BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**361 of 2023**
Date of complaint	**:**	**02.02.2023**
Date of order	**:**	**27.03.2024**

1. Rajan Mayor,
2. Meenakshi Mayor,
Both R/o: - D-2, Ansal Villas,
Satbari, New Delhi-110074. **Complainants**

Versus

M/s Orris Infrastructure Pvt. Ltd.
Regd. Office At: RZ-D-5, Mahavir Enclave,
South West Delhi, Delhi-110045. **Respondent**

CORAM:
Ashok Sangwan **Member**

APPEARANCE:
Gaurav Rawat (Advocate) Complainants
Charu Rustagi (Advocate) 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 provisions of the Act or the

Rules and regulations made thereunder 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:

Sr. No.	Particulars	Details
1.	Name of the project	Floreal Towers, Sector 83, Gurugram, Haryana
2.	Project area	9.052 acres
3.	Nature of the project	Commercial colony
4.	DTCP license no.	260 of 2007 dated 14.11.2007
	License valid till	13.11.2024
	Licensed area	9.05 acres
	License holder	M/s Seriatim Land & Housing Pvt. Ltd.
5.	HRERA registered/ not registered	**Not registered**
6.	MOU executed on	26.09.2008 [Page 26 of complaint]
8.	Assured Return clause	2. After receipt of consideration of Rs.66,00,000/- (Rupees Sixty-Six Lac only) the **Developer shall give an investment return @ 68/- per sq. ft. per month i.e. Rs.1,36,000/- (Rupees Sixty One Lac Thirty-Six Thousand only) with effect from 6th October, 2008, on or before 7th day of every month for which it is due upto the first 36 months after completion of the building or till the date the said Office Space is put on lease, whichever is earlier.** [Page 28 of complaint]
9.	Unit no.	219, 2nd Floor, Tower-B (pg. 41 of complaint)

10.	Unit admeasuring as per SBA dated 15.04.2009	2000 sq. ft. (super area) (page 19 of complaint)
11.	Space buyer agreement executed between complainant and respondent	15.04.2009 (pg. 36 of complaint)
12.	Possession clause	***10.1 Schedule for Possession of the said Unit*** *The company based on its present plans and estimates and subject to all just exceptions. contemplates to complete construction of the said Building / said Unit within the period of 36 months from the date of execution of the Space Buyer Agreement by the Company or Sanction of Plans or Commencement of Construction whichever is later, unless there shall be delay or there shall be failure due to reasons mentioned in Clauses (11.1). (11.2). (11.3) and Clause (38) or due to failure of Allottee(s) to pay in time the price of the said Unit along with all other charges and dues in accordance with the schedule of payments given in Annexure I or as per the demands raised by the Company from time to time or any failure on the part of the Allottee (s) to abide by any terms or conditions of this Space Buyer Agreement.* (pg. 52 of complaint)
13.	Date of sanction of building plans	***Not on record***
14.	Date of commencement of construction	***Not on record***
15.	Due date of possession	**15.04.2012** (calculated as 36 months from the date of buyer's agreement)
16.	Total consideration as per statement of account dated	Rs.87,57,780/-

	27.03.2018 at page 79 of complaint	(including BSP, EDC & IDC, Utility Charges, GST, VAT, IFMS & One-time electricity connection charges)
17.	Amount paid by the complainant as per statement of account dated 27.03.2018 at page 79 of complaint	Rs.66,00,000/-
18.	Occupation certificate	16.08.2017 [page 17 of reply]
19.	Offer of constructive possession	27.03.2018 (page 19 of reply)
20.	Unit shifting letter from tower B to tower A being an unintentional error/mistake	28.06.2018 (page 21 of reply)

B. Facts of the complaint

3. The complainants have made the following submissions: -

I. That relying on various representations and assurances given by the respondent, the complainants booked a commercial unit under assured return plan having 2000 sq. ft. super area, in the project of the respondent named "Floreal Towers" at Sector 83, Gurugram by paying an amount of Rs.66,00000/- as full and final payment towards the said booking to the respondent and the same was acknowledged by the respondent on 27.09.2008.

II. That after receipt of consideration, the respondent to dupe the complainants in their net even executed MoU dated 26.09.2008 with the complainants just to create a false belief that it will pay investment return on down payment of Rs.66,00000/- @ rate of Rs.68/- per sq. ft per month i.e. Rs.1,36000/- with effect from 06.10.2008 on or before 07th of every month for which it is due upto the 36 months after completion of the building or till the date the said office space is put on

lease, whichever is earlier. Thereafter, a unit bearing no. 219, 2nd Floor in Tower-B, admeasuring 2000 sq. ft in the said project was allotted to the complainants vide space buyer agreement dated 15.04.2009 for a total sale consideration of Rs.6600000/- and the same was duly paid by the complainants in time bound manner under assured return plan.

III. That the complainants wrote emails dated 10.04.2018, 26.02.2019 to the respondent regarding the monthly assured return which was due since long time but respondent instead of replying to the above said query send reminder letter to the complainants.

IV. That the respondent has failed to meet the obligations and with malafide intentions has collected a huge amount of money from the complainants. This act on part of the respondent has not only caused huge financial losses but has also offset the family life.

V. That the respondent at the time of execution of MoU agreed to lease out office space at a minimum rental of Rs.68/- per sq. ft. per month after completion of the construction of the proposed building as per clause 5 of the MOU.

VI. That respondent was liable to hand over the possession of the said unit before 14.04.2012 so far from completion as per clause 10.1 of the space buyer agreement, but the builder offered possession for fit-out on 10.03.2017 without getting Occupation Certificate and also unit was not in habitable condition. Thereafter, on 27.03.2018, the respondent offered constructive possession of the unit, but the unit was again not in habitable condition.

VII. That on 28.06.2018, the respondent raised an illegal and unjustified demand of Rs.1300980/- through demand letter dated 28.06.2018.

Further, as per construction status and absence of basic amenities respondent will take more time to give physical possession.

VIII. That the builder in the last 15 years many times made false promises for possession of the unit, whereas the current status of project is still desolate and raw and not even 70% completed.

IX. That respondent vide offer of possession letter dated 27.03.2018, forcibly imposed additional EDC & IDC charges of Rs.822700/-, utility charges of Rs.1000000/- and IFMS deposit of Rs.250000/- upon the complainants which is unjustified.

X. That the respondent had illegally and unjustifiably raised demand towards VAT of Rs.69300 /- intimidation attempt to coerce and obtain an illegal and unfounded claim amount.

XI. That the complainants wrote many emails and letters dated 18.09.2019, 26.11.2019, 30.06.2020, 18.07.2020, 15.12.2020, 14.07.2021, 18.08.2022 regarding the illegal demand and multiple issues but respondent instead of replying to the above said query send reminder letters to the complainants.

XII. That the respondent sends a maintenance confirmation letter dated 02.01.2023 vide which the respondent demanded maintenance charges @127440/- for the period of 01.01.2023 to 31.03.2023 without having given the physical possession and without the registration of the flat which is absolutely illegal.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s):

I. Direct the respondent to handover possession of the unit and to pay delay interest on amount paid at prescribed rate.

II. Direct the respondents to pay assured return amount @136000/- per month till 36 months after the actual physical possession date.

III. Direct the respondent to quash the utility charge, one time electricity connection charge, IFMS charge, VAT charges and increase in super area.

5. On the date of hearing, the authority explained to the respondent/promoter 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 has contested the complaint by filing reply dated 25.10.2023 on the following grounds: -

(i) That in the present complaint, the complainant was allotted unit no. 219, 2nd floor, tower A, admeasuring 2000 Sq. Ft. in the project 'Floreal Towers', located at Sector-83, Gurugram, Haryana. The memorandum of understanding between the parties was executed on 26.09.2008 and the space buyer agreement between the parties took place on 15.04.2009 wherein as per clause 10.1 of the buyer agreement, the respondent was supposed to hand over the possession within a period of 36 months from the date of execution of buyer's agreement.

(ii) That thereafter, several obstructions had taken place which hampered the pace of the construction wherein in the year, 2012 on the directions of the Hon'ble Supreme Court of India, the mining activities of minor minerals (which includes sand) were regulated. The Hon'ble Supreme Court directed framing of Modern Mineral Concession Rules. Reference in this regard may be had to the

judgment of "Deepak Kumar v. State of Haryana, (2012) 4 SCC 629". The competent authorities took substantial time in framing the rules and in the process the availability of building materials including sand which was an important raw material for development of the said project became scarce in the NCR as well as areas around it. Further, the respondent was faced with certain other force majeure events including but not limited to non-availability of raw material due to various stay orders of Hon'ble Punjab & Haryana High Court and National Green Tribunal thereby stopping/regulating the mining activities, brick kilns, regulation of the construction and development activities by the judicial authorities in NCR on account of the environmental conditions, restrictions on usage of water, etc. It is pertinent to state that the National Green Tribunal in several cases related to Punjab and Haryana had stayed mining operations including in O.A No. 171/2013, wherein vide order dated 02.11.2015 mining activities by the newly allotted mining contracts by the state of Haryana was stayed on the Yamuna Riverbed. These orders inter-alia continued till the year 2018. Similar orders staying the mining operations were also passed by the Hon'ble High Court and the National Green Tribunal in Punjab and Uttar Pradesh as well. The stopping of mining activity not only made procurement of material difficult but also raised the prices of sand/gravel exponentially. It was almost 2 years that the scarcity as detailed above continued, despite which all efforts were made and materials were procured at 3-4 times the rate and the construction continued without shifting any extra burden to the customer. That the above said restrictions clearly fall

within the parameter "reasons beyond the control of the respondent as described under of clause 11.1 of the buyer agreement.

(iii) That during that time, a writ petition was filed in the Hon'ble High Court of Punjab and Haryana titled as "Sunil Singh vs. Ministry of Environment & Forests Parayavaran" which was numbered as CWP-20032-2008 wherein the Hon'ble High Court pursuant to order dated 31.07.2012 imposed a blanket ban on the use of ground water in the region of Gurgaon and adjoining areas for the purposes of construction. That on passing of the abovementioned orders by the High Court, the entire construction work in the Gurgaon region came to stand still as the water is one of the essential parts for construction. That in light of the order passed by the Hon'ble High Court, the respondent had to arrange and procure water from alternate sources which were far from the construction site. The arrangement of water from distant places required additional time and money which resulted in the alleged delay and further as per necessary requirements STP was required to be setup for the treatment of the procured water before the usage for construction which further resulted in the alleged delay.

(iv) That orders passed by Hon'ble High Court of Punjab and Haryana wherein the Hon'ble Court has restricted use of groundwater in construction activity and directed use of only treated water from available sewerage treatment plants. However, there was lack of number of sewage treatment plants which led to scarcity of water and further delayed the project. That in addition to this, labour rejected to work using the STP water over their health issues

because of the pungent and foul smell coming from the STP water as the water from the S.T.P' s of the State/Corporations had not undergone proper tertiary treatment as per prescribed norms.

(v) That on 19.02.2013, the office of the executive engineer, HUDA Division No. II, Gurgoan vide memo no. 3008-3181, had issued instruction to all developers to lift tertiary treated effluent for construction purpose for Sewerage Treatment plant Behrampur. Due to this instruction, the respondent company faced the problem of water supply for a period of several months as adequate treated water was not available at Behrampur.

(vi) That the occupation certificate of the tower in question was obtained by the respondent on 16.08.2017 and constructive possession of the unit was offered to the complainants on 27.03.2018 and thereafter, another letter dated 28.06.2018 was sent to the complainants informing them about the pending dues and outstanding amount of the assured returns and it was understood that since the outstanding amount to be paid on behalf of the complainants is more than the amount of the assured returns, the same shall be adjusted and the complainants were requested to make the balance payment so that the complainant take the possession of the unit in question.

(vii) That the complainants had initiated insolvency proceedings before the Hon'ble National Company Law Tribunal, Delhi, titled as "Rajan Mayor vs Orris Infrastructure Pvt Ltd", having case no. (IB)-423 of 2017, wherein the complainant filed the said petition on same line and prayer as that of the present complaint before this Authority

and therefore, the present complaint is barred by the principles of res-judicata.

(viii) That the complainant has settled the matter with the respondent vid settlement deed dated 14.11.2017 wherein the complainant has already accepted amount of Rs.13,46,400/- as full and final settlement and withdrew the company petition before the NCLT and therefore, the complainant is barred to proceed with the present complaint.

(ix) That this Authority lacks jurisdiction to entertain the present complaint as the unit allotted to the complaint was under assured return scheme and therefore, the matter falls under the Banning of Unregulated Deposit Schemes Act, 2019.

(x) That the respondent company cannot be made liable for the delay. As per clause 11.1 of the space buyer's agreement which clearly states that respondent shall be entitled to extension of time for delivery of possession of the said premises if such performance is prevented or delayed due to conditions as mentioned therein. The answering respondent has acted in accordance with the terms and conditions of the buyer's agreement executed between the parties on their own free will. That the complainant was duly informed about the schedule of possession as per clauses 10.1 of the buyer's agreement entered into between the complainant and respondent.

(xi) That there was a change in the zoning plan due to which the land owner company, i.e., Seratum Land and Housing Pvt Ltd ("Seratum") had sent a letter regarding the approval from Director General Town and Country Planning Haryana vide letter dated 14.03.2014 wherein it was also requested grant of occupation

certificate and to deposit compounding charges as per prevailing policies. On 22.05.2015 a letter from DTCP, Haryana was received by the Seratum wherein the amount of the compounding fees was informed and vide letter dated 06.09.2014, Seratum informed DTCP regarding payment of the requisite fees along with the details. Again, the respondent as well as Seratum vide letters dated 17.11.2014 and 21.04.2016 respectively requested for grant of occupation certificate but the same was issued by the statutory authority on 16.08.2017.

(xii) That it is submitted that even otherwise the complainant cannot invoke the jurisdiction of the Hon'ble Authority in respect of the unit allotted to the complainant, especially when there is an arbitration clause 49 provided in the space buyer agreement, whereby all or any disputes arising out of or touching upon or in relation to the terms of the said agreement or its termination and respective rights and obligations, is to be settled amicable failing which the same is to be settled through arbitration. Once the parties have agreed to have adjudication carried out by an Alternative Dispute Redressal Forum, invoking the jurisdiction of this Hon'ble Authority, is misconceived, erroneous and misplaced.

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

E. Jurisdiction of the authority

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, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

E.II Subject matter jurisdiction

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

> ***Section 11*****.....*(4) The promoter shall-*
> *(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
> ***Section 34-Functions of the Authority:***
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

10. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation

which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondent.

F. I. Objection regarding maintainability of complaint.

11. The respondent vide its reply dated 25.10.2023 contented that the present complaint is not maintainable as the complainants had previously approached the NCLT for payment of the dues, but the matter was settled between the parties vide settlement deed dated 14.11.2017, wherein the complainants withdrew their complaint on settlement of dues. However, after considering the documents available on record as well as submissions made by the parties, it is determined that the settlement agreement dated 14.11.2017 was not a full and final settlement and was without prejudice to the respective claims, contentions and rights of the parties. In view of the above, the contention/objection of respondent stands rejected.

F.II Objection regarding complainant is in breach of agreement for non-invocation of arbitration.

12. The respondent submitted that the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute and the same is reproduced below for the ready reference:

> ***"35. Dispute Resolution by Arbitration***
> *"All or any disputes arising out of or touching upon or in relation to the terms of this Space Buyer 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 settled through arbitration. The arbitration proceeding shall*

be governed by the Arbitration & Conciliation Act, 1996 or any statutory amendments/modifications thereof for the time bring in force. The arbitration proceedings shall be held at the corporate office of the Company alone at Gurgaon stated hereinabove by a Sole Arbitrator who shall be nominated by the Company. The Allottee hereby confirms that he/she shall have no objection to this appointment. The courts at Gurgaon alone and the Punjab & Haryana High Court at Chandigarh alone shall have the jurisdiction in all matters arising out of/touching and/or concerning this Space Buyer Agreement regardless of the place of execution of this Space Buyer Agreement which is deemed to be at Gurgaon".

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 complainant

and builder 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 the complainants are well within right 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. In the light of the above-mentioned reasons, the authority is of the view that the objection of the respondent stands rejected.

F. III Objection regarding the project being delayed because of force majeure circumstances.

17. The respondent-promoter has raised the contention that the construction of the project 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, shortage of labour force in the NCR region, ban on the use of underground water

for construction purposes, heavy shortage of supply of construction material 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 15.04.2012. 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.

G. Findings on the relief sought by the complainants.

G.I. Direct the respondent to handover possession of the unit and to pay delay interest on amount paid at prescribed rate.

G.II Direct the respondents to pay assured return amount @136000/- per month till 36 months after the actual physical possession date.

18. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso 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."*

19. Clause 10.1 of the space buyer's agreement dated 15.04.2009 provides for handing over of possession and is reproduced below: -

> ***10.1 Schedule for Possession of the said Unit***
> *"The company based on its present plans and estimates and subject to all just exceptions. contemplates to complete construction of the said Building / said Unit within the period of 36 months from the date of execution of the Space Buyer Agreement by the Company or Sanction of Plans or Commencement of*

Construction whichever is later, unless there shall be delay or there shall be failure due to reasons mentioned in Clauses (11.1). (11.2). (11.3) and Clause (38) or due to failure of Allottee(s) to pay in time the price of the said Unit along with all other charges and dues in accordance with the schedule of payments given in Annexure I or as per the demands raised by the Company from time to time or any failure on the part of the Allottee (s) to abide by any terms or conditions of this Space Buyer Agreement."

20. 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 application, 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 are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottees in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the buyer developer agreement by the promoter is just to evade the liability towards timely delivery of subject unit 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 its dominant position and drafted such mischievous clause in the agreement and the allottees are left with no option but to sign on the dotted lines.

21. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at prescribed rate of interest. 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.*

22. 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.

23. 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., 27.03.2024 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.

24. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, 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. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.85% by the respondent/promoter which the same is as is being granted to the complainants in case of delayed possession charges.

G. II Direct the respondent to pay assured return amount @136000/- per month till 36 months after the actual physical possession date.

26. The complainants are seeking payment of the balance assured return which have been paid upto November 2017 while as per MoU clause 2, the respondent is required to pay assured return upto the first 36 months after completion of the building or till the date of leasing out of the unit, whichever is earlier. Since the unit is not yet put on lease and hence, the respondent is required to make the payment of assured return till date.

27. However, the counsel for the respondent has submitted that the complainants have approached NCLT in 2017 for payment of dues, but the matter was settled between the parties vide settlement deed dated 14.11.2017, wherein the complainants withdrew their complaint on settlement of dues. Although the OC of the unit has been obtained on 16.08.2017 and possession of the unit was offered on 27.03.2018.

28. As per clause 2 of MOU, the respondent was liable to pay investment return at the rate of Rs.68/- per sq. ft. per month i.e., Rs.1,36,000/- with effect from 06.10.2008, upto the first 36 months after completion of the building or till the said office space is leased out by the developer to the lessee, whichever is earlier. Clause 2 of the memorandum of understanding stipulates that: -

> *2. After receipt of full consideration of Rs. 66,00,000/- (Rupees Sixty Six Lac only) the* ***Developer shall give an investment return @ 68/- per sq. ft. per month i.e. Rs.1,36,000/- (Rupees Sixty One Lac Thirty-Six Thousand only) with effect from 6th October, 2008, on or before 7th day of every month for which it is due upto the first 36 months after completion of the building or till the date the said Office Space is put on lease, whichever is earlier."***

29. It is pleaded by the complainants that the respondent has not complied with the terms and conditions of the MOU/agreement. Further, the settlement agreement dated 14.11.2017 was upto the point of pending assured return till November 2017 and the settlement was without prejudice to the claims of the parties. The respondent has submitted that the Authority has no jurisdiction to entertain the present complaint as the unit allotted to the complainants was under assured return scheme and therefore, the matter falls under the Banning of Unregulated Deposit Schemes Act, 2019 (hereinafter referred to as the BUDS Act, 2019). But that Act does not create a bar for payment of

assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act. Further, an MOU can be considered as an agreement for sale interpretating 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 allottees would be bound by the obligations contained in the memorandum of understanding 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 allottees 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 allottees 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 allottees arises out of the same relationship. Therefore, it can be said that this 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 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

30. 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 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 a plea raised with regard to maintainability of the complaint in the face of earlier orders of the authority in not tenable. The authority can take different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. It is now well settled preposition of law that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum , memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement for sale defines the builder-buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allotee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arise 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(1)(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 allottees 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.

31. It is pleaded on behalf of respondent/builder that after the Banning of Unregulated Deposit Scheme Act of 2019 came into force, there is bar for payment of assured returns to an allottee. But again, the plea taken in this regard is devoid of merit. Section 2(4) of the above mentioned Act defines the word ' deposit' as *an amount of money received by way of an advance or loan or in any other form, by any deposit taken with a promise to return whether after a specified period* or otherwise, either in cash or in kind or in the form of a specified service, *with or without any benefit in the form of interest, bonus, profit or in any other form, but does not include:*

    i. *an amount received in the course of, or for the purpose of, business and bearing a genuine connection to such business including—*
    ii. *advance received in connection with consideration of an immovable property under an agreement or arrangement subject to the condition that such advance is adjusted against such immovable property as specified in terms of the agreement or arrangement.*

32. A perusal of the above-mentioned definition of the term 'deposit' shows that it has been given the same meaning as assigned to it under the Companies Act, 2013 and the same provides under section 2(31)

includes any receipt by way of deposit or loan or in any other form by a company but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India. Similarly rule 2(c) of the Companies (Acceptance of Deposits) Rules, 2014 defines the meaning of deposit which includes any receipt of money by way of deposit or loan or in any other form by a company but does not include.

i. *as a advance, accounted for in any manner whatsoever, received in connection with consideration for an immovable property*
ii. *as an advance received and as allowed by any sectoral regulator or in accordance with directions of Central or State Government;*

33. 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.

34. The Government of India enacted the Banning of Unregulated Deposit Schemes Act, 2019 to provide for a comprehensive mechanism to ban the unregulated deposit schemes, other than deposits taken in the ordinary course of business and to protect the interest of depositors and for matters connected therewith or incidental thereto as defined in section 2 (4) of the BUDS Act 2019 mentioned above.

35. It is evident from the perusal of section 2(4)(l)(ii) of the above-mentioned Act that the advances received in connection with consideration of an immovable property under an agreement or arrangement subject to the condition that such advances are adjusted against such immovable property as specified in terms of the agreement

or arrangement do not fall within the term of deposit, which have been banned by the Act of 2019.

36. Moreover, the developer is also bound by promissory estoppel. As per this doctrine, the view is that if any person has made a promise and the promisee has acted on such promise and altered his position, then the person/promisor is bound to comply with his or her promise. When the builders failed to honour their commitments, a number of cases were filed by the creditors at different forums such as Nikhil Mehta, Pioneer Urban Land and Infrastructure which ultimately led the central government to enact the Banning of Unregulated Deposit Scheme Act, 2019 on 31.07.2019 in pursuant to the Banning of Unregulated Deposit Scheme Ordinance, 2018. However, the moot question to be decided is as to whether the schemes floated earlier by the builders and promising as assured returns on the basis of allotment of units are covered by the abovementioned Act or not. A similar issue for consideration arose before Hon'ble RERA Panchkula in case Baldev Gautam VS Rise Projects Private Limited (RERA-PKL-2068-2019) where in it was held on 11.03.2020 that a builder is liable to pay monthly assured returns to the complainant till possession of respective apartments stands handed over and there is no illegality in this regard.

37. The definition of term 'deposit' as given in the BUDS Act 2019, has the same meaning as assigned to it under the Companies Act 2013, as per section 2(4)(iv)(i) i.e., explanation to sub-clause (iv). In pursuant to powers conferred by clause 31 of section 2, section 73 and 76 read with sub-section 1 and 2 of section 469 of the Companies Act 2013, the Rules with regard to acceptance of deposits by the companies were framed in the year 2014 and the same came into force on 01.04.2014. The

definition of deposit has been given under section 2 (c) of the above-mentioned Rules and as per clause xii (b), as advance, accounted for in any manner whatsoever received in connection with consideration for an immovable property under an agreement or arrangement, provided such advance is adjusted against such property in accordance with the terms of agreement or arrangement shall not be a deposit. Though there is proviso to this provision as well as to the amounts received under heading 'a' and 'd' and the amount becoming refundable with or without interest due to the reasons that the company accepting the money does not have necessary permission or approval whenever required to deal in the goods or properties or services for which the money is taken, then the amount received shall be deemed to be a deposit under these rules however, the same are not applicable in the case in hand. Though it is contended that there is no necessary permission or approval to take the sale consideration as advance and would be considered as deposit as per sub-clause 2(xv)(b) but the plea advanced in this regard is devoid of merit. First of all, there is exclusion clause to section 2 (xiv)(b) which provides that unless specifically excluded under this clause. Earlier, the deposits received by the companies or the builders as advance were considered as deposits but w.e.f. 29.06.2016, it was provided that the money received as such would not be deposit unless specifically excluded under this clause. A reference in this regard may be given to clause 2 of the First schedule of Regulated Deposit Schemes framed under section 2 (xv) of the Act of 2019 which provides as under:-

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

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

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

38. 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.

39. 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.

40. 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.

41. The authority further observes that now, the proposition before the Authority whether an allottee who is getting/entitled for assured return even after expiry of due date of possession, is entitled to both the assured return as well as delayed possession charges?

To answer the above proposition, it is worthwhile to consider that the assured return is payable to the allottee on account of a provision in the BBA or in a MoU having reference of the BBA or an addendum to the BBA/MoU or allotment letter. The rate at which assured return has been committed by the promoter is Rs.1,30,000/- per month. If we compare this assured return with delayed possession charges payable under proviso to section 18 (1) of the Real Estate (Regulation and Development) Act, 2016, the assured return is much better. By way of assured return, the promoter has assured the allottees that they will be entitled for this specific amount from 06.10.2008 upto the first 36 months after completion of the building or till the date the said office space is put on lease, whichever is earlier. Accordingly, the interest of the allottee is protected even after the due date of possession is over. 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.

42. 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, the allottee shall be entitled to assured return or delayed possession charges, whichever is higher without prejudice to any other remedy including compensation.

43. In the present complaint, as per clause 2 of the MoU dated 26.09.2008, the amount on account of assured return was payable from 06.10.2008 upto the first 36 months after completion of the building or till the said office space is leased out by the developer to the lessee, whichever is earlier. However, the date of completion of the building is not provided by either of the parties. Therefore, the date of grant of occupation certificate i.e., 16.08.2017 ought to be taken as the date of completion of the building. Therefore, considering the facts of the present case, the respondent is directed to pay the balance amount of assured return at the agreed rate i.e., Rs.1,30,000/- per month from December 2017 upto 16.08.2020 i.e., 36 months from the date of completion of the building (date of grant of OC) being earlier as the unit/space has not yet been leased out by the respondent.

44. 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, from the complainants and failing which that amount would be payable with interest @ 8.85% p.a. till the date of actual realization.

G.III Direct the respondent to quash the utility charge, one time electricity connection charge, IFMS charge, VAT charges and increase in super area.

45. **Electricity connection charge:** The promoter is entitled to charge the actual charges paid to the concerned departments from the complainant/allottee on pro-rata basis on account of electricity connection depending upon the area of the space/unit allotted to the

complainants viz-à-viz the area of the project, subject to the respondent furnishing proof of having paid the same to the competent authority.

46. **Increase in super area:** The complainant is seeking quashing of demand on account of increase in super area of the unit allotted to the complainants. However, as per record, the super area of the unit/space allotted to the complainants has not been revised. Therefore, no direction to the same.

47. The complainants have submitted that the respondent is illegally demanding amount on account of utility charge, IFMS charge, VAT charges. Whereas the respondent has stated that these issues have already been dealt by the Authority vide order dated 18.01.2023 in case bearing no. 1297 of 2019 titled as *"RajBala and Ors. Vs. Orris Infrastructure Pvt. Ltd. and Ors."*. Ordered accordingly.

H. Directions of the authority

48. 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/builder is directed to pay the balance amount of assured return at the agreed rate i.e., Rs.1,30,000/- per month from December 2017 upto 16.08.2020 i.e., 36 months from the date of completion of the building (date of grant of OC) being earlier.

ii. 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, failing which that amount would be payable with interest @8.85% p.a. till the date of actual realization.

iii. The respondent is directed to handover possession of the unit/space in question to the complainants in terms of the space buyer agreement dated 15.04.2009.

iv. The respondent shall not charge anything from the complainants which is not part of the space buyer agreement.

49. Complaint stands disposed of.

50. File be consigned to registry.

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 27.03.2024