

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

Complaint no. : 2311 of 2023
Date of decision : 22.05.2024

1. Shri. Dilbag Singh Tokas.
2. Mrs. Suman Dhillon .
Both R/o: -H.No.-78-B, Jalvaya Vihar,
Sector-30, Gurugram.

Complainants

Versus

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

Respondent

CORAM:
Shri. Ashok Sangwan

Member

APPEARANCE:
Shri. Sukhbir Yadav
Shri. Venket Rao

Advocate for the complainants
Advocate for the respondent

ORDER

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

A. Unit and project related details

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

Sr. No.	Particulars	Details
1.	Name of the project	"Neo Square", Dwarka Expressway, Sector-109, Gurgaon, Haryana
2.	Project Area	3.089 acres
3.	Nature of project	Commercial complex
4.	DTCP license no.	License No. 102 of 2008 Dated:- 15.05.2008
5.	RERA registered	Registered 109 of 2017 Dated:- 24.08.2017
6.	Unit no.	Priority no. 16, floor-5 th
7.	Unit area	300 sq.ft. [Super-area] (As on page no. 54 of complaint)
8.	MoU	25.08.2016 (As on page no. 34 of complaint)
9.	Date of execution of buyer's agreement	25.08.2016 (As on page no. 50 of complaint)
10.	Possession clause as per MoU	Clause 3 <i>The company shall complete the construction of the said Building/Complex, within which the said space is located within 36 months from the date of execution of this Agreement or from the start</i>

		<p><i>of construction, whichever is later and apply for grant of completion/Occupancy Certificate. The Company on grant of Occupancy /Completion Certificate, shall issue final letters to the Allottee(s) who shall within 30 (thirty) days, thereof remit all dues.</i></p> <p><i>[Emphasis supplied]</i></p> <p><i>(As on page no. 36 of complaint)</i></p>
11.	Due date of possession	25.08.2019 [Calculated 36 months from the date of MOU]
12.	Total sale consideration	Rs.14,32,350/- (As per payment plan on page no. 70 of complaint)
13.	Total amount paid by the complainant	Rs.15,28,632 /- (As on page no. 95 of reply)
14.	Assured return as per MoU	<p>Clause 4</p> <p><i>The Company shall pay a monthly assured return of Rs.19,500/- (Rupees Nineteen Thousand Five Hundred Only) on the total amount received with effect from _____ before deduction of Tax at Source and service tax, cess or any balance sale consideration shall be payable by the Allottee(s) to the Company and the balance consideration shall be payable by the Allottee(s) to the Company in accordance with the Payment Schedule annexed as Annexure-I. The monthly assured return shall be paid to the Allottee(s)</i></p>

		<i>until the commencement of the first lease on the said unit. This shall be paid from the effective date. (As on page no. 37 of complaint)</i>
15.	Occupation certificate	Not received
16.	Offer of possession	Not offered

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint: -
 - I. That, the complainants are law-abiding and peace-loving citizens and the respondent "Neo Developers Pvt. Ltd" is a company incorporated under the Companies Act, 1956 having a Registered office at 32B, Pusa Road, New Delhi . The project in question is known as "Neo Square", situated in Sector - 109, Dwarka Expressway, Gurugram, Haryana.
 - II. That in June 2016 the respondent marketed the commercial project. The complainant i.e, Mr. Dilbagh Singh received a marketing call from the office of the respondent and the caller represented himself as the marketing manager of the respondent company. The complainant visited the project site and consulted with the office bearers of the respondent. The office bearers again represented that possession of the unit will be delivered within 36 months from the date of booking and thereafter the respondent shall pay the monthly assured return till the first lease of the unit.
 - III. That being relied upon the representation of the respondent, the complainants i.e., Dilbagh Singh Tokas and Suman Dhillon booked a commercial space in the project and priority no. 16 was assigned with

the super area of 300 sq. ft. at the rate of Rs.3900/- per sq. ft. The total cost of the unit was Rs.14,32,350/-.

- IV. That on 04.07.2016, an application for the allotment was submitted along with the down payment of Rs.1,00,000/- by the complainants. It is imperative to mention here that between 14.07.2016 to 25.08.2016, various payments were made by the complainants by cheques and payment receipts of the same were issued by the respondent.
- V. That an MOU dated 25.08.2016 was executed between the parties. On 26.08.2016 a pre-printed, one-sided, builder buyer agreement was executed between the parties for the commercial unit for a total sale consideration of Rs.14,32,350/-. It is pertinent to mention here that for the commercial space instead of a unit number a priority number was issued. It is further pertinent to mention here that later on 05.03.2021 agreement was registered before the office of the Sub-Registrar, Kadipur, Gurugram, moreover, in the MOU and BBA, there is no due date of possession mentioned by the respondent, furthermore, as per clause 5.2 of the BBA, "The construction completion date shall be deemed to be the date when the application for grant of completion/occupation certificate is made". It is further pertinent to mention here that as per clause No. 20 of the said BBA, "the memorandum of understanding dated 25.08.2016 shall have the overriding effect to the extent of inconsistent terms in the present agreement".
- VI. That through letter dated 02.09.2016, the respondent shared the details of the assured return @ Rs. 65/- per sq. ft for an area measuring 300 sq. ft. to be payable to the allottees as per the MOU and a cheque of Rs. 1,12,360/- was issued after deducting TDS. The payment was done for a period from April 2016 to March 2017.

- VII. That through letter dated 26.05.2017 respondent shared the details of the assured return @ Rs. 65/- per sq. ft for an area measuring 300 sq. ft. to be payable to the allottees as per the MOU and a cheque of Rs. 2,10,600/- was issued. The payment was done for a period from April 2017 to March 2018.
- VIII. That on 22.01.2020 a payment request for Rs. 1,05,282/- was raised by the respondent against the VAT and the same was paid by the complainants through cheque number "000023" drawn on UCO Bank.
- IX. That on 20.02.2020, the respondent sent a statement of account which shows that the complainants have paid Rs.14,70,132/-. It is pertinent to mention here that as per payment receipts the total amount paid to the respondent is Rs.15,28,632/-.
- X. That the main grievance of the complainants in the present complaint is that despite the complainants having paid more than 100% of the sale consideration amount as per the payment schedule in BBA, the respondent party has failed to deliver the possession of the commercial space as per specifications and with amenities shown in the brochure, and the Builder Buyer Agreement.
- XI. That there is a clear unfair trade practice and breach of contract and deficiency in the services of the respondent. The complainants do not want to withdraw from the project. The promoter has not fulfilled his obligation therefore as per obligations of the promoter under sections 11(4), 12, 18, and 19 the promoter(s) are obligated to pay delayed possession interest to the allottee.

C. Relief sought by the complainants

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



- i. Direct the respondent to pay the assured return of Rs.19,500/- per month from April 2018 to the first lease of the property.
 - ii. Direct the respondent to pay delayed possession interest from the due date of possession till the actual handover of the space, with all amenities as specified in the brochure and builder buyer agreement and MOU.
 - iii. Direct the respondent to handover physical possession of the commercial space (complete in all respect as per BBA and MOU) after obtaining occupation certificate.
 - iv. Direct the respondent to provide a lockable space with the proper unit number to the complainants with the specification of the floor as currently only a priority number is provided without any certainty of the floor for the same.
5. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent has contested the complaint on the following grounds:-
- I. That the complainants with the intent to invest approached the respondent and inquired about the project i.e., "Neo square" situated at Sector-109, Gurugram, Haryana. That after being fully satisfied with the project and the approvals thereof, the c decided to apply by submitting a booking application form dated 04.07.2016, whereby seeking allotment of priority No. 16 on the 5th floor admeasuring 300 sq. ft admeasuring super area for a basic sale price of Rs.11,70,000/- . The complainants, considering the future speculative gains, also

opted for the Down Payment Plan – AR (Assured Return Plan) being floated by the respondent for the project.

- II. That since the complainant had opted for the Investment Return Plan, a Memorandum of Understanding dated 25.08.2016 was executed between the parties, which was a completely separate understanding between the parties in regards to the payment of assured returns in lieu of investment made by the complainants and leasing of the unit/space. It is pertinent to mention herein that as per the mutually agreed terms between the complainant and the respondent, the returns were to be paid from August 2016 till the commencement of the first lease. It is also submitted that as per clause 4 of the MOU, the complainant had duly authorised the respondent to put the said unit on lease.
- III. That by no stretch of imagination it can be concluded that the complainants are "Allottee/Consumer." That the complainants are simply investors who approached the respondent for investment opportunities and for a steady Assured Returns and Rental Income. That the MOU executed between the parties was in the form of an "Investment Agreement" and the complainant had approached the respondent as an investor looking for certain investment opportunities. Therefore, the allotment of the said unit contained a "Lease Clause" which empowers the developer to put the unit along with the other commercial space unit on lease and does not have possession clauses, for handing over the physical possession. Hence, the embargo of the Authority, in totality, does not exist.
- IV. It is also pertinent to mention that the respondent had been paying the committed return of Rs.19,500/- for every month to the complainants without any delay. It is to note, that as on 2020, the

complainants had already received an amount of **Rs.6,66,900/-** as assured return as agreed by the respondent under the aforesaid agreement against the Basic Sale Consideration of Rs.11,70,000/- . However, post July 2019 the respondent could not pay the agreed Assured Returns due to the prevailing legal position w.r.t. banning of returns over unregulated deposits post the enactment of the BUDS Act.

- V. Clause 7 of the MOU dated 25.08.2016 elucidates that the obligation of payment of Assured Return by the respondent was only till the commencement of first lease on the unit. The relevant paragraphs in this regard have been reiterated for ready reference:

"4. The monthly assured return shall be paid to the Allottee(s) until the commencement of the first lease on the said unit."

"7. (a) That the responsibility of assured returns to be paid by the Company shall cease on commencement of the first lease of the said unit..."

- VI. It is further submitted that the first lease of the premises wherein the unit of the complainants is situated has already been executed on 10.07.2020. Thereby, the respondent has duly fulfilled its obligations of execution of the First Lease in terms of the MOU. That after the commencement of the first lease, the respondent has duly intimated the complainants vide letter dated 01.10.2020 and various telephonic conversations regarding the same. The respondent further sent a letter for assignment of lease form to the complainants to come forward to sign the lease assignment, as had been agreed in the MOU. However, the complainant did not come to sign the lease assignment and therefore failed to fulfil his part of the obligations. That, since the complainant did not come forward to sign the lease assignment, the

- respondent further sent a reminder letter dated 10.12.2020 & 07.12.2021.
- VII. It is also pertinent to mention herein that in the Memorandum of Understanding, there was never any pre-condition of obtaining the Occupation Certificate for the invitation to lease. It is submitted that as per the mutually agreed terms between the complainants and the respondent, the payment of assured returns was to commence only from August 2016 till the commencement of first lease. However, the Banning of Unregulated Deposits Schemes Act, 2019 [hereinafter referred to as "**BUDS Act**"] came into force in 2019 and therefore the respondent was constrained to cease all payment pertaining to Assured Return to all its allottees who had opted for the same from 2016.
- VIII. That it is pertinent to mention herein that the relief of assured return is not maintainable before the Authority upon enactment of the BUDS Act. That any direction for payment of assured return shall be tantamount to violation of the provisions of the BUDS Act.
- IX. It is also pertinent to mention herein that recently a Writ Petition was filed before the Hon'ble High Court of Punjab & Haryana in the matter of *Vatika Ltd. vs Union of India & Anr. - CWP-26740-2022*, on similar grounds of directions passed for payment of Assured Return being completely contrary to the BUDS Act. That the Hon'ble High Court after hearing the initial arguments vide order dated 22.11.2022 was pleased to pass direction with respect to not taking coercive steps in criminal cases registered against the Petitioner therein, seeking recovery of deposits till the next date of hearing.
- X. It is submitted that the as per clause 3 of the 'MOU', the respondent was obligated to complete the construction of the said complex ✓

within 36 months from the date of execution of the MOU or from start of construction, whichever is later:

".....The Company shall complete the construction of the said Building/Complex, within which the said space is located within 36 months from the date of execution of this agreement or from the start of construction, whichever is later and apply for grant of completion/Occupancy Certificate. The company on grant of Occupancy Completion/Certificate, shall issue final letters to the Allottee(s) who shall within 30 (thirty) days, thereof remit all dues".

- XI. It is submitted that as per Clause 5.2 of the Agreement the construction completion date was the date when the application for grant of completion/occupancy certificate was made. For the convenience of the the Authority Clause 5.2 is produced as follows:
- "5.2. That the construction completion date shall be deemed to be the date when the application for grant of completion/occupancy certificate is made".*
- XII. Accordingly, the due date of delivery of possession in the present case is 36 months + 6 months (grace period) to be calculated from 25.08.2016 as reiterated and held in the supra Order/Judgment, and the due date of possession in the instant case comes out to be 25.02.2020.
- XIII. It is pertinent to mention that the respondent from time-to-time issued demand request/reminders to the complainant to clear the outstanding dues against the booked unit. However, the complainant delayed the same for one or the other reasons.
- XIV. It is to be noted that the complainants miserably failed to comply the payment plan under which the unit was allotted to the complainants and further on each and every occasion failed to remit the outstanding dues. The complainants as per the records had only paid Rs.15,28,632/- against the total due Amount of Rs. 15,58,250.51/- It is to be noted that there lies an outstanding due of Rs.29,618.51/- .{

- XV. It is humbly submitted that the respondent is raising the VAT demands as per government regulations. That the rate at which the respondent is charging the VAT amount is as per the provisions of the Haryana Value Added Tax Act 2003. Accordingly, the VAT amounts have been demanded from the complainant, as the same has been assessed and demanded by the competent authority.
- XVI. It is pertinent to mention that the respondent has not availed the Amnesty Scheme namely, Haryana Alternative Tax Compliance Scheme for Contractors, 2016, floated by the Government of Haryana, for the recovery of tax, interest, penalty or other dues payable under the said HVAT Act, 2003. To further substantiate the same, the name of the respondent is not appearing in the list of builders, who have opted for the Lumpsum Scheme/Amnesty Scheme under Rule 49A of HVAT Rules, 2003 as circulated by the Excise & Taxation Department Haryana,
- XVII. It is submitted that as per the agreement, the completion of the said unit was subject to the midway hindrances which were beyond the control of the respondent. It is to be noted that the development and implementation of the project have been hindered on account of several orders/directions passed by various authorities/forums/courts as has been delineated here in below:

S. no.	Date of Order	Directions	Period of Restriction	Days affected	Comments
1.	07.04.2015	National Green Tribunal had directed that old diesel vehicles (heavy or light) more than 10 years old would not be permitted to ply on	7 th of April, 2015 to 6 th of May, 2015	30 days	The aforesaid ban affected the supply of raw materials as most of the contractors/buildi



		<p>the roads of NCR, Delhi. It has further been directed by virtue of the aforesaid order that all the registration authorities in the State of Haryana, UP and NCT Delhi would not register any diesel vehicles more than 10 years old and would also file the list of vehicles before the tribunal and provide the same to the police and other concerned authorities.</p>			<p>ng material suppliers used diesel vehicles more than 10 years old. The order had abruptly stopped movement of diesel vehicles more than 10 years old which are commonly used in construction activity. The order had completely hampered the construction activity.</p>
2.	19th July 2016	<p>National Green Tribunal in O.A. No. 479/2016 had directed that no stone crushers be permitted to operate unless they operate consent from the State Pollution Control Board, no objection from the concerned authorities and have the Environment Clearance from the competent Authority.</p>	<p>Till date the order in force and no relaxation has been given to this effect.</p>	30 days	<p>The directions of NGT were a big blow to the real estate sector as the construction activity majorly requires gravel produced from the stone crushers. The reduced supply of gravels directly affected the supply and price of ready mix concrete required for construction activities.</p>



3.	8 th Nov, 2016	National Green Tribunal had directed all brick kilns operating in NCR, Delhi would be prohibited from working for a period of 2016 one week from the date of passing of the order. It had also been directed that no construction activity would be permitted for a period of one week from the date of order.	8 th Nov, 2016 to 15 th Nov, 2016	7 days	The bar imposed by Tribunal was absolute. The order had completely stopped construction activity.
4.	7 th Nov, 2017	Environment Pollution (Prevention and Control Authority) had directed to the closure of all brick kilns, stones crushers, hot mix plants, etc. with effect from 7 th Nov 2017 till further notice.	Till date the order has not been vacated	90 days	The bar for the closure of stone crushers simply put an end to the construction activity as in the absence of crushed stones and bricks carrying on of construction were simply not feasible. The respondent eventually ended up locating alternatives with the intent of expeditiously concluding construction activities but the previous period of 90 days was consumed in doing so. The said period ought to be



					excluded while computing the alleged delay attributed to the Respondent by the Complainant. It is pertinent to mention that the aforesaid bar stands in force regarding brick kilns till date is evident from orders dated 21 st Dec, 19 and 30 th Jan, 20.
5.	9 th Nov 2017 and 17 th Nov, 2017	National Green Tribunal has passed the said order dated 9 th Nov, 2017 completely prohibiting the carrying on of construction by any person, private, or government authority in NCR till the next date of hearing. (17 th of Nov, 2017). By virtue of the said order, NGT had only permitted the competition of interior finishing/interior work of projects. The order dated 9 th Nov, 17 was vacated vide order dated 17 th Nov, 17.		9 days	On account of passing of the aforesaid order, no construction activity could have been legally carried out by the Respondent. Accordingly, construction activity has been completely stopped during this period.
6.	29 th October 2018	Haryana State Pollution Control Board, Panchkula has passed the order dated 29 th October 2018 in furtherance of	1 st Nov to 10 th Nov, 2018	10 days	On account of the passing of the aforesaid order, no construction activity could have been legally

		directions of Environmental Pollution (Prevention and Control) Authority dated 27 th Oct 2018. By virtue of order dated 29 th of October 2018 all the construction activities including the excavation, civil construction were directed to remain close in Delhi and other NCR Districts from 1 st Nov to 10 th Nov 2018.		carried out by the Respondent. Accordingly, construction activity has been completely stopped during this period.
7.	24 th July, 2019	NGT in O.A. no. 667/2019 & 679/2019 had again directed the immediate closure of all illegal stone crushers in Mahendergarh Haryana who have not complied with the siting criteria, ambient, air quality, carrying capacity, and assessment of health impact. The tribunal further directed initiation of action by way of prosecution and recovery of compensation relatable to the cost of restoration.	30 days	Th directions of the NGT were again a setback for stone crushers operators who have finally succeeded to obtain necessary permissions from the competent authority after the order passed by NGT on July 2017. Resultantly, coercive action was taken by the authorities against the stone crusher operators which again was a hit to the real estate sector as the supply of gravel reduced manifolds and there was a sharp increase in prices which

					consequently affected the pace of construction.
8.	11 th October 2019	Commissioner, Municipal Corporation, Gurugram has passed an order dated 11 th of Oct 2019 whereby the construction activity has been prohibited from 11 th Oct 2019 to 31 st Dec 2019. It was specifically mentioned in the aforesaid order that construction activity would be completely stopped during this period.	11 th Oct 2019 to 31 st Dec 2019	81 days	On account of the passing of the aforesaid order, no construction activity could have been legally carried out by the Respondent. Accordingly, construction activity has been completely stopped during this period.
9.	04.11.2019	The Hon'ble Supreme Court of India vide its order dated 04.11.2019 passed in writ petition bearing no. 13029/1985 titled as "MC Mehta vs. Union of India" completely banned all construction activities in Delhi-NCR which restriction was partly modified vide order dated 09.12.2019 and was completely lifted by the Hon'ble Supreme Court vide its order dated 14.02.2020.	04.11.2019 - 14.02.2020	102 days	These bans forced the migrant labourers to return to their native towns/states/villages creating an acute shortage of labourers in the NCR Region. Due to the said shortage the Construction activity could not resume at full throttle even after the lifting of ban by the Hon'ble Apex Court.
10.	3 rd week of Feb 2020	Covid-19 pandemic	Feb 2020 to till date	To date (3 month)	Since the 3 rd week of February 2020, the Respondent



				s Nation wide lockdo wn)	has also suffered devastatingly because of the outbreak, spread, and resurgence of COVID-19 in the year 2020. The concerned statutory authorities had earlier imposed a blanket ban on construction activities in Gurugram. Subsequently, the said embargo had been lifted to a limited extent. However, during the interregnum, large-scale migration of labor occurred and the availability of raw materials started becoming a major cause of concern.
11.	Covid in 2021	That period from 12.04.2021 to 24.07.2021, each and every activity including the construction activity was banned in the State	12.04.2021 - 24.07.2021	103 days	Considering the wide spread of Covid-19, firstly night curfew was imposed followed by weekend curfew and then complete curfew.
			Total days	582 days	

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XVIII. That from the facts indicated above, it is comprehensively established that a period of 582 days was consumed on account of circumstances beyond the power and control of the respondent, owing to the passing of orders by the statutory authorities.

XIX. It is pertinent to mention herein that since inception the respondent was committed to complete the project, however, the development was delayed due to the reasons beyond the control of the respondent. That due to the above reasons the project in question got delayed from its scheduled timeline. However, the respondent is committed to complete the said project in all aspect at the earliest.

E. Jurisdiction of the authority

7. The respondent raised a preliminary submission/objection that the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

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

E.II Subject-matter jurisdiction

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

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

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

F. Findings on the objections raised by the respondent

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

11. The respondent/promoter has raised the contention that the construction of the tower in which the unit of the complainants are situated, has been delayed due to force majeure circumstances such as orders/restrictions of the NGT as well as competent authorities, High Court and Supreme Court orders etc. However, all the pleas advanced in this regard are devoid of merit. First of all, the possession of the unit in question was to be offered by 25.08.2019. 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

aforsaid reasons and it is a well settled principle that a person cannot take benefit of his own wrong.

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

12. The respondent has taken a stand that the complainants are investor and not consumers, therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumer of the real estate sector. The authority observed that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyers and they have paid total price of **Rs.15,28,632 /-** to the promoter towards purchase of an unit in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

13. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement cum provisional allotment letter executed between promoter and complainants, it is crystal clear that they are allottee(s) as the subject unit allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as *M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.* has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoters that the allottees being investors are not entitled to the protection of this Act also stands rejected.

G. Findings on the relief sought by the complainants

G.I Assured Return

14. The complainants submitted that the respondent vide clause 4 of the MoU dated 25.08.2016 agreed to give an investment return of Rs.19,500/- per month and the monthly assured return had to be paid to the complainants until the commencement of the first lease on the said unit. However, the respondent has failed to make payment to the complainants against the assured return in utter contravention of its own commitment. The total basic sale consideration of the allotted space was Rs.14,32,350/- and the complainants have paid a sum of Rs.15,28,250/- against the same i.e., more than the total sale price.
15. An MOU can be considered as an agreement for sale interpreting the definition of the agreement for "agreement for sale" under section 2(c) of the Act and broadly by taking into consideration the objects of the ✓

Act. Therefore, the promoter and allottee would be bound by the obligations contained in the memorandum of understandings and the promoter shall be responsible for all obligations, responsibilities, and functions to the allottee as per the agreement for sale executed inter-se them under section 11(4)(a) of the Act. An agreement defines the rights and liabilities of both the parties i.e., promoter and the allottee and marks the start of new contractual relationship between them. This contractual relationship gives rise to future agreements and transactions between them. Therefore, different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral parts of this agreement is the transaction of assured return inter-se parties. The "agreement for sale" after coming into force of this Act (i.e., Act of 2016) shall be in the prescribed form as per rules but this Act of 2016 does not rewrite the "agreement" entered between promoter and allottee prior to coming into force of the Act as held by the Hon'ble Bombay High Court in case **Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.**, (Writ Petition No. 2737 of 2017) decided on 06.12.2017.

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

- (i) *an amount received in the course of, or for the purpose of business and bearing a genuine connection to such business including*
- (ii) *advance received in connection with consideration of an immovable property, under an agreement or arrangement subject to the condition that such advance is adjusted against such immovable property as specified in terms of the agreement or arrangement.*
17. A perusal of the above-mentioned definition of the term 'deposit', shows that it has been given the same meaning as assigned to it under the Companies Act, 2013 and the same provides under section 2(31) includes any receipt by way of deposit or loan or in any other form by a company but does not include such categories of, amount as may be prescribed in consultation with the Reserve Bank of India. Similarly rule 2(c) of the Companies (Acceptance of Deposits) Rules, 2014 defines the meaning of deposit which includes any receipt of money by way of deposit or loan or in any other form by a company but does not include:
- (i) *as an advance, accounted for in any manner whatsoever, received in connection with consideration for 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;*
18. 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.
19. 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.

20. 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.
21. It is not disputed that the respondent is a real estate developer, and it had not obtained registration under the Act of 2016 for the project in question. However, the project in which the advance has been received by the developer from the allottees is an ongoing project as per section 3(1) of the Act of 2015 and, the same would fall within the jurisdiction of the authority for giving the desired relief to the complainants besides initiating penal proceedings. So, the amount paid by the complainants to the builder is a regulated deposit accepted by the later from the former against the immovable property to be transferred to the allottee later on.
22. The money was taken by the builder as a deposit in advance against allotment of immovable property and its possession was to be offered within a certain period. However, in view of taking sale consideration by way of advance, the builder promised certain amount by way of assured returns for a certain period. So, on his failure to fulfil that commitment, the allottee has a right to approach the authority for redressal of his grievances by way of filing a complaint.
23. 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. The authority is of the view that since the occupation certificate in respect to the project has not been received yet and thus the respondent cannot execute a lease deed with the third party. The lease deed executed on 10.07.2020 thus holds not relevance here. Also, in the lease deed dated 10.07.2020, a description of the unit no's and the floor is specified in respect to which the lease deed has been executed, the said specification has no mention of the subject unit. Thus, it can be concluded that the said lease deed is not in respect of the subject unit.

24. Therefore, the authority directs the respondent/promoter to pay assured return from the date assured return was last paid to the complainants till the execution of first lease after obtaining the occupation certificate.
25. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges however, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under: -

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

- (1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

26. 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.
27. 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., 22.05.2024 is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.
28. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

- (i) *the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) *the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

25. The builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement defines the builder/buyer relationship. So, it can be said that the agreement for assured returns between the promoter and

allottee arises out of the same relationship and is marked by the original agreement for sale.

26. To answer the above proposition, it is worthwhile to consider that the assured return is payable to the allottees on account of a provision in the BBA or in a MoU having reference of the BBA or an addendum to the BBA or in a MoU or allotment letter. The assured return in this case is payable from the date of till the commencement of the first lease on the said unit, after obtaining the occupation certificate.
27. The rate at which assured return has been committed by the promoter is Rs.19,500/- per month. If we compare this assured return with delayed possession charges payable under proviso to section 18(1) of the Act, 2016, the assured return is higher. By way of assured return, the promoter has assured the allottees that they would be entitled for this specific amount till the commencement of the first lease on the said unit. Accordingly, the interest of the allottees is protected even after the due date of possession is over as the assured returns are payable from the date of the MOU i.e 25.08.2016 after deduction of Tax at Source and service tax, cess or any other levy which is due and payable by the allottee(s) to the company and the balance sale consideration shall be payable by the allottee(s) to the company in accordance with the payment schedule. The monthly assured return shall be paid to the allottee(s) until the commencement of the first lease on the said unit after obtaining the occupation certificate. The purpose of delayed possession charges after due date of possession is served on payment of assured return after due date of possession as the same is to safeguard the interest of the allottees as their money is continued to be used by the promoter even after the promised due date and in return,

they are to be paid either the assured return or delayed possession charges whichever is higher.

28. Accordingly, the authority decides that in cases where assured return is reasonable and comparable with the delayed possession charges under section 18 and assured return is payable even after due date of possession till the commencement of the first lease on the said unit, after obtaining the occupation certificate. The allottee shall be entitled to assured return or delayed possession charges, whichever is higher without prejudice to any other remedy including compensation. In the present case, the assured return was payable till the commencement of first lease. The project is considered habitable or fit for occupation only after the grant of occupation certificate by the competent authority. However, the respondent has not received occupation certificate from the competent authority till the date of passing of this order. Hence, the said building cannot be presumed to be fit for occupation. Furthermore, the respondent has put the said premises to lease by way of executing lease deed dated 10.07.2020. In the absence of occupation certificate, the said lease cannot be considered to be valid in the eyes of law. In view of the above, the assured return shall be payable till the said premises is put to lease after obtain occupation certificate from the competent authority.
29. Hence, the authority directs the respondent/promoter to pay assured return to the complainant at the rate of Rs.19,500/- per month from the date i.e., 25.08.2016 till the commencement of the first lease on the said unit as per the memorandum of understanding after deducting the amount already paid by the respondent on account of assured return to the complainants.

G.II Direct the respondent to provide a lockable space with the proper unit number to the complainants with the specification of floor as only priority number has been issued now.

30. Under section 19, clause 1 and 2, the allottee is entitled to obtain the information relating to sanctioned plans, layout plans alongwith the specifications from the promoter. Relevant section has been reproduced below:

"Section 19 Rights and duties of allottees-

(1)The allottee shall be entitled to obtain the information relating to sanctioned plans, layout plans along with the specifications, approved by the competent authority and such other information as provided in this Act or the rules and regulations made thereunder or the agreement for sale signed with the promoter"

[Emphasis supplied]

31. The respondent/promoter is directed to provide specifications to the complainant/allottee regarding the subject matter unit of the complainant.

H. Directions of the authority

32. 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 the arrears of amount of assured return at the rate i.e., Rs.26,000/- per month from the date i.e., 25.08.2016 till the commencement of the first lease on the said unit as per the memorandum of understanding, after deducting the amount already paid by the respondent on account of assured return to the complainants.
- ii. The respondent is directed to pay arrears of accrued assured return as per MoU dated 25.08.2016 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.

- iii. The respondent shall not charge anything from the complainant which is not the part of the agreement of sale.
 - iv. The respondent/promoter is directed to provide specifications to the complainant/allottee regarding the subject matter unit of the complainant.
33. Complaint stands disposed of.
34. File be consigned to registry.



(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 22.05.2024