11.2020 till date of offer of possession (04.10.2021) plus two months i.e., (04.12.2021) after deducting amount of assured return of

two months i.e., 01.12.2020 to 31.01.2021.

- ii. The promoter shall not charge anything which is not part of the BBA.
  - iii. Separate proceeding to be initiated by the planning department of the Authority for taking an appropriate action against the builder as the registration of the project has been expired.
30. Complaint stands disposed of.
31. File be consigned to registry.



  
Sanjeev Kumar Arora  
Member

Haryana Real Estate Regulatory Authority, Gurugram  
Dated: 27.10.2023

HARERA  
GURUGRAM