BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**1161 of 2023**
Date of complaint	**:**	**22.03.2023**
Date of decision	**:**	**26.07.2024**

Rajeev Mehrotra
R/o: - 1211, Pocket-A,
Sector-A, Vasant Kunj, Delhi-110070. **Complainant**

Versus

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

CORAM:
Sanjeev Kumar Arora **Member**

APPEARANCE:
Saurav Jain Advocate for the complainant
Venket Rao Advocate for the respondent

ORDER

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

A. Unit and project related details

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

S. N.	Particulars	Details
1.	Name of the project	"Neo Square", Sector 109, Gurugram
2	Project area	2.71 acres
3	Nature of the project	Commercial complex
4	DTCP license no. and validity status	102 of 2008 dated 15.05.2008 valid up to 14.05.2024
5	RERA Registered/ not registered	109 of 2017 dated 24.08.2017 valid up to 23.08.2021 plus 6 months of extension due to COVID-19 i.e. 22.02.2024 ***Registration expired***
6	Unit no.	Original unit – 61, First floor (page 22 of complaint) Changed unit - 21, First floor (page 40 of complaint)
7	Unit area admeasuring	Original unit – 411 sq. ft. (page 22 of complaint) Changed unit - 411 sq. ft. (page 40 of complaint)
8	Date of execution of agreement	11.01.2021 (Page 55 of reply)
9	Date of execution of MoU	01.12.2012 (as per page no. 21 of complaint)
10.	MOU effective from	09.03.2013 (Page 23 of the complaint)
11.	Possession clause as per agreement	Not mentioned *relevant clauses 5 and 9
12.	Assured Return Clause as per MoU	**3.** The Company hereby has agreed to allot to the allottee premises measuring 411 sq. ft. on the first floor of tower – B of the said project. The allottee has opted for the investment return plan and has agreed that the basic consideration for allotment of the

		premises is to be determined at Rs. 5000/- per sq. ft. taking into consideration a return of Rs. 92.5/- per sq. ft. subject to the terms of this MOU. 16.**The builder in terms of its commitment to pay the assured return till the possession shall issue** the post-dated cheques for each financial year taking into consideration the expected period of possession. The post-dated cheques shall not be dishonoured for any of the reason.
13.	Assured return paid	**From March 2013 till June 2019- as per complaint**
14.	Construction update and status of monthly interest cheques	18.12.2019 Wherein respondent stated that they will adjust his payments towards monthly interest at the time of possession
15.	Due date of possession	01.12.2015 **[Calculated as per *Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018]***
16.	Total cost	Rs. 20,55,000/- (As per page no. 40 of complaint)
17.	Amount paid by the complainant	Rs. 21,31,245/- (As per page no. 12 of complaint)
18.	Occupation certificate /Completion certificate	N/A
19.	Offer of possession	N/A

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint:

I. That in the year 2012, the complainant had booked/purchased a commercial shop/unit in the project of the respondent named "Neo Square" at Sector-109, Gurgaon, Haryana. Accordingly, vide application form dated 07.03.2012, the complainant was initially

allotted a unit bearing no. 61 located at 1st floor, Tower-B, measuring about 411 sq.ft. for a total sale consideration of Rs.26,26,034/- including IFMS, PLC, EDC/IDC, GST etc.

II. That vide the said application form, the complainant had opted for assured return payment plan. Accordingly, the parties have entered into a Memorandum of Understanding dated 01.12.2012 for payment of assured returns on the investment made by the complainant and the said MOU was deemed to be effective from 09.03.2013.

III. That the complainant paid a total sum of Rs.21,31,245/- by March 2013 to the respondent. That pursuant to the payments being made by the complainant as well as the terms of the MOU entered into between the parties for payment of assured returns, the respondent had started making payment of assured returns of Rs.38,018/- per month and handed over post-dated cheques to the complainant for the said purpose and had sent covering letter dated 22.05.2013 to the complainant at the time of handing over of post-dated cheques towards payment of assured returns of Rs.38,018/- per month.

IV. That the respondent continued payment of assured return amounting to Rs.38,018/- per month till June 2019. However, thereafter, the payment was arbitrarily stopped by the respondent.

V. That the respondent thereafter, had sent letter dated 18.12.2019 to the complainant wherein the respondent had mentioned that they would adjust the payments towards monthly interest (assured returns) at the time of possession. That in the meanwhile, the respondent had also shifted the unit booked by the complainant from unit no.61 to unit no.21.

VI. That the complainant had also booked another unit in the same project being unit no.57 situated at Ground Floor. However, at the request of the complainant to cancel the said unit, the respondent had assured the complainant that they will refund the entire amount of Rs.19,22,056/- paid by the complainant towards this unit/shop without any deductions.

VII. That pursuant to the aforesaid discussions, the complainant had got the allotment for the said shop at ground floor cancelled. However, instead of refunding the entire amount as assured, the respondent gave post-dated cheques for some amount and arbitrarily and unilaterally had shown a sum of Rs.5,98,846/- as adjusted towards the unit no.21 situated at 1st floor vide invoice-cum-receipt dated 26.12.2020.

VIII. That thereafter, the buyer's agreement was executed by the parties on 11.01.2021 i.e. after a lapse of 8 years from booking. However, there was no specific timeline for completion of construction and handing over possession of the unit to the complainant.

IX. That although there is no mention about the date of possession in the buyer's agreement, but the respondent had assured the complainant that the possession of the unit would be handed over within 3 years from date of booking.

X. That the complainant had sent email dated 24.01.2023 to the respondent enquiring about the expected timelines for handing over of possession as well as about assured returns, however, the respondent chose not to respond to the queries of the complainant.

XI. That as per clause 4.6 of the buyer's agreement, the respondent would charge interest @ 18% p.a., in case of any delay made by the complainant in making payments of any installment but there is no

compensation clause for the delay made by the respondent in the buyer's agreement. Such a term is unfair as the respondent charges interest as penalty on delayed payments even if there is a small default by any customer. But it refused to pay any compensation for any inordinate delay in completing the construction of the project or handing over possession to the customer. Therefore, the respondent is also liable to pay to the complainant, pendente lite and future interest @18% p.a., as is being charged by the respondent till the date of the realization, or such higher interest which this Authority may deem fit in the interest of justice.

XII. That in the present case, the respondent has defaulted in payment of assured returns and in addition, the respondent has further failed to give possession of the unit till date to the complainant. Therefore, the complainant is entitled to assured returns as per the agreement between the parties along with interest on the said amount on account of default and delay in making timely payments, as per the provisions of the Real Estate (Regulation and Development) Act, 2016.

XIII. That the complainant is further entitled to get immediate possession of the unit No.21 situated at 1st floor in the said project along with compensation on account of default and delay in handing over possession, as per the provisions of the Real Estate (Regulation and Development) Act, 2016.

C. Relief sought by the complainant

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

i. Direct the respondent to pay the assured return along with interest from July 2019 to till date forthwith and continue to pay assured return as per the MOU.

ii. Direct the respondent to handover the physical possession of the unit in question and to pay delayed possession interest for every month of delay, till the handover of possession.

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 complainant 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 14.02.2013, whereby seeking allotment of unit no. 21 on the 1st floor, admeasuring 411 sq. ft. super area for a basic sale price of Rs.20,55,000/-. The complainant, considering the future speculative gains, also opted for the Investment 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 01.12.2012 was executed between the parties, which was a completely separate understanding between the parties in regard 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 09.03.2013 till the commencement of the first lease. It is also submitted that as per clause 9 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. That after execution of the MOU, a buyer's agreement regarding the said allotment was executed between the parties on 11.01.2021.

V. That as per the mutually agreed terms between the parties, the payment of assured return was to commence only from 09.03.2013 till the commencement of first lease. However, BUDS Act came into force in 2019 and therefore the respondent was constrained to cease all payments pertaining to assured return to all its allottees who opted the same from 2019.

VI. That as the complainant in the present complaint is seeking the relief of assured return, it is pertinent to mention here 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.

VII. 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.

VIII. It is submitted that the as per clause 14 of the 'MOU', the due date for handing over of possession was when the tenure of the first lease was completed, the unit shall be handed over directly by the lessee to the complainant.

IX. 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. Accordingly, the due date of delivery of possession in the present case is 36 months + 6 months (grace period) to be calculated from 15.12.2015, which comes out to be 15.06.2019.

X. 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.

XI. That the complainant may have cleared the basic sale price of the said commercial property, however, he is still liable to pay all other charges such as VAT, Interest, Registration Charges, Security Deposit, duties, taxes, levies etc. when demanded. The same has been clearly agreed to in various clauses of buyer agreement and MOU.

XII. That the complainant had also booked another unit in the similar project on ground floor bearing no. 57 and paid Rs.19,22,056/-. On the request of the complainant the above unit was cancelled and an amount of Rs.7,00,000/- had been refunded to the complainant. Further, upon request of the complainant to adjust Rs.6,26,345.68/-, respondent upon its calculations agreed to adjust Rs.5,98,846/- in the dues of the unit at first floor from the amount paid by him for ground floor unit.

XIII. 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 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	**7th of April, 2015 to 6th of May, 2015**	**30 days**	The aforesaid ban affected the supply of raw materials as most of the contractors/building material suppliers used diesel vehicles more than 10 years old. The order had abruptly stopped movement of diesel vehicles

		vehicles before the tribunal and provide the same to the police and other concerned authorities.			more than 10 years old which are commonly used in construction activity. The order had completely hampered the construction activity.
2.	**19th July 2016**	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.	Till date the order in force and no relaxation has been given to this effect.	**30 days**	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.
3.	**8th 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	8th Nov, 2016 to 15th Nov, 2016	**7 days**	The bar imposed by Tribunal was absolute. The order had completely stopped construction activity.

		directed that no construction activity would be permitted for a period of one week from the date of order.			
4.	**7th 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 7th 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 21st Dec, 19 and 30th Jan, 20.
5.	9th Nov 2017 and 17th Nov, 2017	National Green Tribunal has passed the said order dated 9th Nov, 2017 completely prohibiting the carrying on of construction by any person, private, or government authority in NCR till the next date of hearing. (17th 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 9th Nov, 17 was vacated vide order dated 17th 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.	29th October 2018	Haryana State Pollution Control Board, Panchkula has passed the order dated 29th October 2018 in furtherance of directions of Environmental Pollution (Prevention and Control) Authority dated 27th Oct 2018. By virtue of order dated 29th of October 2018 all the construction activities including the excavation, civil construction were	**1st Nov to 10th Nov, 2018**	**10 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.

		directed to remain close in Delhi and other NCR Districts from 1st Nov to 10th Nov 2018.			
7.	24th 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.	11th October 2019	Commissioner, Municipal Corporation, Gurugram has passed an order dated 11th of Oct 2019 whereby the construction activity has been prohibited from 11th Oct 2019 to	**11th Oct 2019 to 31st 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.

		31st Dec 2019. It was specifically mentioned in the aforesaid order that construction activity would be completely stopped during this period.			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.	3rd week of Feb 2020	Covid-19 pandemic	**Feb 2020 to till date**	**To date (3 months Nation wide lockdown)**	Since the 3rd week of February 2020, the Respondent 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**	

XIV. 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.

XV. 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 compete 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 complainant 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 complainant is 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 01.12.2015. Hence, events alleged by the respondent do not have any impact on the project being developed by the respondent. Moreover, some of the events mentioned above are of routine in nature happening annually and the promoter is required to take the same into consideration while launching the project. Thus, the promoter/respondent cannot be given any leniency on based of aforesaid reasons and it is a well settled principle that a person cannot take benefit of his own wrong.

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

12. The respondent has taken a stand that the complainant is an investor and not consumer, therefore, he is 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 complainant is a buyer, and he has paid total price of Rs.21,31,245/- to the promoter towards purchase of a 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 complainant, it is crystal clear that they are allottee(s) as the subject unit 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 allottee being investor is not entitled to the protection of this Act also stands rejected.

G. Findings on the relief sought by the complainant

G.I Assured Return

14. The complainant submitted that the respondent vide clause 3 of the MoU dated 01.12.2012 agreed to give an investment return of Rs.38,018/- 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.20,55,000/- and the complainants have paid a sum of Rs.21,31,245/- 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(4J 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 properly 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 on 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 (4J 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.

24. Therefore, the authority directs the respondent/promoter to pay assured return from the date the payment of assured return was stopped till the execution of first lease after obtaining the occupation certificate.

25. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges however, proviso to section 18 provides that where an allottee does not

intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under: -

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

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., 26.07.2024 is 9%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 11%.

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 vide letter dated 18.12.2019 and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement defines the builder/buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allotee arises out of the same relationship and is marked by the original agreement for sale.

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.38,017.5/- 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 allottee is protected even after the due date of possession is over as the assured returns are payable from 09.03.2013 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. 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.38,017.5/- per month from the date the payment of assured return was stopped till the

commencement of the first lease on the said unit as per the memorandum of understanding.

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. Since vide letter dated 18.12.2019, respondent itself agreed to pay assured return at the time of possession. The respondent is directed to pay the arrears of amount of assured return at the rate i.e., Rs.38,017.5/- per month from the date the payment of assured return was stopped till the commencement of the first lease on the said unit as per the memorandum of understanding.

ii. The respondent is directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of this order after adjustment of outstanding dues, if any, failing which that amount would be payable with interest @9% p.a. till the date of actual realization.

iii. The respondent is directed to handover the possession of the subject unit to the complainant within two months after obtaining valid occupation certificate from the competent authority.

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

33. Complaint stands disposed off.

34. File be consigned to registry.

(Sanjeev Kumar Arora)
Member
Haryana Real Estate Regulatory Authority, Gurugram
Dated: 26.07.2024