BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.: 705 of 2022
Order reserved on: 22.02.2024
Order pronounced on: 18.04.2024

1. Mr. Purshotam Goyal
2. Mrs. Disha Goyal

Both RR/o: 1234 Sector 4 Urban estate, Gurugram – 122004, Haryana

Complainants

Versus

M/s Spaze Towers Pvt. Ltd.
Corporate Office at: - Spazedge, Sector 47, Gurugram Sohna road Gurugram-122002

Respondent

CORAM:
Shri Vijay Kumar Goyal

Member

APPEARANCE:
Shri Rajinder Kumar Goyal — Advocate for complainants
Shri Harshit Batra — Advocate for 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. Project and unit related details

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

S. N.	Particulars	Details
1.	Name of the project	Tristaar, Sector 92, Gurugram
2.	Nature of the project	Commercial
3.	RERA registration	Registered 247 of 2017 dated 26.09.2017
4.	DTCP license no. and validity status	219 of 2007 dated 11.09.2007 upto 10.09.2024
5.	Unit no.	FC-23, 2nd floor (page 27 of complaint)
6.	Unit admeasuring	419 sq. ft. (page 27 complaint)
7.	Date of execution of Buyers agreement	Not Executed
8.	Memorandum of understanding	19.02.2018 (page 36 of complaint)
9.	Assured return clause	***2.1.1*** ***".....The first party/developer agrees and undertakes to pay the Allottee commitment amount of Rs.33,520/- calculated @Rs.80/- per square feet(per month) of the permises subject to deduction of applicable taxes at source."***
10.	Total sale consideration	Rs.25,14,000/- (page 39 of complaint)
11.	Amount paid by the complainant	Rs.25,35,990/- (page 10 of complaint)
12.	Occupation certificate	03.05.2021 (page 66 of complaint)
13.	Offer of possession	05.05.2021 (page 69 of reply)

B. Facts of the complaint

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

i. That the respondent invited applications for KISOK allotments in their commercial project 'Tristaar' in 2018. The respondent's agents approached the complainants, painting a positive picture of the project and confirming that all legal requirements had been met, with possession set to be handed over within 36 months.

ii. That upon the assurances and based on documents, the complainants handed over a cheque no.024544 dated 22.01.2018 of Rs.2,00,000/- to the respondent. Upon realization of the cheque, the complainants were required to submit an application for the allotment of KIOSK. Subsequently, an application dated 09.02.2018 along with another cheque no. 024546 dated 09.02.2018 of Rs.23,35,990/- was handed over to the respondent. The complainants paid a total of Rs.25,35,990/-.

iii. Further, on 19.02.2018, a memorandum of understanding (MOU) was executed between the parties for the allotted unit. As per the MOU, the complainants received an initial payment as an assured return of Rs. 16,760/- each. Subsequently, the complainants received similar assured return each month for the following 20 months.

iv. That no further payment of assured returns was made by the respondent after February 2020. Consequently, a total payment of Rs.8,04,480/- remains outstanding to the respondent till February 2022.

v. That the respondent has deposited an amount of Rs.16,788/- in the name of complainants as TDS for the financial year 2020-21 by showing that an amount of Rs.2,23,840/-. However, no such payment was ever affected to the complainants for the said period.

vi. That the complainants sent a legal notice dated 25.10.2021 and a letter dated 01.01.2022 to the respondent seeking statement of accounts and other basic information. But the respondent never responded to the same.

C. Relief sought by the complainants:

4. The complainants have filed the present compliant for seeking following relief:

   i. Direct the respondent to pay assured return from February 2020 till date along with interest.
   ii. Direct the respondent to remove sinking fund of Rs.83,000/- and IFMS of Rs.62,850/- and interest on this in absence of offer of possession.
   iii. Direct the respondent to provide basis on which the demanded amount of Sinking Fund and the IFMS arrives at.
   iv. Direct the respondent to provide full details of account of the complainants.
   v. Direct the respondent to execute Buyer's Agreement.

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 and to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent has raised certain preliminary objections and has contested the present complaint on the following grounds:

   i. That the complainants being interested in the real estate development of the respondent project "SPAZE TRISTAAR" Sector-92, Village Dhorka, Gurugram, Haryana tentatively applied for the allotment of the commercial shop vide application form dated 09.02.2018 and were consequently allotted a unit no. KIOSK-F23, 2nd floor, admeasuring 419 sq. ft.

ii. Thereafter, a Memorandum of Understanding ("MOU") was executed between the parties on 19.02.2018. As per the Article 2 of the said MOU, the respondent had to pay committed amount of Rs.33,520/- w.e.f. 01.03.2018 till offer of possession. It was clarified to the complainants that after offer of possession no assured returns will be paid.

iii. That the said project is registered with Haryana RERA vide registration no. 247 of 2017 dated 26.09.2017, originally valid till 30.06.2020, which was further extended by 6 months by the Authority vide notification no. 9/3-2020 HARERA/GGM (Admin) dated 02.05.2020, thereby extending the date to 30th of December 2020. Further, on 12.01.2021 the respondent applied for the extension of the registration under section 6 of the Act for which project registration proceedings were carried on under complaint no. 883 of 2021, wherein, the request for extension of the project was approved. Subsequently, after the grant of extension, the end date of expiry was further extended.

iv. In such circumstances, the Authority has been noted to have considered the date of expiry of the registration certificate. As stated above, the validity of the registration certificate was 30.06.2020, firstly extended till 30.12.2020 and further extended vide order dated 04.10.2021, thereby extending the validity further beyond October 2021

v. That the building plan for the project was tentative and subject to change, as communicated to the complainants at the time of booking. In accordance with the agreed terms, laws, rules, and regulations, the respondent sought to revise the building plans from the earlier approved plan to an in-principal approval. Public notices were issued

in English (Indian Express), Hindi (Dainik Bhaskar), and a local newspaper (The Tribune, Gurugram), inviting objections to the revision. The plans were made available on the website, at the office, project site, and STP, Gurugram. Objections were invited from the complainants, but none were submitted, resulting in deemed consent. There was no change in the unit's area, and the building plan was revised as per the clauses of the allotment letter and MOU.

vi. That the parties did not agree to a specific date for the offer of possession in the MOU and no buyer's agreement was executed between the parties. The application for the grant of occupancy certificate was submitted to competent authority on 09.10.2020 before the deadline and RERA certificate validation expiry, indicating no default by the respondent. Subsequently, the respondent received the occupancy certificate on 03.05.2021 and legally offered possession to the complainants on 05.05.2021 after obtaining necessary permissions. Despite this, the complainants significantly delayed taking possession and have yet to do so. The complainants failed to inform the Authority about the respondent offered possession on 05.05.2021.

vii. That the due date for the offer of possession was extendable if there was a delay or failure by a concerned department or on the occurrence of force majeure conditions which are beyond the power and control of the developer. The construction of the project faced significant delays due to various force majeure events, such as restrictions on diesel vehicles, stone crushers, and brick kilns imposed by the NGT and other certain orders passed by the authorities. These directives hindered the supply of raw materials essential for construction activities, leading to

a total delay of 377 days. Additionally, orders from environmental authorities and courts further impacted construction activities. Despite these challenges, the respondent managed to progress with the construction, obtain necessary approvals, and offer possession of the unit. Given the circumstances were beyond the control, the respondent should be granted an extension of 377 days and the complaint should be dismissed, considering the external factors that caused delays in the project completion including covid-19 pandemic.

viii. The respondent's liability for the assured return extended until the offer of possession of the unit, as specified in Clause 2.1.2 of the Memorandum of Understanding executed between the parties. Despite sending an offer of possession on 05.05.2021, the complainants have not taken possession, alleging delays by the respondent, contrary to their own admission. The respondent has fulfilled its obligation by paying the assured returns until the enactment of the BUDS act, after which it became illegal due to regulatory changes. Assured returns were to be made only until the offer of possession date, which was met on 05.05.2021. The respondent has complied with all terms and conditions, and the current complaint appears to be a means of harassment.

ix. That the complainants in the present complaint are claiming the reliefs on basis of the terms agreed under the MOU between the parties. The Authority is exercising its power and jurisdiction as provided under the provisions of the. As per the provisions of the Act, 2016, the Authority is dressed with the jurisdiction to adjudicate upon all the complaints arising out of failure of either party to fulfil the terms and conditions of the agreement for sale. However, in the present matter

the complainants are relying upon the terms of MOU which is a distinct agreement then the buyer's agreement and thus, the MOU is not covered under the provisions of the Act, 2016. That the said complaint is not maintainable on this basis that there exists no relationship of builder-allottee in terms of the MOU, by virtue of which the complainants are raising their grievance.

x. That the buyer's agreement and the assured return agreement both contain rights and obligations of parties which are not identical of each other. Therefore, both these documents cannot be treated as a single document enumerating the same rights and obligations. The complainants seeking assured return relief, is not viable under the BUDS Act. Any direction for assured return payment would breach the BUDS Act. The RERA Act applies to promoters' obligations towards allottees, with no provision for assured returns. Section 11 of the Act, 2016 outlines promoter obligations without mentioning assured returns. The definitions of allottee and promoter in Sections 2(d) and 2(zk) do not cover transactions involving assured returns, placing such schemes outside the provisions of the Act's scope and the Authority's jurisdiction.

xi. That the respondent has always been prompt in making the payment of assured returns as agreed under the agreement. The respondent herein had been paying the committed return for every month to the complainants without any delay since March, 2018. A total sum of return of Rs.10,61,827/- in lieu of complete satisfaction towards the payment of assured return has been made by the respondent.

xii. That the respondent vide letter dated 25.07.2020 also intimated the complainants that due to the reason of force majeure event due to

Covid-19 the respondent is unable to provide the committed/assured return for the period of March 2020 till Sept 2020. Thereafter, the respondent had rightly adjusted the assured returns from Oct 2020 to April 2021 amounting to Rs.2,97,544/- in offer of possession dated 05.05.2021, also paid the TDS of Rs.20,139/- for the said period, which is also admitted by the complainants and hence, there is no assured return pending to be paid to the complainants.

xiii. That the complainants have only paid Rs.25,35,990/- and have miserably failed to pay the outstanding dues of over Rs.14,00,000/- and on the other hand, the complainants have enjoyed the regular payment of assured returns.

xiv. That the complainants have failed to take possession of the unit legally offered to them after grant of the occupancy certificate dated 03.05.2022. The complainants were reminded multiple times to pay the outstanding amount for the unit allotted and take possession of the unit.

xv. That the respondent has complied with all of its obligations with respect to the MOU with the complainants and as per the concerned laws, rules, and regulations thereunder and the local authorities. Despite innumerable hardships being faced by the respondent, the respondent completed the construction of the project and applied for the occupation certificate vide an application dated 09.10.2020 before the concerned Authority and successfully attained the occupation certificate dated 03.05.2021. Once an application for grant of occupation certificate is submitted to the concerned statutory authority, the respondent ceases to have any control over the same. The grant of occupation certificate is the prerogative of the concerned

statutory authority and the respondent does not exercise any influence in any manner whatsoever over the same. There is a delay of around 7 months caused due to the non-issuance of the occupation certificate by the statutory authority while calculating the period of delay. Therefore, it is respectfully submitted that the time period utilised by the concerned statutory authority for granting the occupation certificate is liable to be excluded from the time period utilised for the implementation of the project.

xvi. That there is no delay on part of the respondent in offering the possession and no cause of action arose under section 18 as there was no default of the respondent in offering the possession of the unit. The complainants are themselves at default by not taking over the possession duly offered to them and cannot benefit from their own wrongs. The complainants have caused an inordinate delay in taking possession of the unit which was issued by the respondent on 05.05.2021, thereby violating Section 19(10) of the Act as have failed to take possession of the unit.

xvii. That the complaint is baseless, unclear, and intended to harm the reputation and interests of the respondent and the project. Hence, the complaint should be rejected.

E. Written submission of the complainants:

7. The complainants have filed the written submission on 02.08.2023 and made following submissions:

i. That the respondent has never posted the letter for offer of possession dated 05.05.2021 to the complainants and no proof of sending same is placed on record. Moreover, no subsequent reminders were received by the complainants specifying that the offer of possession has been made to the complainants.

ii. That as per the terms of the agreement consent was taken in MOU for leasing of the premises on completion to Kwals Hospitality Pvt. Ltd. and the assured return/commitment amount was to be paid to the complainants from the lease rent.

iii. That the complainants were not allowed to take physical possession after giving consent for lease which was obtained at the time of executing MOU dated 19.02.2018 and after receiving full payment of the unit from the complainants.

F. Written submission of the respondent:

8. The respondent has filed the written submission on 08.04.2024 and made following submissions:

i. That the offer of possession was rightly made to the complainants. Moreover, multiple reminders were sent after the offer of possession dated 05.05.2021 to the complainants. So, no order for payment of assured return can be made.

ii. That the Authority has allowed the extension/grace period of 6 months from 25.03.2020 onwards in accordance with notification no. 9/3-20 dated 26.05.2020 and the respondent restarted the payment of assured return after the grace period of 6 months.

9. 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 these undisputed documents.

G. Jurisdiction of the Authority

10. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

G.I Territorial jurisdiction

11. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana, 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.

G.II Subject-matter jurisdiction

12. Section 11(4)(a) of the Act 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) 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.

13. 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 as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

H. Findings on the reliefs sought by the complainants.

H.I Direct the respondent to pay assured return from February 2020 till date along with interest.

14. The complainants are seeking unpaid assured return on monthly basis from the respondent as per clause 2.1.1 of memorandum of understanding

executed between the parties on 19.02.2018. In furtherance of the same, the respondent had agreed to pay an amount of Rs.33,520/- per month by way of assured return to the complainants from 01.03.2018 till the date of offer of possession of the unit. It is pleaded by the respondent that the Authority does not have the power to grant the relief of assured returns after coming into force of the Banning of Unregulated Deposit Schemes 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.

15. However, the plea of respondent is otherwise who took a stand that complete assured returns have been paid/adjusted. It was further submitted that a total sum of Rs.10,61,827/- in lieu of assured return has been made to the complainants and there remains no outstanding amount on part of the respondent, as detailed below:

Particular	**Return Paid/Adjusted**
Paid to complainants	Rs. 6,63,696/-
Adjusted against outstanding dues (as is evident from the offer of possession)	Rs. 2,97,544/-
TDS deposited	Rs. 1,00,587/-
TOTAL PAID	**Rs. 10,61,827/-**

16. The Act of 2016 defines "agreement for sale" means an agreement entered into between the promoter and the allottee [Section 2(c)]. An agreement for sale is defined as an arrangement entered between the promoter and allottee with freewill and consent of both the parties. An agreement defines the rights and liabilities of both the parties i.e., promoter and the allottee and marks the start of new contractual relationship between them. This contractual relationship gives rise to future agreements and transactions between them. The different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral part

of this agreement is the transaction of assured return inter-se parties. The "agreement for sale" after coming into force of this Act (i.e., Act of 2016) shall be in the prescribed form as per rules but this Act of 2016 does not rewrite the "agreement" entered between promoter and allottee prior to coming into force of the Act as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors., (Writ Petition No. 2737 of 2017) decided on 06.12.2017.*** Since the agreement defines the buyer-promoter relationship therefore, it can be said that the agreement for assured returns between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate regulatory authority has complete jurisdiction to deal with assured return cases as the contractual relationship arise out of agreement for sale only and between the same parties as per the provisions of section 11(4) (a) of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the agreement for sale till the execution of conveyance deed of the unit in favour of the allottee.

17. It is a 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 an allotee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to

assured return cases as the contractual relationship arises out of the agreement for sale only and between the same contracting parties to agreement for sale.

18. 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,*** and in the case ***Jaypee Kensington Boulevard Apartments Welfare Association and Ors. Vs. NBCC (India) Ltd. and Ors. (24.03.2021-SC): MANU/ SC/0206 /2021***, it was held with regard to the allottees of assured returns to be financial creditors within the meaning of Section 5(7) of the Code. So, the respondent/builder can't take a plea that there was no contractual obligation to pay the amount of assured returns to the allottee after the Act of 2016 came into force or that a new agreement is being executed with regard to that fact. When there is an obligation of the promoter against an allottee to pay the amount of assured returns, then he can't wriggle out from that situation by taking a plea of the enforcement of Act of 2016, BUDS Act 2019 or any other law.

19. It is pleaded on behalf of respondent/builder 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 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 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.

20. 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;

21. 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.

22. 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.

23. 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.

24. 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 promise has acted on such promise and altered his position, then the person/promisor is bound to comply with his or her promise. 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 complainants till possession of respective apartments stands handed over and there is no illegality in this regard.

25. 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:-

i. *deposits accepted under any scheme, or an arrangement registered with any regulatory body in India constituted or established under a statute; and*
ii. *any other scheme as may be notified by the Central Government under this Act.*

26. 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.

27. 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 allottee is an ongoing project as per section 3(1) of the Act of 2016 and, the same would fall within the jurisdiction of the authority for giving the desired relief to the complainant besides initiating penal proceedings. So, the amount paid by the complainant 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.

28. On consideration of documents available on record and submissions made by both the parties, the authority is satisfied that the respondent is in contravention of the provisions of the Act. The memorandum of understanding was executed between the parties on 19.02.2018. Herein, the assured return is payable as per "clause 2.1.1 of the MOU". Clause 2.1.1 of the MOU specifies that the respondent has agreed to pay Rs.33,520/- per month by way of assured return to the complainants from 01.03.2018 till the date of offer of possession of the unit. The said clause further provides that it is the obligation of the respondent promoter to pay the assured returns. The respondent has duly paid assured return to the complainants till December 2019 as evident from the assured return statement (Annexure R10). Further, the assured return for the period commencing from January 2020 till March 2020 and thereafter from October 2020 till April 2021 had been adjusted by the respondent against the amount outstanding to be paid by the complainants on the date of offer of possession i.e. 05.05.2021. It is noteworthy that, no assured return had

been paid by the respondent to the complainants for the period between March 2020 to September 2020 in lieu of Covid-19.

29. That during the proceedings dated 21.12.2023, the complainants submitted that they never received the offer of possession dated 05.05.2021. On 16.04.2024 the respondent placed on record a copy of postal receipt of delivery of offer of possession to the complainants. Thus, a presumption is drawn in favor of the respondent that offer of possession dated 05.05.2021 had been duly served by the respondent to the complainants after obtaining occupation certificate dated 03.05.2021. Therefore, in view of same the offer of possession dated 05.05.2021 is held to be valid.

30. The respondent is seeking a grace period of 6 months from March 2020 to September 2020 due to Covid-19, as per clause 5.1 of the MOU. However, in the factual matrix of the present case, neither a builder-buyer agreement was executed nor did the MOU contain any possession clause. Therefore, the due date of possession is calculated by the Authority as per the judgment of the ***Hon'ble Supreme Court case titled Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018***. In this case, the Hon'ble Apex Court observed that "a person cannot be made to wait indefinitely for the possession of the flats allotted to them. Although we are aware of the fact that when there is no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract. Therefore, the date of the MOU (19.02.2018) should be considered as the date for calculating the due date of possession.

31. In cases where delay possession charges are requested and the due date of possession comes after 25.03.2020, the Authority allows relaxation of 6

months to both complainant and respondent. However, in the present case, no due date of possession was agreed between the parties. Consequently, the due date for handing over the possession of the unit is determined to be 19.02.2021. Based on this reasoning, the respondent's request for a grace period of 6 months from March 2020 to September 2020, due to Covid-19, is accepted in accordance with ***HARERA notification no. 9/3-2020 dated 26.05.2020***,which grants a 6-month extension for projects with completion/due dates on or after 25.03.2020. The Covid-19 period relaxation of six months as has been allowed on the directions of the Government is applicable as it was difficult to lease out the premises during that period.

32. Therefore, considering the facts of the present case, the respondent is liable to pay the arrears of assured return as per MOU dated 19.02.2018 i.e. at Rs.33,520/- per month from 01.03.2018 till the date of offer of possession i.e., 05.05.2021 subject to relaxation of 6 months in lieu of Covid-19. The amount of assured return already paid by the respondent to the complainants and the outstanding amount due on complainants shall be deducted/adjusted before paying the residual assured return.

H.II Direct the respondent to remove sinking fund of Rs.83,000/- and IFMS of Rs.62,850/- and interest on this in absence of offer of possession.

33. That the respondent/promoter may be allowed to collect a reasonable amount from the complainant/allottee under the head of "IFMS". However, the authority directs that the promoter must always keep the amount collected under this head in a very transparent manner. If any allottee requires the promoter to give the details regarding the availability of IFMS amount and the interest accrued thereon, the promoter must provide the details to the allottee. This is further clarified the out of this IFMS/IBMS, no amount can be spent by the promoter for expenditure it is liable to incur to

discharge its liability and obligations as per the provisions of section 14 of the Act. As far as sinking fund is concerned, the IFMS/IBMS and the sinking fund are same and the respondent cannot charge for the same under different heads.

H.III Direct the respondent to provide basis on which the demanded amount of Sinking Fund and the IFMS arrives at.

H.IV Direct the respondent to provide full details of account of the complainants.

34. The above-mentioned reliefs sought by the complainants are being taken together as the findings in one relief will definitely affect the result of the other relief and the same being interconnected

35. The respondent is directed to issue a detailed revised account statement after adjustment of outstanding amount with details of all the demands raised/adjusted.

H.V Direct the respondent to execute buyers agreement.

36. The respondent is directed to execute the buyer's agreement within a period of 30 days from the date of this order with respect to the subject unit in accordance with the 'Annexure A' agreement for sale of the Rules 2017, Act of 2016.

I. Directions of the authority

37. 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 assured return as per MOU dated 19.02.2018 i.e. at Rs.33,520/- per month from 01.03.2018 till the date of offer of possession i.e., 05.05.2021 subject to relaxation of 6 months as per HARERA notification no. 9/3-2020 dated 26.05.2020. The amount of assured return already paid i.e.

Rs.6,63,696/- by the respondent to the complainants shall be deducted/adjusted before paying the residual assured return.

ii. The respondent is directed to pay the outstanding accrued assured return amount till offer of possession i.e. 05.05.2021 within 90 days from the date of this order after adjustment of outstanding dues, if any, from the complainants, 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 issue a revised account statement after adjustment of outstanding amount as per above within a period of 30 days from the date of this order.

iv. The respondent is directed to execute the buyer's agreement within a period of 30 days from the date of this order with respect to the subject unit in accordance with the 'Annexure A' agreement for sale of the Rules 2017, Act of 2016.

v. The respondent shall not charge anything from the complainants which is not the part of MOU.

38. Complaint stands disposed of.

39. File be consigned to registry.

Dated: 18.04.2024

(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram