

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

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|-----------------------------|-------------------|
| Order reserved on: | 04.07.2024 |
| Order pronounced on: | 26.09.2024 |

| NAME OF THE BUILDER | | K S PROPMART PRIVATE LIMITED | |
|---------------------|--------------|---|---|
| PROJECT NAME | | "PARK STREET" | |
| S. No. | Case No. | Case title | APPEARANCE |
| 1. | CR/1707/2022 | Rimpy Kumar V/S K S Propmart Private Limited | Sh. Manul Mittra Advocate Jagdeep Yadav Advocate |
| 2. | CR/5902/2022 | Kulwinder Singh V/S K S Propmart Private Limited | Sh. Manul Mittra Advocate Jagdeep Yadav Advocate |

CORAM:

Shri Vijay Kumar Goyal

Member**ORDER**

1. This order shall dispose of both the complaints titled as above filed before this authority 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.
2. The core issues emanating from them are similar in nature and the complainant(s) in the above referred matters are allottees of the project, namely, "Park Street" (Commercial Colony) being developed by the same

respondent/promoter i.e., M/s K S Propmart Private Limited. The terms and conditions of the memorandum of understanding, fulcrum of the issues involved in all these cases pertains to failure on the part of the promoter to deliver timely possession of the units in question, seeking handing over of possession, assured return along with interest and other.

3. The details of the complaints, reply to status, unit no., date of MOU, due date of possession, total sale consideration, total paid amount and relief sought are given in the table below:

| | | |
|---|--|--|
| Project Name and Location | K S Propmart Private Limited at "Park Street" situated in Sector- 85, Gurugram. | |
| Assured Return Clause | | |
| 3. Assured Return | | |
| <i>It is hereby agreed and undertaken by the developer from 1st November 2018 till submission of application for grant of occupation certificate to competent authority, the developer shall pay to the allottee an assured return at the rate of Rs.161.94/- per sq. ft. of super area of premises per month (herein referred to as the Assured Return). The assured return shall be subject to tax deduction at source, which shall be payable on due date of every English Calendar month on due basis.</i> | | |
| Occupation certificate: - Not obtained | | |
| Complaint No. & Case Title | CR/1707/2022 Rimpy Kumar V/S K S Propmart Private Limited | CR/5902/2022 Kulwinder Singh V/S K S Propmart Private Limited |
| Reply status | 14.11.2022 | 14.11.2022 |
| Unit no. | GF-88 [As per page no. 35 of the complaint] | GF-62 [As per page no. 39 of the complaint] |
| Area admeasuring | 370.50 sq. ft. (Super area) [As per page no. 35 of the complaint] | 410 sq. ft. (Super area) [As per page no. 29 of the complaint] |
| Date of MOU | 01.11.2018 [As per page no. 33 of the complaint] | 13.12.2018 [As per page no. 27 of the complaint] |
| Due date of handing over of possession | 31.12.2021 (As per application for registration of the project) | 31.12.2021 (As per application for registration of the project) |
| Offer of possession | Not offered | Not offered |
| Total | TSC: Rs.20,00,700/- | TSC: Rs.24,25,120/- |

| Consideration | (As per page no. 35 of the complaint) | (As per page no. 29 of the complaint) |
|--|--|--|
| Total Amount paid by the complainant(s) | AP: Rs.22,40,000/- (As per page no. 35 of the complaint) | AP: Rs.24,73,654/- (As per page no. 30 of the reply) |
| Assured return paid by the respondent | AR: Rs.11,94,000/- (As per ledger of assured return filed by the respondent) | AR: Rs.11,24,868/- (As per ledger of assured return filed by the respondent) |
| <p>The complainants in the above complaint(s) have sought the following reliefs:</p> <ol style="list-style-type: none"> 1. Direct the respondent to pay the pending assured return of Rs.54,000/- per month for 16 months i.e., April 2020 to September 2020 (6 months), November 2020 to December 2020 (2 months) & February 2021 to May 2021 (4 months) and August 2021 to November 2021 (4 months) amounting to Rs.8,64,000/. 2. Direct the respondent to make legal and complete offer of possession as well as registry of the said unit at the earliest after receiving the necessary government licenses and approvals. 3. Direct the respondent to pay the total interest due against payment of assured return till date. 4. Direct the respondent to pay an additional amount of Rs.1,00,000/- to the complainant towards litigation cost. 5. Direct the respondent to waive off any maintenance charges, cost of parking or any other charges that the respondent may have charged since the respondent has not offered possession till date. <p>Note: In the table referred above, certain abbreviations have been used. They are elaborated as follows:</p> <p>Abbreviation Full form TSC Total Sale consideration AP Amount paid by the allottee(s)</p> | | |

4. The aforesaid complaints were filed against the promoter on account of violation of the MOU against the allotment of units in the project of the respondent/builder and for not handing over the possession by the due date, seeking award of possession along with assured return as per clause 3 of the MOU.
5. It has been decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter/respondent in terms of section 34(f) of the Act which mandates the authority to ensure compliance of the obligations cast upon the promoters,

the allottee(s) and the real estate agents under the Act, the rules and the regulations made thereunder.

6. The facts of all the complaints filed by the complainant(s)/allottee(s) are also similar. Out of the above-mentioned case, the particulars of lead case **CR/1707/2022 titled as Rimpay Kumar V/S K S Propmart Private Limited** are being taken into consideration for determining the rights of the allottee(s) qua assured return along with interest and others.

A. Unit and project related details

7. 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. No. | Particulars | Details |
|--------|------------------------------------|---|
| 1. | Name and location of the project | "Park Street" at sector 85, Gurgaon, Haryana |
| 2. | Project area | 2.85 acres |
| 3. | Nature of project | Commercial |
| 4. | RERA registered/not registered | 41 of 2019 dated 30.07.2017 valid up to 31.12.2021 |
| 5. | DTCP license no. & validity status | 100 of 2013 dated 02.12.2013 valid up to 01.12.2019 |
| 6. | Name of licensee | M/s K S Propmart Pvt. Ltd. |
| 7. | Date of MOU | 01.11.2018 (As per page no. 33 of the complaint) |
| 8. | Unit No. | GF-88, Ground Floor (As per page no. 35 of the complaint) |
| 9. | Unit admeasuring area | 370.50 sq. ft. (As per page no. 35 of the complaint) |
| 10. | Assured Return clause | 3. Assured Return <i>It is hereby agreed and undertaken by the Developer from 1st November</i> |

| | | |
|-----|---|---|
| | | <i>2018 till submission of application for grant of occupation certificate to competent authority, the Developer shall pay to the Allottee an Assured Return at the rate of Rs. 161.94/- per sq. ft. of super area of premises per month (herein referred to as the Assured return). The assured return shall be subject to tax deduction at source, which shall be payable on due date of every English Calendar month on due basis.</i> |
| 11. | Total sale consideration | Rs.20,00,700/- (As per page no. 35 of the complaint) |
| 12. | Amount paid by complainant | Rs.22,40,000/- (As per page no. 35 of the complaint) |
| 13. | Amount paid by the respondent as assured return | Rs.11,94,000/- (As per ledger of assured return filed by the respondent) |
| 14. | Occupation certificate | Not obtained |
| 15. | Offer of possession | Not offered |

B. Facts of the complaint:

8. The complainant has made the following submissions in the complaint:
- I. That the complainant i.e., Mrs. Rimpay Kumar is a resident of House No.-5, Chase Compound, Jail Road, Koil, Aligarh, Uttar Pradesh and is a peace loving and law abiding citizen of India.
 - II. That the respondent i.e., M/s K S Propmart Private Limited is the sister-company of M/s VSR Infratech Private Limited having the same registered address as well as corporate address.

- III. That the respondent was developing and setting up commercial towers/colony by the name of "Park Street" over an area of 2.85 acres situated at Village Badha, Sector-85, Gurugram.
- IV. That the complainant showed her interest in buying/purchasing a unit in the aforementioned commercial colony/towers being developed by the respondent.
- V. That the respondent had given false verbal assurances and promises to deliver the possession of the unit within 03 years as well as to give monthly assured return to the complainant.
- VI. That the complainant believing and falling for the false assurances of the respondent agreed to buy a unit in the aforementioned project and the respondent had asked the complainant to pay the total sale consideration of the unit to the sister-company of the respondent namely M/s VSR Infratech Private Limited.
- VII. That on 30.10.2018 the respondent issued a receipt to the complainant acknowledging the receiving of Rs.2,40,000/- for buying a unit on the ground floor of the said project.
- VIII. That the complainant issued a cheque dated 12.09.2018 amounting to Rs.20,00,000/- in favour of the respondent for buying a unit in the aforementioned project being developed by the respondent and same was acknowledged by the respondent vide receipt dated 31.10.2018.
- IX. That thereafter, the respondent and the complainant entered into a memorandum of understanding dated 01.11.2018 wherein the respondent had allotted a unit bearing unit no. GF-88 admeasuring a tentative super area of 370.50 sq. ft. to the complainant for a total sale consideration of Rs.20,00,700/-.

- X. That according to clause 1.4 of the above mentioned MOU dated 01.11.2018, the complainant had paid a total of Rs.22,40,000/- to the respondent including Rs.2,40,000/- towards GST against her booking of the unit.
- XI. That according to clause 3.1 of the above mentioned MoU dated 01.11.2018, the respondent had to give monthly assured return of approximately Rs.60,000/- per month to the complainant w.e.f. 01.11.2018 till submission of application for grant of occupation certificate to the competent authority.
- XII. That moreover, to completely deceive the complainant, the respondent issued 36 post-dated cheques from 01.12.2018 to 01.11.2021 each amounting to Rs.54,000/- for monthly payment of assured return as per the terms of MOU dated 01.11.2018.
- XIII. That initially the respondent was paying the monthly assured return to the complainant till March 2020 but stopped paying assured return thereafter. The post-dated cheques given to the complainant started to bounce thereafter.
- XIV. That the complainant had again and again requested the respondent to clear the pending assured return as she had no other source of income and had put her lifelong savings in buying the aforesaid unit with the intention of becoming the absolute owner of a world-class property (as promised by the respondent) in Gurugram.
- XV. That till date, neither the respondent has given possession to the complainant as the project is still incomplete, nor the respondent has paid the monthly assured return from April 2020 till date.
- XVI. That from April 2020 to November, 2021 out of 20 months monthly assured return, the respondent has just paid monthly assured return



of 4 months i.e., October 2020, January 2021, June 2021 and July 2021 and till date monthly assured return of 16 months is due which amounts to Rs.8,64,000/- and the respondent is intentionally and deliberately not paying to the complainant.

- XVII. That the complainant had time and again requested the respondent to pay monthly assured return to the complainant in accordance with the said MoU and had put multiple efforts and approached the respondent for the same, but all the efforts made by the complainant went in vain as after receiving money from the complainant, the respondent started ignoring the complainant and has neither completed the project, nor applied for OC, nor executed a space buyer's agreement, nor the respondent has paid monthly assured return to the complainant for 40 months causing immense mental trauma and financial loss to the complainant.
- XVIII. That according to the application to authority for registration of real estate project submitted by the respondent to the Hon'ble Authority, revised date of completion of the said project is 31.12.2021 which makes it crystal clear to understand and deem that the project was supposed to be completed till 31.12.2021, although the complainant was shocked to know that the project is far from being completed.
- XIX. That taking advantage of its dominant position in the real estate market, the respondent has clearly refused to pay any pending and/or forthcoming monthly assured return as well as to give possession to the complainant leaving the complainant with no other option but to approach the Hon'ble Authority.

XX. That the complainant being an aggrieved party is filing the present complaint under Section 31 with the Authority for violation/contravention of provisions of this Act.

C. Relief sought by the complainant:

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

- i. Direct the respondent to pay the pending assured return of Rs.54,000/- per month for 16 months i.e., April 2020 to September 2020 (6 months), November 2020 to December 2020 (2 months) & February 2021 to May 2021 (4 months) and August 2021 to November 2021 (4 months) amounting to Rs.8,64,000/.
- ii. Direct the respondent to make legal and complete offer of possession as well as registry of the said unit at the earliest after receiving the necessary government licenses and approvals.
- iii. Direct the respondent to pay the total interest due against payment of assured return till date.
- iv. Direct the respondent to pay an additional amount of Rs.1,00,000/- to the complainant towards litigation cost.
- v. Direct the respondent to waive off any maintenance charges, cost of parking or any other charges that the respondent may have charged since the respondent has not offered possession till date.

10. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent:

11. The respondent has contested the complaint on the following grounds:

- i. That the complainant made an application for provisional allotment of a unit bearing no. GF-88 located on ground floor in the project developed by the respondent known as "VSR 85 Avenue" which is now known as "Park Street" vide an application form.
- ii. That one of the offers made by the respondent at that point of time was that the respondent will pay an assured return at the rate of Rs.161.94/- per sq.ft. of the super area from 01.11.2018 till submission of application for grant of occupation certificate to the competent authority. That the complainant accordingly entered into an MOU dated 01.11.2018 with the respondent determining all the rights and liabilities of the parties.
- iii. That as per MOU, the price of the unit for an area admeasuring 370.50 sq. ft. was Rs.20,00,704/- exclusive of EDC, IDC, Interest Free Maintenance Security (IFMS), Electricity Connection Charges, Power Back up charges, Air Conditioning Charges, service tax and such other levies/cessess/VAT as may be imposed by the any statutory authority.
- iv. That the complainant has made payment of Rs.22,40,000/- including GST of Rs.2,40,000/- to the respondent at the time of allotment. However, in addition to the above additional cost the complainant is also supposed to make other payments in the nature of EDC, IDC, Interest Free Maintenance Security (IFMS), Electricity Connection Charges, Power Back up charges, Air Conditioning Charges, service tax and such other levies/cessess /VAT as per the demands raised by the respondent.
- v. That there was no time limit provided under the MOU for handing over the possession of the unit. Thus, time was not the essence of the

contract for delivering the possession, however it was mutually agreed upon that the complainant will be entitled to the benefit of assured returns as per the terms of the MOU. That the very inclusion of such a clause in the MOU goes a step further in illustrating the fact that the complainant knew it well and understood the implication of the terms of the MOU having no date of possession but having a buffer/protection of payment of assured return till completion of the building. Hence, now it doesn't lie in the mouth of the complainant to allege that there has been undue delay in the handing over of the possession.

- vi. That as per the terms of the MOU, it was also agreed that the respondent will pay an assured return at the rate of Rs.161.94/- per sq. ft. of the super area from 01.11.2018 till submission of application for grant of occupation certificate to the competent authority. However, the payment of assured return was subject to force majeure clause as provided under clause 7.1 of the MOU and other clauses of the MOU. It is submitted that an amount of Rs.11,94,000/- for a period of 22 months has been paid by the respondent as assured return to the complainant.
- vii. That without prejudice to the above, it is stated that the statement of objects and reasons of the said Act clearly state that the RERA is enacted for effective consumer protection. RERA is not enacted to protect the interest of investors. As the said Act has not defined the term consumer, therefore the definition of "Consumer" as provided under the Consumer Protection Act, 1986 has to be referred for adjudication of the present complaint. The complainant is an investor and not a consumer.

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viii. That the complainant was entitled to assured return subject to force majeure conditions in developing the said project. It is submitted that the construction and development of the project was affected due to force majeure conditions and the same are enumerated herein below:

- a. Shortage of labour
- b. Increase in the cost of construction to a great extent.
- c. Moreover due to active implementation of social schemes like National Rural Employment Guarantee and Jawaharlal Nehru National Urban Renewal Mission, there was also more employment available for labours at their hometown despite the fact that the NCR region was itself facing a huge demand for labour to complete the projects.
- d. That the Ministry of Environment and Forest and the Ministry of Mines had imposed certain restrictions which resulted in a drastic reduction in the availability of bricks and availability of sand which is the most basic ingredient of construction activity. That said ministries had barred excavation of topsoil for manufacture of bricks and further directed that no more manufacturing of bricks be done within a radius of 50 km from coal and lignite-based thermal power plants without mixing 25% of ash with soil.
- e. That shortage of bricks in region has been continuing ever since and the respondent had to wait many months after placing order with concerned manufacturer who in fact also could not deliver on time resulting in a huge delay in project.
- f. That same further cost huge delay in project and stalling various parts and agencies at work in advanced stages, for



- now the respondent had to redo, the said work causing huge financial burden on respondent, which has never been transferred to complainant or any other customers of project.
- g. That in addition to that the Government has declared demonetization on 08.11.2016 which severely impacted the operations and project execution on the site as the labourers in absence of having bank accounts were only being paid via cash by the sub-contractors of the company and on the declaration of the demonetization, there was a huge chaos which ensued and resulted in the labourers not accepting demonetized currency after demonetization.
- h. That in the year 2012, on the directions of the Hon'ble Supreme Court of India, the mining activities of minor minerals (which includes sand) were regulated. The Hon'ble Supreme Court directed framing of Modern Mineral Concession Rules. Reference in this regard the judgment of "*Deepak Kumar v. State of Haryana, (2012) 4 SCC 629*". The competent authorities took substantial time in framing the rules and in the process the availability of building materials including sand which was an important raw material for development of the paid project became scarce in the NCR as well as areas around it. Further, developer was faced with certain other force majeure events including but not limited to non-availability of raw material due to various stay orders of Hon'ble Punjab & Haryana High Court and National Green Tribunal thereby stopping/regulating the mining activities, brick kilns, regulation of the construction and development

activities by the judicial authorities in NCR on account of the environmental conditions, restrictions on usage of water, etc. In addition to above all the projects in Delhi NCR region are also affected by the blanket stay on construction every year during winters on account of air pollution which leads to further delay the project. That such stay orders are passed every year either by Hon'ble Supreme Court, NGT or/and other pollution boards, competent courts, Environment Pollution (Prevention & Control) Authority established under Bhure Lal Committee, which in turn affect the project.

- i. That in July 2017 the Government of India further introduced a new regime of taxation under the Goods and Service Tax which further created chaos and confusion owing to lack of clarity in its implementation. That ever since July 2017 since all the materials required for the project of the company were to be taxed under the new regime it was an uphill task of the vendors of building material along with all other necessary materials required for construction of the project wherein the auditors and CA's across the country were advising everyone to wait for clarities to be issued on various unclear subjects of this new regime of taxation which further resulted in delays of procurement of materials required for the completion of the project.
- j. That further the construction has also been delayed due to the Covid-19 pandemic which kicked start in March 2020 and is still ongoing.

- ix. That the complainant in the present case is seeking relief of assured returns as per the MOU signed between the parties. That as per Act of 2016 complaint can be filed only under Section 12, 14, 18 & 19 for any violation. However, the complainant has failed to plead any violation under Section 12, 14, 18 & 19 and thus the present complaint needs to be dismissed.
- x. That the complainant is praying for the relief of "Assured Returns" which is beyond the jurisdiction of the Authority. The compensation for assured return and other relief, if any cannot be awarded by the Hon'ble Authority, as the Authority does not have the jurisdiction to award any reliefs qua assured return as provided under section 18 of the Act and in accordance with the rules, framed there under.
- xi. That the enforcement of memorandum of understanding entered into between the parties on the same date with regard to assured return before and after offer of possession is a matter of civil nature, only to be dealt with by a civil court/ consumer court as the case may be.
- xii. That in the matter of *Brhimjeet & Ors vs. M/s Landmark Apartments Pvt. Ltd. (Complaint No. 141 of 2018)*, the Hon'ble Authority has taken the same view as observed by Maharashtra RERA in Mahesh Pariani (supra). Thus, the Act of 2016 cannot deal with issues of assured return. Hence, the complaint deserves to be dismissed at the very outset.
- xiii. That the complainant's act is also violative of the provisions of Banning of Unregulated Deposit Ordinance, 2019 as she is falling within the definition of Deposit Takers", as per the section 2(6) of 'The Banning of Unregulated Deposit Schemes Ordinance, 2019 and

the said ordinance bans such deposits, thereby also bars such assured returns.

xiv. That the complainant is attempting to seek an advantage of the slowdown in the real estate sector, and it is apparent from the facts of the present case that the main purpose of the present complaint is to harass the respondent by engaging and igniting frivolous issues with ulterior motives to pressurize the respondent. Thus, the complaint is without any basis and no cause of action has arisen till date in favour of the complainant and against the respondent and hence, the complaint deserves to be dismissed.

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

E. Jurisdiction of the authority:

13. The respondent has raised a preliminary submission/objection 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

14. 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

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

Section 11.....

(4) The promoter shall-

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

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

16. 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 objections raised by the respondent:

F.I Objection regarding the complainant being investor.

17. The respondent has taken a stand that the complainant is the investor and not consumer. Therefore, she is not entitled to the protection of the Act and is 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 observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumer of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a

statute and states main aims & objects of enacting a statute but at the same time the 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 documents placed on record, it is revealed that the complainant is buyer and paid total price of Rs.22,40,000/- to the promoter towards purchase of a unit in its project. 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;"

18. In view of the above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment application for allotment, it is crystal clear that the complainant is allottee as the subject unit was allotted to her by the promoter. The concept of investor is not defined or referred to 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 to in the Act. Thus, the contention of the promoter that the allottee being investor is not entitled to protection of this Act also stands rejected.

F.II Objection regarding force majeure conditions:

19. 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 demonetisation, certain environment restrictions, weather conditions in NCR region, shortage of labour, increase in cost of construction material, and implementation of GST and major spread of Covid-19 across worldwide. However, all the pleas advanced in this regard are devoid of merit. Further, the Authority has gone through the application form and observed that due date for possession is 31.12.2021. ***Further as per HARERA notification no. 9/3-2020 dated 26.05.2020, an extension of 6 months is granted for the projects having completion/due date on or after 25.03.2020.*** The authority put reliance judgment of Hon'ble Delhi High Court in case titled as ***M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (I) (Comm.) no. 88/ 2020 and IAs 3696-3697/2020*** dated 29.05.2020 which has observed that-

"69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself."

20. The completion date of the aforesaid project in which the subject unit is being allotted to the complainant is 31.12.2021 i.e., after 25.03.2020. Consequently, an extension of 6 months is to be given over on account of force majeure conditions due to outbreak of Covid-19 pandemic. Therefore, the due date of subject unit comes to 30.06.2022 and the 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 basis of aforesaid reasons and it is a well settled principle that a person cannot take benefit of his own wrong.

G. Findings on the relief sought by the complainant:

G.I Direct the respondent to pay the pending assured return of Rs.54,000/- per month for 16 months i.e., April 2020 to September 2020 (6 months), November 2020 to December 2020 (2 months) & February 2021 to May 2021 (4 months) and August 2021 to November 2021 (4 months) amounting to Rs.8,64,000/.

G.II Direct the respondent to pay the total interest due against payment of assured return till date.

21. The above sought relief(s) by the complainant are taken together being inter-connected.

22. The complainant has sought relief of pending assured investment return in terms of MOU dated 01.11.2018. As per clause 3 of MoU, the developer agreed to pay investment assured return of Rs.161.94/- per sq. ft. per month i.e., Rs.59,998/- per month w.e.f. 01.11.2018 till submission of application for grant of occupation certificate to the competent authority. Further, clause 3 of MoU, the developer has given advance 36 post-from 01.12.2018 to 01.11.2021 each amounting to Rs.54,000/- for monthly payment of assured return as per the terms of MOU dated 01.11.2018. That initially the respondent was paying the monthly assured return to the complainant till March 2020 but stopped paying assured return thereafter. The post-dated cheques given to the complainant started to bounce thereafter. However, the payment of assured return was subject to force majeure clause as provided under clause 7.1 of the MOU and other clauses of the MOU. The relevant clauses are produced for the ready reference:

3. Assured Return

It is hereby agreed and undertaken by the Developer from 1st November 2018 till submission of application for grant of occupation certificate to competent authority, the Developer shall pay to the Allottee an Assured Return at the rate

of Rs. 161.94/- per sq. ft. of super area of premises per month (herein referred to as the Assured return). The assured return shall be subject to tax deduction at source, which shall be payable on due date of every English Calendar month on due basis.

7. Force Majeure:

In the event force majeure conditions prevails, then the payment of Assured Return shall remain suspended for such period and payment of same shall resume upon discontinuation of such force majeure conditions. In the event such force majeure conditions prevail beyond the period of 90 days then the developer shall at its discretion opt to terminate this MOU and transaction contemplated herein. In such an event, the developer without any additional interest shall refund to the allottee all sums received from the allottee. Thereafter, the allottee shall not have any title or claim over the premises and the developer shall be free to deal with the said premises in any manner whatsoever.

23. It is pleaded by the complainant, that the respondent has not complied with the terms and conditions of the MoU. Though for sometime the assured return was paid by the respondent as admitted by the respondent in its reply, but later it failed to fulfil the obligation conferred over it. However, the respondent in its reply contended that the complainant has already received a sum of Rs.11,94,000/- towards the payment of assured return for 22 months in respect of the subject unit. The respondent submitted that there was no time limit provided under the MOU for handing over the possession of the unit and thus there has not been undue delay in handing over the possession. Furthermore, the respondent states that the complainant's act is violation of the provisions of Banning of Unregulated Deposit Ordinance, 2019 as she is falling within the definition of "Deposit Takers" as per the section 2(6) of the Banning of Unregulated Deposit Schemes Ordinance, 2019 and the said ordinance bans such deposits, thereby also bars such assured returns.
24. 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 the 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.

25. It is now well settled preposition of law that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum, memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and can't take a plea

that it is not liable to pay the amount of assured return. Moreover, an agreement for sale defines the builder-buyer relationship. So, it can be said that the agreement for assured returns between the promoter and an allottee 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. Further, after coming into force the Act of 2016 w.e.f 01.05.2017, the builder is obligated to register the project with the authority being an ongoing project as per proviso to section 3(1) of the Act of 2017 read with rule 2(o) of the Rules, 2017. The Act of 2016 has no provision for re-writing of contractual obligations between the parties as held by the Hon'ble Bombay High Court in case *Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors., (supra)* as quoted earlier. So, the respondent/builder can't take a plea that there was no contractual obligation to pay the amount of assured returns to the allottee after the Act of 2016 came into force or that a new agreement is being executed with regard to that fact. When there is an obligation of the promoter against an 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.

26. 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.*

27. The money was taken by the builder as deposit in advance against the 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 fulfill that commitment, the allottee has a right to approach the Authority for redressal of his grievances by way of filing a complaint.

28. Moreover, the developer is also bound by promissory estoppel. As per this doctrine, the view is that if any person has made a promise and the promisee has acted on such promise and altered his position, then the person/promisor is bound to comply with his or her promise. When the builders failed to honour their commitments, a number of cases were filed by the creditors at different forums such as ***Nikhil Mehta, Pioneer Urban Land and Infrastructure*** which ultimately led the central government to enact the Banning of Unregulated Deposit Scheme Act, 2019 on 31.07.2019 in pursuant to the Banning of Unregulated Deposit Scheme Ordinance, 2018. However, the moot question to be decided is as to whether the schemes floated earlier by the builders and promising as assured returns on the basis of allotment of units are covered by the

abovementioned Act or not. A similar issue for consideration arose before Hon'ble RERA Panchkula in case ***Baldev Gautam VS Rise Projects Private Limited (RERA-PKL-2068-2019)*** where in it was held on 11.03.2020 that a builder is liable to pay monthly assured returns to the complainants till possession of respective apartments stands handed over and there is no illegality in this regard. This Authority has also deliberated the issue of assured returns in number of cases including complaint no. RERA-GRG-660-2021 titled as Prateek Srivastava & Namita Mehta Vs. Vatika Limited and similar view has been taken in the present case.

29. It is not disputed that the respondent is a real estate developer, under the Act of 2016 and rules framed thereunder in which the advance has been received by the developer from the allottee in an ongoing project as per section 3(1) of the Act of 2016 and hence 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.
30. On consideration of documents available on record and submissions made by the parties, it is observed that the assured return to the tune of Rs.59,998/- per month w.e.f. 01.11.2018 till submission of application for grant of occupation certificate to the competent authority. Further, as per clause 3 of MoU, the developer has given advance 36 post-from 01.12.2018 to 01.11.2021 each amounting to Rs.54,000/- for monthly payment of assured return as per the terms of MOU dated 01.11.2018. That initially the respondent was paying the monthly assured return to the complainant till March 2020 but stopped paying assured return thereafter. The post-

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dated cheques given to the complainant started to bounce thereafter. However, the payment of assured return was subject to force majeure clause as provided under clause 7.1 of the MOU and other clauses of the MOU.

31. The Authority while going by the facts of the case is of the view that till date neither the project is completed nor the respondent has not applied for occupation certificate to the competent Authority. Moreover the clause 3 of MOU is to read with clause 7.1 of the MOU which talks about force majeure circumstances and Covid-19 is covered under that. The due date in the present case as provided in application form for registration is 31.12.2021. The Authority vide its *notification no. 9/3-2020 dated 26.05.2020, an extension of 6 months is granted for the projects having completion/due date on or after 25.03.2020*. As the due date in the present case is 31.12.2021 i.e., after 25.03.2020, therefore grace period of 6 months is allowed. Keeping in view the above-mentioned facts and clause 3 read with clause 7.1 of MoU, the respondent has been granted an exemption for 6 months for the payment of assured return to the complainant. In the present case, the respondent has not applied for occupation certificate, thus the complainant is entitled for assured return till the application for occupation certificate is made in terms of above clause.

G.III Direct the respondent to make legal and complete offer of possession as well as registry of the said unit to the complainant at the earliest after receiving necessary government licenses and approvals from the competent authority.

32. The complainant is seeking legal and complete offer of possession in terms of the MOU dated 01.11.2018. As per clause 2.1, the respondent has to lease out the unit after issuing a valid offer of possession to the

complainant. The relevant portion of the clause is reproduced below for the ready reference:

2. LEASE OF UNIT

2.1 That upon completion of the complex the developer issue offer of possession to the allottee and after payment of all dues as demanded by the developer, the developer shall find out a suitable lessee to lease the premises on such terms and conditions as may be determined by the developer. The allottee hereby authorizes developer to grant to any person (herein after referred as 'Lessee') on lease the unit and allottee shall not grant the unit on lease to any third party or deal otherwise with the unit without obtaining the written consent of developer.....

33. In terms of the clause 2.1 of the MOU and 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 complainant. Whereas as per section 19(11) of the Act of 2016, the allottee is also obligated to participate towards registration of the conveyance deed of the unit in question.
34. The respondent has not obtained the occupation certificate till date. Thus the respondent is directed to offer the possession of the subject unit within two months after obtaining occupation certificate from the competent Authority and get the conveyance deed executed in next 90 days.

G.IV Direct the respondent to pay an additional amount of Rs.1,00,000/- to the complainant towards litigation cost.

35. The complainant is seeking above mentioned relief w.r.t. compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as *M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. (supra)*, has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section

72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses.

G.V Direct the respondent to waive off any maintenance charges, cost of parking or any other charges that the respondent may have charged since the respondent has not offered possession till date.

36. The Authority after carefully considering the submissions presented by the complainant, finds that the complainant has failed to substantiate her claims with any documentary evidence and it has not been pressed during the proceedings by the counsel for the complainant. In the absence of such material proof, the Authority is unable to ascertain the legitimacy of the complainant's concerns about the claimed reliefs. Thus, no direction to this effect.

H. 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/promoter is directed to pay the assured return at the rate i.e., Rs.59,998/- per month as per agreed terms of MoU from the date i.e., 01.11.2018 till offer of possession after obtaining the occupation certificate after deduction of amount already paid in lieu of assured return.
- ii. The respondent is directed to pay arrears of accrued assured return as per MoU dated 01.11.2018 till date at the agreed rate within 90 days from the date of this order after adjustment of outstanding dues, if any, from the complainants and failing which that amount would be payable with interest @9.10 % p.a. till the date of actual realization.

- iii. The complainant is directed to pay outstanding dues, if any remains after adjustment of payable assured returns, the respondent shall offer the possession of the allotted unit after obtaining occupation certificate and execute conveyance deed in next 90 days.
38. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.
39. Complaints stand disposed of. True certified copy of this order shall be placed in the case file of each matter.
40. Files be consigned to registry.



Haryana Real Estate Regulatory Authority, Gurugram

Dated: 26.09.2024

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