BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.: **7998 of 2022**
Date of decision **20.03.2024**

Naresh Saran
R/o : A-11, Geetanjali Enclave,
New Delhi — Complainant

Versus

Advance India Projects Ltd.
Address:- 232B, 4th floor, Okhla Industrial Estate,
Phase-III, New delhi-110020 — Respondent

CORAM:
Shri Ashok Sangwan — Member

APPEARANCE:
Shri Dhruv Lamba (Advocate) — Complainant
Shri DhruvRohtagi (Advocate) — Respondent

ORDER

1. The present complaint dated 03.01.2023 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions as provided under the

provision of the Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

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

S. N.	Particulars	Details
1.	Name of the project	"AIPL Joy Central", Sector-65, Gurgaon
2.	Nature of project	Commercial colony
3.	DTPC License no.	249 of 2007 dated 02.11.2007
	Validity status	01.11.2024
	Licensed area	3.987 acres
	Name of licensee	M/s Wellworth Project Developers Pvt. Ltd.
4.	Unit no.	Retail shop no. 0050on Ground floor
5.	Revised unit no.	Retail shop GF-52
6.	Unit area admeasuring	716sq. ft. [Super area]
7.	Revised unit area admeasuring	695.63 sq. ft. [Super area]
8.	Allotment letter	23.02.2017 [As per page no. 91-92 of reply]
9.	Date of builder buyer agreement	04.10.2017 (As on page no. 112 of complaint)
10.	Total sale consideration	Rs. 2,10,98,320/- [As per statement of accounts dated

		29.05.2023 on page no. 162 of reply]
11.	Amount paid by the complainant	Rs. 2,08,70,940/- [As per statement of accounts dated 29.05.2023 on page no. 162 of reply]
12.	Possession clause	**Clause 44** *Subject to the aforesaid and subject to the Allottee not being in default under any part of this Agreement including but not limited to the timely payment of the Total Price and also subject to the Allottee having complied with all formalities or documentation as prescribed by the Company, the Company endeavors to hand over the possession of the Unit to the Allottee* ***within a period of 54 (fifty four) months, with a further grace period of 6 (six) months, from 1 September 2017.*** *[Emphasis supplied]* *(As on page no. 139 of complaint)*
13.	Due date of possession	01.09.2022 [Calculated 54 months + 6 months from 01.09.2017]
14.	Assured return Clause 32 of the BBA	**Clause 32** *The company has agreed to pay Rs.* ***81,211/- per month by way of assured return to the allottee from 17.05.2017 till the date of issue of notice of possession of the unit.*** *The return shall be inclusive of all taxes whatsoever payable or due on the return.*
15.	Copy of the letter inviting objection for approval of building plan	21.11.2019

	dated	
16.	Copy of the letter providing update on assured return dated	06.07.2020 (As on page 142-143 of reply)
17.	Termination letter dated	28.04.2017 [As per page no. 136 of reply]
18.	Occupation certificate	24.12.2021 [As on page no. 147-148 of reply]
19.	Offer of possession	21.01.2022 (As on page no. 149-161 of reply)

B. Facts of the complaint

3. The complainant has pleaded the complaint on the following facts:

I. The respondent company had announced the launch of the project "AIPL Joy Central" in the year 2007. The respondent claimed to have taken all due approvals, sanctions and government permissions towards development and construction of project. The sales representatives of the respondent lured the complainant to buy a retail outlet in the project.

II. In the year 2007, the respondent announced the launch of "AIPL Joy Central" project at Sector 65, Gurugram Haryana. The agents and officers of the respondent's company told the complainant about the moonshine reputation of the company by making huge presentations about the project and claimed to have taken all due approvals, sanctions and government permissions towards development and construction of the project.

III. Relying on the representations and assurances by the respondent, the complainant booked a unit in the project by paying a booking amount of Rs.5,00,000/-. In accordance with the payment plan, the complainant made a payment of Rs.10,62,633/- to the respondent and the same was acknowledged vide receipt dated 02.02.2017.

IV. The respondent vide letter dated 23.02.2017 allotted a retail shop having unit no. 50 admeasuring 695.63 sq. ft. (super area) on the ground floor in the project for a total sale consideration of Rs. 1,93,75,058.66. On account of delay on some payments, the respondent vide letter dated 28.04.2017 terminated the allotment of the above said unit. In view of the same, the complainant met the respondent and sought for withdrawal of the termination letters.

V. That unit buyer agreement was executed between the complainant and the respondent and as per clause 44 of the unit buyer agreement, the possession was to be handed over within 54 months with a further grace period of 6 months from 01.09.2017 upon full discharge of the obligations on the part of the allottee.

VI. It is pertinent to mention here that the respondent already took more than 10% of the total sale consideration before executing the unit buyer's agreement in violation of Section 13(1) of the RERA Act. Also, the layout plan of ground floor was changed to the disadvantage of the complainant by reducing the carpet area of the unit and the utility areas and the location of the unit.

VII. The complainant received a letter from the respondent dated 30.11.2019 claiming various frivolous reasons for not remitting the assured return from 01.11.2019 till 05.12.2019 plus another 25 days citing the NGT ban on construction activities in the NCR region.

However, it is pertinent to note that the complainant had already paid more than the total sale consideration on time. The complainant in response to the said letter issued a letter dated 31.01.2020 seeking reconsideration of the decision as not to pay assured returns on account of the said ban and requesting the respondent not to burden the buyers for the same. The respondent vide email dated 10.04.2020 informed the complainant of the lack of manpower and other logistical issued encountered on account of COVID-19 and sought time to clear dues of assured returns. In response, the complainant vide email dated 28.04.2020 sought for the clearance of the pending dues of assured return interest for the month of March and April 2020.

VIII. The respondent renumbered the unit no. 50 to 52 vide letter dated 20.05.2020. It is pertinent to note that the said communication carried no clarification as to whether there was any change in the layout plan or the areas/dimensions of the unit. In view of the renumbering of unit, the complainant issued a letter dated 18.06.2020 seeking clarification with respect to the changes proposed in the said unit and the blueprint of the layout plan of the ground floor sanctioned by the office of the Town Planner, Gurugram as well as the blueprint of the proposed layout plan of the ground floor to compare the proposed changes. However, these were ignored and denied.

IX. The respondent vide email dated 26.06.2020 and letter dated 06.07.2020 completely changed the assured return policy stating that the monthly assured return payable per month from 22.03.2020 till 15.06.2020 shall be divided into 2 parts of 50% each and informed the complainant of the time period for payment of the parts of assured

returns. The consent of the complainant was nowhere sought and one-sided unilateral change was made in the policy

X. The respondent vide letter dated 21.01.2022 issued notice of offer of possession by which constructive possession of unit no. 50 (now renumbered as unit no. GF-52) was offered to the complainant. The respondent without obtaining the complainant's consent reduced the super area of the unit from 716.00 sq. ft. to 695.63 sq. ft. and also reduced the covered area and the carpet area. The respondent raised several demands towards sinking fund, labour cess, common area maintenance charges, infrastructure augmentation charges, electric switch in station and deposit charges and sewage/ storm water /water connection charge, electric switch-in-station & deposit charges, electric meter charges, registration charges, which were not payable by the complainant.

XI. In response to the constructive possession offer, the complainant issued a letter dated nil to the respondent seeking clarification on the following accounts before considering the said offer of constructive possession: -Offer of physical possession of the unit; conveyance deed and clarification on the terms of the deed; payment of pending dues of assured returns; statement of accounts along with detailed calculation (on account of changes in the unit) to see how much excess amount has been collected by the respondent; information about the super area, and reduction in the covered area and carpet area of the unit from the areas promised at the time of taking initial payments; copy of the occupation certificate; one-sided unilateral nature of the proposed indemnity bond; arbitrary demand of maintenance charges.

XII. The complainant kept pursuing the matter with the representatives of the respondent by visiting their office regularly as well as raising the issues as to when will they deliver the project, payment of assured returns dues payable, reduction of areas in the unit, changes in the revised layout ground floor plan, and why construction was going on at such a slow pace. But received no satisfactory response from the respondent. Hence, this complaint.

C. Relief sought by the complainant:

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

i. Direct the respondent not to cancel the allotment of the unit and refund the excess amount received from the complainant of Rs.31,16,370/-.

ii. Direct the respondent to pay assured returns of Rs.21,22,083/-/- upto 31.03.2022.

iii. Direct the respondent to set aside the offer of constructive possession and issue fresh offer of actual physical possession.

iv. Direct the respondent to handover physical possession of the unit and duly execute conveyance deed.

v. Direct the respondent not to charge any amount on labour cess, sinking funds, electrical switch in charges station, deposit charges, sewage/storm water/water connection charges, registration charges.

vi. Direct the respondent to pay an interest at the rate 11% p.a on Rs. 31,16,370/-.

D. Reply by the respondent

5. The respondent contested the complaint on the following grounds:

I. That the complainant is not an "Allottee" but an investor who has booked the apartment in question as a speculative investment in order to earn rental income from its resale. The complainant approached the respondent and expressed his interest in booking an apartment in the commercial colony developed by the respondent. The complainant booked the unit in question bearing number GF/49, admeasuring 627 sq. ft. (tentative area) situated in the project known as "AIPL Joy Central" at Sector 65, Gurugram, Haryana. Thereafter, the complainant vide application form applied for provisional allotment of a unit bearing number GF/49 in the project.. It is submitted that the complainant prior to approaching the respondent, had conducted extensive and independent enquiries regarding the project and it was only after being fully satisfied with regard to all aspects of the project, the complainant took an independent and informed decision to purchase the unit, un-influenced in any manner by the respondent.

II. That the booking was willingly made by the complainant with an understanding of the same being for leasing purposes and not self-use, as can be noted in clause 43 of the Schedule I of the Application form:

> *43. The Applicant has clearly understood that the Unit is not for the purpose of self-occupation and use by the Applicant and is for the purpose of leasing to third parties along with combined units as larger area. The Applicant has given unfettered rights to the Company to lease out the unit along with other combined units as a larger area on the terms and conditions that the Company would deem fit. The Applicant shall at no point of time object to any such decision of leasing by the Company.*

III. That as can be noted from the above-mentioned clause 43, the complainant had given unfettered right to the respondent to lease the

unit and had agreed to not object to the decision of leasing at any point in time. However, despite having booked the unit on these terms, the complainant have *malafidely* filed the present complaint with the motive to seek wrongful gains over the respondent.

IV. That pursuant to the execution of the application form, the respondent had no reason to suspect the bonafide of the complainant and the allotment letter dated 23.02.2017 was issued to the complainant. The unit was allotted provisionally, subject to change as was categorically agreed between the parties. That clause-1 of schedule-1 of the application form is reiterated as under:

> *The Applicant has applied for the provisional allotment of a Unit (the "Unit") in the Project and clearly understands that the allotment of the Unit by the Company shall be purely provisional till such time that the Unit Buyer's Agreement, in the format prescribed by the Company, is executed between the Company and the Applicant.*

V. That thereafter, a buyer's agreement was executed between the original allottees and the respondent on 04.10.2017. It is pertinent to note that as per clause 12 of the buyer's agreement as well as clause 18 of schedule I of the application form,

> *The Applicant shall get possession of the Unit only after the Applicant has fully discharged all his obligations and there is no breach on the part of the Applicant and complete payment of Sale Consideration against the Unit has been made and all other applicable charges/dues/taxes of the Applicant have been paid. Conveyance / Sale Deed/necessary transfer documents in favour of the Applicant shall be executed and/or registered upon payment of the entire Sale Consideration and other dues, taxes, charges etc. in respect of the Unit by the Applicant. After taking the possession of the Unit, it shall be deemed that the Applicant has satisfied himself/herself/itself with regard to the construction or quality of workmanship.*

VI. That in the present case, the complainant failed to abide by the terms and conditions of the buyer's agreement and defaulted in remitting

timely instalments. Thus, the respondent issued reminders to the complainant and categorically notified him that he had defaulted in remittance of the amounts due and payable by him. It was further conveyed by the respondent that in the event of failure to remit the amounts mentioned in the said notice, the respondent would be constrained to cancel the provisional allotment of the unit in question.

VII. That the respondent due to the inactions and omissions of the complainant terminated the allotment of the unit vide intimation of termination letter dated 28.04.2017. That through the said termination letter, the complainant was informed about his failure to clear the outstanding dues and that the said unit stands cancelled. Pursuant to this, the complainant approached the respondent to restore the allotment of the said unit and assured the respondent about timely payments of all instalments. As a goodwill gesture the respondent restored the allotment of the unit, subject to the timely payments.

VIII. That it is submitted that the project underwent a change/modification and upon the same being done, objections/suggestions for approval of building plans were invited from the complainant on 21.11.2019. The complainant neither paid any heed to the requests of the respondent nor came forward with objections and he chose to be mute spectator by not even replying to the said letter.

IX. That the respondent was miserably affected by the ban on construction activities, orders by the NGT and EPCA, demobilization of labour, etc. being circumstances beyond the control of the Respondent and force majeure circumstances, that the payment of assured return

was severely affected during this period and the same was rightfully intimated to the complainant by the letter dated 30.11.2019.

X. That the complainant has filed the present complaint before the Authority which is not maintainable. That the complainant is praying for the relief of "Assured Returns" which is beyond the jurisdiction of the authority. It is pertinent to note, that nowhere in the said provision the Authority has been dressed with jurisdiction to grant "Assured Returns". Therefore, the present complaint is filed with grave illegalities and lack of jurisdiction and the same is liable to be dismissed at the very outset.

XI. It is pertinent to mention herein that on 21.02.2019 the Central Government passed an ordinance "Banning of Unregulated Deposits, 2019", to stop the menace of unregulated deposits. The "Assured Returns Scheme" given to the complainant fell under the scope of this Ordinance and the payment of such returns became wholly illegal.

XII. That it is submitted that due to the COVID-19 pandemic, whole nation was under the complete lockdown and all activities including the construction of the said project was under a complete standstill. It is further submitted that the respondent was also severally affected by the adverse effects of the covid pandemic. That on 06.07.2020, the payment of assured returns was divided in two parts of 50% each and the same were made payable in the following manner:-

a. Payment of Part-I AR

- Part-I AR shall be due every month from the succeeding date of the Lockdown Period **(AR Restart Date)**.
- 45 days period from the AR Restart Date shall be moratorium period for payment of Part-I AR The cumulative Part-I AR of the Moratorium Period shall be paid in 4 equal installments along with

the assured return of 4 months starting from the end of the Moratorium Period,

- The payment of assured return as per the monthly payment cycle shall resume from 46th day from the AR Restart Date.

b. *Adjustment of Part II AR:*

- *The balance 50% Assured Return shall accrue from the succeeding date of the Lockdown Period along with an interest@12% till (a) due date of next installment; or (b) till the date of filing of application for grant of Occupancy Certificate for the Unit/Project, whichever is earlier, shall be accumulated and adjusted from the demand amount due at next installment or demand amount due on date of filing of application for grant of Occupancy Certificate/Offer of Possession for the Unit/Project, as the case may be.*

XIII. That thereafter, the complainant through letter dated 20.05.2020 was informed about the re-numbering and change in the area of the unit number GF/49 to GF/50. It is submitted that the construction was done in compliance with the sanctioned plans as approved by the competent authorities and the complainant was very well informed at the time of execution of the buyer's agreement that only the tentative unit has been allotted which is subject to changes as per the approved.

XIV. That the complainant was offered possession of the unit on 21.01.2022. The complainant was called upon to remit balance payment including delayed payment charges and to complete the necessary formalities/documentation necessary for handover of the unit and to further complete all the formalities regarding delivery of possession. However, the complainant did not pay any heed to the requests of the respondent and threatened the respondent with institution of unwarranted litigation.

XV. That it was an obligation of the complainant to make the payments against the unit however, the complainant has gravely defaulted in the same. That the principal amount demanded against the said unit was

Rs.1,83,14,764/-. The total sales consideration was Rs. 1,86,34,504/- including possession charges, however, excluding the stamp duty and registration charges, which are Rs.11,71,100/- and Rs. 50,003/-, respectively. After adjustment of the assured returns of Rs. 7,26,781/-, there is an excess of Rs. 5,88,196/ which the complainant is yet to pay . Hence, the complainants can either seek the refund of above mentioned excess and pay the stamp duty and registration charges or seek an adjustment of the excess and pay the balance dues.

6. 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 based on these undisputed documents and submission made by the complainant.

E. Jurisdiction of the authority

7. The authority observed 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 allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)
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;

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. Objection raised by the respondent

F.I Objection regarding complainant being investor not allottee.

12. The respondent submitted that the complainant is an investor and not a consumer/allottee, thus, the complainant is not entitled to the protection of the Act and hence the present complaint is not maintainable.

13. The authority observes that the Act is enacted to protect the interest of consumers of the real estate sector. It is a settled principle of interpretation that preamble is an introduction of a statute and it states the main aims and 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 under section 31 of the

Act, 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 buyer's agreement, it is revealed that the complainant is an allottee/buyer and he has paid total price of Rs. 2,08,70,940/- to the promoter towards purchase of the said 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;"*

14. In view of the above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement executed between respondent and complainant, it is crystal clear that the complainant is an allottee as the subject unit was allotted to him 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 promoter that the complainant-allottee being investor is not entitled to protection of this Act stands rejected.

G. Findings on the relief sought by the complainant.

G.I Direct the respondent not to cancel the allotment of the unit and refund the excess amount received from the complainant of Rs.31,16,370/-.

G.II Direct the respondent to pay assured returns of Rs.21,22,083- upto 31.03.2022.

G.III Direct the respondent to set aside the offer of constructive possession and issue fresh offer of actual physical possession.

G.IV Direct the respondent to handover physical possession of the unit and duly execute conveyance deed.

G.V Direct the respondent not to charge any amount on labour cess, sinking funds, electrical switch in charges station, deposit charges, sewage/storm water/water connection charges, registration charges.

G.VI Direct the respondent to pay an interest at the rate 11% p.a on Rs.31,16,370/-.

1. POSSESSION

15. The complainant is seeking relief of handing over of physical possession of the subject unit and assured return in terms of clause 32 of buyer's agreement executed inter se parties in the above-mentioned heads. It is matter of record that the complainant made an application for the allotment of the unit in the project of the respondent. As per the application form, the said unit was booked under assured return

scheme and under clause 18 of the said application form, it is mentioned that the applicant shall get possession of the unit only after fully discharging the obligations and making complete payment of sale consideration against the unit. The unit buyer's agreement was executed between the complainant and the respondent on 04.10.2017. Clause-44 of the builder buyer's agreement deals with handing over of possession of the subject unit stating that the possession of the same would be handed over by the respondent builder within a period of 54 months, with a further grace period of 6 months, from 01.09.2017. Therefore, in view of aforesaid clause, the due date of handing over of possession along with grace period of 6 months comes out to be 01.09.2022.

16. The counsel for the complainant submitted that the respondent has made a constructive offer of possession on 21.01.2022 after obtaining occupation certificate from competent authority on 24.12.2021. In this regard, the counsel for the complainant places reliance on clause 11 and 12 of the buyer's agreement which deals with "Procedure for taking possession" and "handing over possession" respectively. Further, it was submitted on behalf of the counsel for the complainant that the words "constructive possession" had nowhere been used in the entire buyer agreement which shows that it was never agreed between the parties.

On the contrary, the counsel for the respondent made a plea that it was never agreed between the parties that the physical possession of unit would be handed over to the complainant and in support of its

contention, reliance is placed upon clause 43 of the application form which states as under:

> *"The Applicant has clearly understood that the Unit is not for the purpose of leasing to third parties alongwith combined units as larger area. The Applicant has given unfettered rights to the Company to lease out the Unit alongwith other combined units as a larger area on the terms and conditions that the Company would deem fit. The Applicant shall at no point of time object to any such decision of leasing by the Company."*
>
> *[Emphasis supplied]*

17. The authority after hearing both the parties is of the view that clause 12 of the builder buyer's agreement clearly specifies that the allottee would be handed over the possession of the unit which simply means physical possession and the same is reproduced hereunder.

> ***HANDING OVER POSSESSION:*** *That the Allottee shall be* ***handed over possession of the Unit*** *from the Company only after the Allottee has fully discharged all his obligations and entire Total Price (including interest due, if any, thereon) against the Unit has been paid and all other applicable charges/dues/taxes of the Allottee have been paid and Conveyance Deed has been executed and registered in his favour. The Company shall hand over possession of the Unit to the Allottee provided the Allottee is not in default of any of the terms and conditions of this Agreement and has complied with all provisions, formalities, documentation, etc. as may be prescribed by the Company in this regard. The Allottee shall be liable to pay the Maintenance Charges from the date referred in the notice for taking possession of the Unit. After taking the possession of the Unit, it shall be deemed that the Allottee has satisfied himself with regard to the construction or quality of workmanship.*

17. Further, it is matter of record that it is nowhere stated or mentioned that the complainant/allottee would be handed over "constructive possession" instead of "physical possession". Further, as far as plea of the respondent w.r.t. clause regarding constructive possession in the application form is concerned, the same is not tenable by virtue of

clause 36 in the buyer's agreement which clearly mentions that the buyer's agreement supersedes all the previous understandings, agreements, correspondences, arrangements, whether written or oral, if any, between the parties and hence, clauses of booking application cannot be relied upon. Clause 36 of the builder buyer agreement has been reproduced as follows:

> *" The Allottee agrees that this Agreement including the preamble along with its annexures and the terms and conditions contained in the Agreement constitutes the entire Agreement between the Parties with respect ,to the subject matter hereof and supersedes any and all understandings, any other agreements, correspondences, arrangements whether written or oral, if any, between the parties hereto. This Agreement or any provision hereof cannot be orally changed, terminated or waived. Any changes or additional provisions must be set forth in writing in a separate Agreement duly executed and signed by and between the parties.*

In light of the reasons stated above, the authority is of the view that as per the buyer's agreement dated 04.10.2017, both the parties have agreed to handover of physical possession of the subject unit and accordingly, the respondent was liable to handover the physical possession of the subject unit to the complainant-allottee and not the constructive possession. Therefore, the respondent is directed to hand over the physical possession of the unit to the complainant within 30 days of this order.

2. ASSURED RETURN

18. The complainant is seeking unpaid assured returns on monthly basis as per the BBA dated 04.10.2017 at the rates mentioned therein. It is pleaded by the complainant that the respondent has not complied with the terms and conditions of the said BBA. Though for some time, the amount of assured returns was paid but later on, the respondent refused to pay the same by taking a plea that the same is not payable

in view of enactment of the **Banning of Unregulated Deposit Schemes Act, 2019** (hereinafter referred to as the Act of 2019), citing earlier decision of the authority **Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd.**, complaint no 141 of 2018) whereby relief of assured return was declined by the authority. The authority has rejected the aforesaid objections raised by the respondent in CR/8001/2022 titled as **Gaurav Kaushik and anr. Vs. Vatika Ltd.** wherein the authority while reiterating the principle of prospective ruling, has held that 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. Further, it was held that when payment of assured returns is part and parcel of builder buyer's agreement then the promoter is liable to pay that amount as agreed upon and the BUDS Act, 2019 does not create a bar for payment of assured returns even after coming into operation as the payments made in this regard are protected as per section 2(4)(l)(iii) of the Act of 2019. Thus, the plea advanced by the respondent is not sustainable in view of the aforesaid reasoning and case cited above.

19. Moreover, as far as the order passed by **Hon'ble High Court of Punjab and Haryana in CWP no. 26740 of 2022** restraining the competent authority from taking any coercive action against the respondent is concerned, the said objection was itself dealt by the Hon'ble High Court vide order dated 22.11.2023 wherein it was held that "*...there is no stay on adjudication on the pending civil appeals/petitions before the Real Estate Regulatory Authority as also against the investigating agencies and they are at liberty to proceed further in the ongoing*

matters that are pending with them." In view of the aforesaid order, the authority is proceeding with the present complaint as such.

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. 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/MoU 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 said memorandum of understanding.

22. In the present complaint, the assured return was payable as per clause 32 of MOU, the assured return agreed to be paid was Rs.81,211/- per month w.e.f. 17.05.2017 till the date of issue of notice of possession.

3. OTHER CHARGES

23. Labour cess is levied @ 1% on the cost of construction incurred by an employer as per the provisions of sections 3(1) and 3(3) of the Building and Other Construction Workers' Welfare Cess Act, 1996 read with Notification No. S.O 2899 dated 26.09.1996. It is levied and collected on the cost of construction incurred by employers including contractors under specific conditions. Moreover, this issue has already

been dealt with by the authority in complaint bearing no.962 of 2019 titled as "***Mr. Sumit Kumar Gupta and Anr. Vs Sepset Properties Private Limited***" wherein it was held that since labour cess is to be paid by the respondent, as such no labour cess should be charged by the respondent. The authority is of the view that the allottee is neither an employer nor a contractor and labour cess is not a tax but a fee. Thus, the demand of labour cess raised upon the complainant is completely arbitrary and the complainant cannot be made liable to pay any labour cess to the respondent and it is the respondent builder who is solely responsible for the disbursement of said amount. Thus, any amount so charged by the respondent/promoter in lieu of the same shall be refunded back to the complainant alongwith interest at prescribed rate from the date of deposit of the said amount till its realization.

24. However, in case of electricity connection charges, water connection charges, sewerage connection charges, there is no doubt that all these charges are payable to various departments for obtaining service connections from the concerned departments including security deposit for sanction and release of such connections in the name of the allottee and are payable by the allottee. Moreover, this issue too has already been dealt with by the authority in complaint bearing no. 4031 of 2019 titled as "***Varun Gupta Vs. Emaar MGF Land Limited***" decided on 12.08.2021, wherein it was held that these connections are applied on behalf of the allottee and allottee has to make payment to the concerned department on actual basis. In case instead of paying individually for the unit if the builder has paid composite payment in respect of the abovesaid connections including security deposit

provided to the units, then the promoters will be entitled to recover the actual charges paid to the concerned department from the allottee on pro-rata basis i.e. depending upon the area of the flat allotted to the complainant viz- à-viz the total area of the particular project. The complainant/allottee will also be entitled to get proof of all such payment to the concerned department along with a computation proportionate to the allotted unit, before making payment under the aforesaid head. Thus, any amount charged under the said heads is valis and payable by the complainant.

25. As regarding registration charges only administrative charges of upto Rs.15,000/- can be charged by the promoter–developer for any such expenses which it may incur for facilitating the said transfer as has been fixed by the DTP office in this regard vide circular dated 02.04.2018.

4. CONVEYANCE DEED

26. As per section 11(4)(f) and section 17(1) of the Act of 2016, the promoter is under an obligation to get the conveyance deed executed in favour of the allottee. Whereas, as per section 19(11) of the Act of 2016, the allottees are also obligated to participate towards registration of the conveyance deed of the unit in question. Thus, the respondent promoter is directed to to get the conveyance deed executed in favour of the complainant and also the complainant is directed to participate in the execution of conveyance deed.

H. Directions of the authority

27. 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 agreed terms contained in clause 32 of the buyer's agreement i.e., Rs.81,211/- w.e.f 17.05.2017 till the date of issuance of offer of possession i.e., 21.01.2022, after adjusting the amount already paid, if any.

ii. The respondent shall refund back the amount taken in excess from the complainant on account of various illegal demands under different heads as elucidated in para 23 above and the allottee shall make the payment of outstanding dues towards the unit as per builder buyer's agreement if any, alongwith interest at the prescribed rate of 10.85%.

iii. The respondent is directed to handover the physical possession of the subject unit to the complainant within 30 days of this order.

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

v. The respondent is directed to execute conveyance deed in favour of the complainant upon payment of requisite stamp duty by him as per norms of the state government as per section 17 of the Act as per their obligation under section 19(11) of the Act within 3 months from the date of handing over of possession.

29. Complaint stand disposed off.

30. File be consigned to the registry

(Ashok Sangwan)
Member
Haryana Real Estate Regulatory Authority, Gurugram

Dated 20.03.2024