

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

Date of order: 10.12.2024

NAME OF THE BUILDER		ADVANCE INDIA PROJECTS LTD.	
PROJECT NAME		AIPL JOY CENTRAL	
S. No.	Case No.	Case title	APPEARANCE
1.	CR/1910/2022	Kapil Dev Khullar & Sanju Khullar V/s Advance India Projects Ltd.	Sh. K.K Kohli Sh. Dhruv Rohtagi
2.	CR/1914/2022	Kapil Dev Khullar & Sanju Khullar V/s Advance India Projects Ltd.	Sh. K.K Kohli Sh. Dhruv Rohtagi

CORAM:

Shri. Arun Kumar

Chairperson

Shri. Vijay Kumar Goyal

Member**ORDER**

1. This order shall dispose of both the complaints titled as above filed before this authority in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "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 its obligations, responsibilities and functions to the allottees as per the agreement for sale executed inter se between parties.
2. The core issues emanating from them are similar in nature and the complainant(s) in the above referred matters are allottees of the projects,



namely, 'AIPL Joy Central' being developed by the same respondent promoters i.e., M/s Advance India Projects Ltd.

3. The details of the complaints, reply to status, unit no., date of agreement, & allotment, due date of possession, offer of possession and relief sought are given in the table below:

Project Name and Location	"AIPL Joy Central", Sector 65, Gurugram, Haryana.	
Possession clause: 44	<i>The company endeavours to hand over the possession of the unit to the allottee within a period of 54 months with a further grace period of 6 months from 1 September 2017.</i>	
Due date of possession	01.09.2022 [Note: Grace period of 6 months included]	
Occupation certificate	24.12.2021 [pg. 109 of reply]	
Comp no.	CR/1910/2022	CR/1914/2022
Unit no.	GF-78 admeasuring 410 sq. ft. [pg. 60 of complaint]	GF-94 admeasuring 787 sq. ft. [pg. 60 of complaint]
Allotment letter in favor of original allottees	01.03.2017 [pg. 22 of complaint]	01.04.2017 [pg. 22 of complaint]
Date of execution of buyer's agreement in favor of original allottees	13.09.2017 [pg. 29 of complaint]	13.09.2017 [pg. 29 of complaint]
Date of assignment issued by the respondent to the complainants	01.10.2021 [pg. 60 of complaint]	01.10.2021 [pg. 60 of complaint]
Basic sale consideration	₹ 82,00,000/- [as per SOA dated 03.10.2023 at pg. 142 of reply]	₹ 1,57,40,000/- [as per SOA dated 03.10.2023 at pg. 148 of reply]
Total amount paid	₹ 95,18,516/-	₹ 1,83,58,152/-

	[as per SOA dated 15.01.2022 at pg. 140 of reply]	[as per SOA dated 03.10.2023 at pg. 150 of reply]
Offer of constructive possession	15.01.2022 [pg. 61 of complaint]	15.01.2022 [pg. 62 of complaint]
Assured return clause	Clause 32 of Agreement <i>Where the Allottee has opted for Payment Plan as per Annexure-A attached herewith and accordingly, the Company has agreed to pay Rs.37,583/- per month by way of assured return to the Allottee from 04/03/2017 till the date of issue of Notice of Possession of the Unit. The return shall be inclusive of all taxes whatsoever payable or due on the return.</i>	Clause 32 of Agreement <i>Where the Allottee has opted for Payment Plan as per Annexure-A attached herewith and accordingly, the Company has agreed to pay Rs.72,142/- per month by way of assured return to the Allottee from 29/03/2017 till the date of issue of Notice of Possession of the Unit. The return shall be inclusive of all taxes whatsoever payable or due on the return.</i>
Assured return amount paid by the respondent	₹ 37,42,772/- [pg. 106 of reply]	₹ 71,39,698/- [pg. 108 of reply]
Assured return period	From March 2017 till December 2021	From March 2017 till December 2021
<ol style="list-style-type: none"> 1. Direct the respondent to pay delay possession charges at prescribed rate of interest from the due date of possession till the date of physical handover of the unit. 2. Direct the respondent to pay assured return as promised in the BBA. 		

4. 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 allottees and the real estate agents under the Act, the rules and the regulations made thereunder.



5. The facts of all the complaints filed by the complainants/ allottees are also similar. Out of the above-mentioned cases, the particulars of lead case **CR/1910/2022 titled as Kapil Dev Khullar & Sanju Khullar V/s Advance India Projects Ltd.** are being taken into consideration for determining the rights of the allottees qua delay possession charges, and other reliefs sought by the complainants.

A. Unit and project related details

6. The particulars of unit details, sale consideration, the amount paid by the complainants, date of proposed handing over the possession, date of buyer's agreement etc, have been detailed in the following tabular form:

**CR/1910/2022 titled as Kapil Dev Khullar & Sanju Khullar V/s
Advance India Projects Ltd.**

S. N.	Particulars	Details
1.	Name of the project	"AIPL Joy Central", Sector-65, Gurgaon
2.	Nature of project	Commercial colony
3.	RERA registered/not registered	183 of 2017 dated 14.09.2017 valid up to 31.12.2022
4.	Allotment letter in favour of original allottees	01.03.2017 [Page no. 22 of complaint]
5.	Agreement for sale in favour of original allottees	13.09.2017 [Page no. 29 of complaint]
6.	Unit no.	0066A on ground floor (retail shop) [Page no. 31 of complaint]
7.	Unit area admeasuring	410 sq. ft. [Super area] [Page no. 31 of complaint]



8.	Date of agreement for sell executed between the original allottee and the complainants herein of unit no. GF-78	27.08.2021 (Page no. 112 of the reply)
9.	Date of assignment issued by the respondent to the complainants of unit no. GF-78	01.10.2021 (Page no. 60 of complaint)
10.	Possession clause as per original BBA	44 The company endeavours to hand over the possession of the unit to the allottee within a period of 54 months with a further grace period of 6 months from 1 September 2017.
11.	Due date of possession	01.09.2022 [Note: 6 months grace period included]
12.	Total sale consideration	Rs.92,11,289/- [As per account statement on page no. 142 of reply]
13.	Amount paid by the complainant	Rs.92,47,154/- [As per account statement on page no. 142 of reply]
14.	Assured Return Clause	Clause 32 of Agreement <i>Where the Allottee has opted for Payment Plan as per Annexure-A attached herewith and accordingly, the Company has agreed to pay Rs.37,583.00 per month by way of assured return to the Allottee from 04/03/2017 till the date of issue of Notice of Possession of the Unit. The</i>

		<i>return shall be inclusive of all taxes whatsoever payable or due on the return.</i>
15.	Occupation certificate	24.12.2021 [Page no. 109 of reply]
16.	Offer of possession to the complainant for unit no. GF-78, ground floor	15.01.2022 [Page no. 61 of complaint]

B. Facts of the complaint

7. The complainants have submitted as under:

- a. The present Complaint has been filed by the Complainants under Section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 29 of the Haryana Real Estate (Regulation and Development) Act, 2017 for violation of Section 11(4) (a) and 19(10) of the Act. That M/s Advance India Projects Limited (hereinafter referred to as the "promoter/developer") is a company engaged in the business of construction and development of residential and commercial projects. The Respondent Company developed a project namely "AIPL Joy Central" (hereinafter referred to as the "said project") situated at Sector 65, Gold Course Extension Road, Gurugram.
- b. That the previous allottees i.e., M/s Deepak Sharma HUF and Mr. Sourabh Kumar Gupta on 05.01.2017 booked a retail shop in the said project. The Allotment letter was issued to them on 01.03.2017 for unit no. GF-0066A admeasuring 410.00 sq. ft (super area).
- c. The previous allottees i.e., M/s Deepak Sharma HUF and Mr. Sourabh Kumar Gupta executed Builder Buyer's Agreement with the promoter on 13.09.2017. That on 01.10.2021 the previous allottees

endorsed the said unit in the favour of Complainants i.e. Mr. Kapil Dev Khullar and Mrs. Sanju Khullar. The Promoter issued the Notice of offer of possession on 15.01.2022 for unit no. GF-78, admesuring 410 sq.ft. wherein it was stated that "it is made clear that as per the Buyer Agreement, Physical possession of the unit shall never be given to you".

- d. That the clauses in the Buyer's Agreement dated 13.09.2017 concerning possession of the unit are clause 11 and clause 12 on page 13. That as per these clauses of the BBA it is nowhere stated that physical possession of the unit shall never be given to the allottees. The relevant part of the clauses are mentioned below :-

"11. PROCEDURE FOR TAKING POSSESSION:

The Company upon obtaining occupation certificate from the government authority shall offer in writing ("notice of possession") possession of the unit to the allottee in terms of this agreement to be taken within 30(thirty) days from the date of issue of such notice and the company shall give possession of the unit to the allottee provided the allottee is not in default of any of the terms and conditions of this agreement and complied with all provisions, formalities, documentation, etc. as may be prescribed by the company in this regard.

12. HANDING OVER POSSESSION:

That the Allottee shall be handed over possession of the Unit from the Company only after the Allottee has fully discharged all his obligations and entire Total Price (including interest due, if any, thereon) against the Unit has been paid and all other applicable charges/dues taxes/cess of the Allottee have been paid and Conveyance Deed has been executed and registered in his favour. The Company shall hand over possession of the Unit to the Allottee provided the Allottee is not in default of any of the terms and conditions of this Agreement and has complied with all provisions, formalities, documentation, etc. as may be prescribed by the Company in this regard."

- e. That along with the possession letter, the statement of account was also shared as per which the Total sale consideration is Rs.

85,18,160/-. The principal Amount demanded was Rs. 92,11,289.60/- and the principal received till 15.01.2022 is Rs. 95,18,516.84/-. It is pertinent to mention that the Complainants have paid more than the demanded amount and the Respondent has still failed to give physical possession of the said unit till date for reasons best known to them.

- f. That from the date of booking and till today, the Respondent had raised various demands for the payments towards the sale consideration and the Complainants have duly paid and satisfied all those demands as per the payment plan without any default or delay on their part. That the Complainants made excess payments way back and the said so called intimation of constructive possession also depicts the balance payable in negative, implying no payment was due on their part. The physical possession of the allotted unit was to be offered and delivered to them which has not been done by the Respondent till date. The Complainants are ready and willing to take the physical possession of the unit as on date. As per agreed terms of the said agreement, the Respondent has to deliver physical possession of the unit.
- g. That this Hon'ble Authority on 12.07.2022 in the matter CR/2827/2021 of Mr. Suresh Kumar vs M/s Advance India Projects Limited has stated in para 46 on page 29 of the order that: - "The Authority is of the view that it nowhere stated or defined as what is meant by "Constructive possession. Therefore, the Respondent would hand over the physical possession of the unit to the

Complainants". Similarly in the present matter, the facts of the present case are the same.

- h. That as per clause 32 of the BBA it clearly states that "the Company has agreed to pay Rs. 37,583/- per month by way of assured return to the allottee from 04.03.2017 till the date of issue of Notice of possession of the unit.". It is important to mention that the Promoter has not paid the assured return to the Complainants since the endorsement. The promoter as per the terms of the BBA is to make payments of the assured returns till actual delivery of possession and not till date of occupation certificate as wrongly alleged by it in the notice for possession letter dated 15.01.2022.
- i. That as per the pictures and information provided on the promoter's website it clearly shows that the construction is still not complete. It was stated by the Hon'ble Supreme Court of India in Indore Development Authority Vs. Shailendra (Dead) through its LRs. & ors. on 08.02.2018 that "The maxim "*nullus commodum capere potest de injuria sua propria*" i.e. 'No man can take advantage of his own wrong'."
- j. It is submitted that there has been a display of lack of intention to complete the project on time by the Respondent. It is further submitted that the Notice of constructive possession issued by the Respondent is invalid and is not as per the law. The Complainants have paid more than the demanded amount and has been waiting since 5 years 7 months for the possession of their allotted unit.
- k. That the Complainants demands the possession of its allotted Unit, payment of assured return till date of possession offered and also

demands delay possession charges since due date of possession till handover of the unit. It is most respectfully prayed to this Hon'ble Authority to consider the present Complaint on behalf of the Complainants and pass an order in accordance with law and pass any other orders which it deems fit.

C. Relief sought by the complainants:

8. The complainants have sought following relief(s):

- a. Direct the respondent to pay delay possession charges at prescribed rate of interest from the due date of possession till actual handing over of the physical possession of the subject unit.
- b. Direct the respondent to pay assured return as promised in the buyer's agreement.

9. On the date of hearing, the authority explained to the respondent /promoters 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

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

- a. That the Complainants has got no locus standi or cause of action to file the present complaint. The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the Buyer's Agreement, as shall be evident from the submissions made in the following paras of the present reply. The Respondent craves leave of this Hon'ble Authority to refer to and rely upon the terms and conditions set out in the Buyer's Agreement in detail at the time of

the hearing of the present complaint, so as to bring out the mutual obligations and the responsibilities of the Respondent as well as the Complainants.

- b. That the Complainants are estopped by their own acts, conduct, acquiescence, laches, omissions etc. from filing the present complaint. It is submitted that the Respondent has already offered possession of the unit in question to the Complainants, who has failed to complete all the formalities and take the possession of the unit, as such, the Respondent has already complied with its obligations under the Buyer's Agreement. The reliefs sought in the false and frivolous complaint are barred by estoppel. That the Complainants are not "Allottees" but are Investors who has booked the apartment in question as a speculative investment in order to earn rental income/profit from its resale. That the Complainants have not come before this Hon'ble Authority with clean hands and have suppressed vital and material facts from this Hon'ble Authority. The correct facts are set out in the succeeding paras of the present reply.
- c. That the original allottees had approached the Respondent and expressed an interest in booking an apartment in the commercial colony developed by the Respondent and booked the retail unit in question, bearing number GF/066A, Ground Floor admeasuring 410 sq. ft. (tentative area) situated in the project developed by the Respondent, known as "AIPL Joy Central" at Sector 65, Gurugram, Haryana. That thereafter the Original Allottees vide application form applied to the Respondent for provisional allotment of a unit bearing

number GF/066A, Ground Floor in the project. It is submitted that the Original allottees prior to approaching the Respondent, had conducted extensive and independent enquiries regarding the project and it was only after they were fully satisfied with regard to all aspects of the project, including but not limited to the capacity of the Respondent to undertake development of the same, that the Original allottees took an independent and informed decision to purchase the unit, un-influenced in any manner by the Respondent. The Original allottees consciously and wilfully opted for flexi payment plan for remittance of the sale consideration for the unit in question and further represented to the Respondent that they shall remit every installment on time as per the payment schedule. That the Respondent had no reason to suspect bonafide of the Original allottees. That the booking was categorically, willingly and voluntarily made by the Complainant with an understanding of the same being for leasing purposes and not self-use, as can be noted in clause 43 of the Schedule I of the Application form:

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

- d. That pursuant to the execution of the Application Form, the Respondent had no reason to suspect the bonafide of the Original allottees and the Allotment letter dated 01.03.2017 was issued to them. That the Unit allotted was provisional and subject to change

as was categorically agreed between the parties. That the Clause 1 of the Schedule I of the Application Form is reiterated as under:

“The applicant has applied for the provisional allotment of a unit (the unit) in the project and clearly understands that the allotment of the unit by the company shall be purely provisional till such time that the BBA, in the format prescribed by the company, is executed between the company and the applicant.”

- e. That thereafter, Buyer's Agreement dated 13.09.2017 was executed between the original allottees and the Respondent. It is pertinent to note that as per clause 12 of the Buyer's Agreement as well as the clause 18 of the Schedule I of the Application Form, the Applicant shall get possession of the Unit only after the Applicant has fully discharged all his obligations and there is no breach on the part of the Applicant and complete payment of Sale Consideration against the Unit has been made and all other applicable charges/dues/taxes of the Applicant have been paid. Conveyance / Sale Deed/necessary transfer documents in favour of the Applicant shall be executed and/or registered upon payment of the entire Sale Consideration and other dues, taxes, charges etc. in respect of the Unit by the Applicant. After taking the possession of the Unit, it shall be deemed that the Applicant has satisfied himself/herself/itself with regard to the construction or quality of workmanship. It was further conveyed by the Respondent to the Original Allottees and the Complainants that in the event of failure to remit the amounts mentioned in the said notice, the Respondent would be constrained to cancel the provisional allotment of the unit in question. Further as per clause 44 of the Buyer's Agreement, subject to the aforesaid and subject to the Applicant not being in default under any part of this Agreement

including but not limited to the timely payment of the Total Price and also subject to the Applicant having complied with all formalities or documentation as prescribed by the Company, the Company endeavors to hand over the possession of the Unit to the Applicant within a period of 54 (fifty four) months, with a further grace period of 6 (six) months, from 01 September, 2017. Accordingly, the due date of possession turns out to be 01.09.2022, including the grace period. It is relevant to submit that the OC was applied for on 09.05.2021, which was granted on 24.12.2021. Hence, there is no delay whatsoever on the part of the Respondent.

- f. It is submitted that the rights and obligations of the Complainants as well as the Respondent are completely and entirely determined by the covenants incorporated in the Buyer's Agreement which continue to be binding upon the parties thereto with full force and effect. Clause 8 of the Buyer's Agreement provides that the Allottee agrees that time is essence with respect to due performance by the Allottee of all the obligations under this Agreement and more specifically timely payment of Sale Consideration and other charges, deposits and amounts payable by the Allottee as per this Agreement and/or as demanded by the Company from time to time. The Company is not under any obligation send any reminders for the payments to be made by the Allottee as per the schedule of payment plan and for the payments to be made as per demand by the Company or performance of other obligations by the Allottee. That as per clause 54 of the Buyer's Agreement, it is mutually agreed between the parties that in the event of the breach, failure, neglect,

omission or ignorance of the Allottee to perform its obligations or fulfil any of the terms and conditions set out in this Agreement, it shall be deemed to be an event of default and the Allottee shall be liable for consequences stipulated herein. Further, in case of any such event of default, the Allottee is incapable of rectification or in the opinion of the Company is unlikely to be rectified by the Allottee or where the breach is repeated or is continuing despite the Allottee being given an opportunity to rectify the same, then this Agreement may be terminated by the Company at its sole discretion by written notice ("Notice of Termination") to the Allottee intimating to it the decision of the Company to terminate the Agreement and the ground on which such action have been taken. In all cases of an event of default, the Company shall give to the Allottee a notice calling upon it to rectify the breach set out in the said notice within the time given therein.

- g. That it is submitted that the project underwent a change/modification and upon the same being done, objections/suggestions for approval of building plans were invited from the Original Allottees on 21.11.2019. It is submitted that the Original Allottees neither paid any heed to the requests of the Respondent nor came forward with objections, if any. That the Original Allottees chose to be mute spectator by not even replying to the said letter. That the Respondent was miserably affected by the ban on construction activities, orders by the NGT and EPCA, demobilization of labour, etc. being circumstances beyond the control of the Respondent and force majeure circumstances, that the

payment of assured return was severely affected during this period and the same was rightfully intimated to the Original Allottees by the letter dated 30.11.2019.

- h. That it is pertinent to highlight that the arrangement between the parties was to transfer the constructive possession of the Unit and the same was categorically agreed between the Parties in the Application form and no protest in this regard had ever been raised by the Original Allottees and the same was willingly and voluntarily accepted by the Original Allottees. That it is an entrenched principle of law that a lease may be limited to take effect either immediately or from a future date. That by virtue of such an understanding, the Complainants/ allottee enjoys the rights of the lessor and hence, enjoys the constructive possession of the Unit, after the notice of possession. It was observed in *Ram Antar vs. Ram Prasad and Ors.* (19.07.2004-ALLHC): MANU/UP/0653/2004 that:

"...The possession may be either actual or constructive. The lessee is in actual possession of the property leased to him on behalf of the lessor but the lessor remains in constructive possession in the eyes of law..."

- i. Further, it needs to be categorically noted that a lessor is always considered to part with the physical possession of the property and stay in constructive possession through the lessee. That such a relationship is valid and has been recognized in law at various occasions. For instance, it was observed in **Motilal Govindram vs. Gopikrishna Shadilalji and Ors.** (06.08.1960-MPHC): MANU/MP/0284/1960:

"To begin with, the word "possession" has in such context two possible meanings. The first, actual physical possession, and the other, the symbolic possession, that is,

the right to receive the rent. Broadly speaking, the landlord holding the right of reversion is also in possession; the difference is that the possession of the lessee is physical while that of the reversioner is symbolic"

- j. That without prejudice to the preliminary objections on maintainability, it is vehemently submitted that the physical possession cannot be given, and the Unit shall be leased out, it was observed in *Gunwantlal v. The State of M.P.*, MANU/SC/0130/1972: AIR 1972 SC 1756, 1759:

"Possession need not be physical possession but can be constructive, having power and control over the gun, while the person to whom physical possession is given holds it subject to that power or control."

- k. That possession can be shown not only by acts of enjoyment of the land itself but also by ascertaining as to in whom the actual control of the thing is to be attributed or the advantages of possession is to be credited, even though some other person is in apparent occupation of the land. In one case, it would be actual possession and in the other case, it would be constructive possession. The Complainants by filing the present complaint and by taking such baseless and untenable pleas is just trying to conceal the material facts in order to somehow cover up their own wrongs, delays and latches and to wriggle out of his contractual obligations by concocting false and frivolous story. Despite all the goodwill gestures extended by the Respondent, the Complainants are trying to illegally extract benefits from the respondent and his main aim is to cause wrongful gain to himself and wrongful loss to the respondent from time to time.
- l. That the Complainants have filed the present Complaint before the Hon'ble Authority which is not maintainable. That the Complainants

is praying for the relief of "Assured Returns" which is beyond the jurisdiction that this Hon'ble Authority. That from the bare perusal of the RERA Act, it is clear that the said Act provides for three kinds of remedies in case of any dispute between a Builder and Buyer with respect to the Development of the project as per the Agreement. That such remedy is provided under Section 18 of the RERA Act, 2016 for violation of any provision of the act. That the said remedies are of "Refund" in case the Allottee wants to withdraw from the Project and the other being "interest for delay of every month" in case the Allottee wants to continue in the Project and the last one is for Compensation for the loss occurred to the Allottee. It is pertinent to note, that nowhere in the said provision the Hon'ble Authority has been dressed with jurisdiction to grant "Assured Returns". Therefore, the present Complaint is filed with grave illegalities and lack of jurisdiction and the same is liable to be dismissed at the very outset and the Complainants shall be directed to file pursue the complaint before the civil court for any dispute arises from the Agreement in the form of investment agreement and lease agreement.

- m. It is pertinent to mention herein that the Respondent cannot pay the "Assured Returns" to the Complainants by any stretch of imagination in the view of prevailing laws. That on 21.02.2019 the Central Government passed an ordinance "Banning of Unregulated Deposits, 2019", to stop the menace of unregulated deposits, the "Assured Returns Scheme" given to the Complainants fell under the scope of this Ordinance and the payment of such returns became wholly

illegal. That later, an act by the name "The Banning of Unregulated Deposits Schemes Act, 2019" (hereinafter referred to as "the BUDS Act") notified on 31.07.2019 and came into force. That under the said Act all the unregulated deposit schemes such as "Assured Returns" have been banned and made punishable with strict penal provisions. That being a law-abiding company, by no stretch of imagination the Respondent can continue to make the payments of the said Assured Returns in violation of the BUDS Act.

- n. That as per clause 32 of the said Agreement, it was the obligation of the Respondent to give the assured returns amounting Rs. 37,583/- from 04.03.2017 till the issuance of the Notice of Offer of Possession. That the law of equity and justice cannot allow such Complainants to reap benefits of such opportunistic attitude and will strive for balance of rights of both the parties at dispute. That this Hon'ble Authority should not allow the Complainants to mislead the Hon'ble Authority and to misuse Real Estate (Regulation and Development) Act, 2016 for harassing the builder. That despite the utter failure of the Complainants in fulfilling the obligations, the Respondent has always showed exemplary conduct. That at this juncture, it is pertinent to note that the payment of assured returns was subject to force majeure conditions and applicable laws, orders, notifications, etc, affecting the construction of the Project and for such period, assured returns were not to become due and payable by the promoter and the promoter was not liable to pay assured return for such period.

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

a. Payment of Part-I AR

- Part-I AR shall be due every month from the succeeding date of the Lockdown Period (AR Restart Date).
- 45 days period from the AR Restart Date shall be moratorium period for payment of Part-I AR. The cumulative Part-I AR of the Moratorium Period shall be paid in 4 equal installments along with the assured return of 4 months starting from the end of the Moratorium Period,
- The payment of assured return as per the monthly payment cycle shall resume from 46th day from the AR Restart Date.

b. Adjustment of Part II AR:

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

demand amount due on date of filing of application for grant of Occupancy Certificate/Offer of Possession for the Unit/Project, as the case may be.

- p. That till June 2019, the assured returns were given through cheques and post June 2019, the Electronic Clearing Services were made mandatory. That it is further submitted that despite there being a number of defaulters in the project, the Respondent itself infused funds into the project and has diligently developed the project in question. The Respondent had applied for Occupation Certificate on 09.05.2021. Occupation certificate was thereafter issued in favour of the Respondent vide memo bearing no. ZP-322-Vol.-II/AD(RA)/2021/32717 dated 24.12.2021. It is pertinent to note that once an application for grant of Occupation Certificate is submitted for approval in the office of the concerned statutory authority, the Respondent ceases to have any control over the same. The grant of sanction of the Occupation Certificate is the prerogative of the concerned statutory authority over which the Respondent cannot exercise any influence. As far as the Respondent is concerned, it has diligently and sincerely pursued the matter with the concerned statutory authority for obtaining of the Occupation Certificate. No fault or lapse can be attributed to the Respondent in the facts and circumstances of the case. Therefore, the time period utilized by the statutory authority to grant occupation certificate to the Respondent is necessarily required to be excluded from computation of the time period utilized for implementation and development of the project.

- q. That the Complainants have intentionally distorted the real and true facts in order to generate an impression that the Respondent has reneged from its commitments. No cause of action has arisen or subsists in favor of the Complainants to institute or prosecute the instant complaint. The Complainants have preferred the instant complaint on absolutely false and extraneous grounds in order to needlessly victimize and harass the Respondent. That pursuant thereto, the original allottees, made a request for transfer of the said allotment in the name of the Complainants. Accordingly, the parties submitted the Agreement to Sell dated 27.08.2021, along with necessary request letters, indemnities and affidavits.
- r. It is pertinent to mention that the Complainants in terms of the indemnity cum undertaking had consciously and voluntarily declared and affirmed that they would be bound by all the terms and conditions of the provisional allotment in favour of the Original Allottees. It was further declared by the Complainants that having been substituted in the place of the original allottees, they were not entitled to any compensation for delay, if any, in delivery of possession of the unit in question or any rebate under a scheme or otherwise or any other discount, by whatever name called, from the Respondent. Furthermore, the Respondent, at the time of endorsement of the unit in question in their favour, had specifically indicated to the Complainants that the Original Allottees had defaulted in timely remittance of the instalments pertaining to the unit in question and therefore, have disentitled themselves for any compensation/interest. The Respondent had conveyed to the

Complainants that on account of the defaults of the Original Allottee, the Complainants would not be entitled to any compensation for delay, if any. The said position was duly accepted and acknowledged by the Complainants. The Complainants are conscious and aware of the fact that they are not entitled to any right or claim against Respondent. The Complainants have intentionally distorted the real and true facts and have filed the present complaint in order to harass the Respondent and mount undue pressure upon it. It is submitted that the filing of the present complaint is nothing but an abuse of the process of law.

5. That in the manner as aforesaid, the Complainants stepped into the shoes of the subsequent allottee upon **endorsement in their favour on 01.10.2021**, much after the due date itself and hence, they were fully aware of the status of construction and yet chose to purchase the unit in question with open eyes. That it is submitted that several allottees, including the Original Allottees and Complainants have defaulted in timely remittance of payment of installments which was an essential, crucial and an indispensable requirement for conceptualization and development of the project in question. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially whereas enormous business losses befall upon the Respondent. The Respondent, despite default of several allottees, has diligently and earnestly pursued the development of the project

in question and has constructed the project in question as expeditiously as possible.

- t. That the Complainants were offered possession of the unit in question through letter of offer of possession dated 15.01.2022. The Complainants was called upon to remit balance payment including delayed payment charges and to complete the necessary formalities/documentation necessary for handover of the unit in question to the Complainants. The Respondent earnestly requested the Complainants to obtain possession of the unit in question and to further complete all the formalities regarding delivery of possession. However, the Complainants did not pay any heed to the legitimate, just and fair requests of the Respondent and threatened the Respondent with institution of unwarranted litigation. It is relevant to note here that the Respondent company had complied with its obligations by offering the possession well within time.
- u. That it is pertinent to mention that the Complainants did not have adequate funds to remit the balance payments requisite for obtaining possession in terms of the Buyer's Agreement and consequently in order to needlessly linger on the matter, the Complainants refrained from obtaining possession of the unit in question. The Complainants needlessly avoided the completion of the transaction with the intent of evading the consequences enumerated in the Buyer's Agreement. Therefore, there is no equity in favour of the Complainants. Without admitting or acknowledging in any manner the truth or correctness of the frivolous allegations levelled by the Complainants and without prejudice to the

contentions of the Respondent, it is submitted that the alleged refund frivolously and falsely sought by the Complainants is illegal and bereft of logic. The Complainants is not entitled to contend that she is entitled for any sort of refund even after receipt of offer for possession within stipulated time. The Complainants have consciously and maliciously refrained from obtaining possession of the unit in question.

- v. That it was an obligation of the Complainants to make the payments against the Unit, however, the Complainants have gravely defaulted in the same. The Complainants are yet to pay Stamp Duty and Registration Charges of Rs. 5,08,700/- and Rs. 45,003/-, respectively as stated above. Hence, the Complainants can either seek the refund of above-mentioned excess and pay the Stamp Duty and Registration Charges or seek an adjustment of the excess and pay the balance dues. That it is submitted that this Hon'ble Authority has no jurisdiction to deal with the cases pertaining to leasing. That the Act is entirely silent on the same. That had the legislature intended the jurisdiction of the Act to extend to leasing arrangements, the same would have been incorporated. It is a settled principle that what cannot be attained directly, cannot be attained indirectly. Accordingly, the Hon'ble Authority has no jurisdiction to deal with the present matter and the present Complaint need to be dismissed at the outset.
- w. That in any manner whatsoever, as has been noted in the preliminary objections to the maintainability, the Hon'ble Authority has no power to deal with cases pertaining to assured return.

Additionally, similar issue regarding jurisdiction of Hon'ble Authority for deciding the complaints pertaining to assured return is already pending with the Hon'ble Haryana Real Estate Appellate Tribunal, Chandigarh as the Hon'ble Tribunal has granted stay in the matter titled as "**Venetial LDF Projects LLP vs. Mohan Yadav [Appeal No. 95 of 2022]**" against the judgment passed by this Hon'ble Authority granting the relief of assured returns to Mr. Mohan Yadav (Complainants).

- x. That on perusal of the reliefs sought by the Complainants, it can be seen that delay possession charges, assured returns, interest, compensation have been sought. That without prejudice to the above-mentioned, it needs to be categorically noted that giving both assured returns, interest, compensation cannot be justified and amounts to an additional and unequivocal burden on the Respondent. That in view of the preliminary objections to maintainability raised above, it must be noted that assured returns cannot be adjudicated by this Hon'ble Authority for lack of subject matter jurisdiction, in any manner cannot be given presently, being banned. That it was an obligation of the Complainants to make the payments against the Unit, however, the Complainants have gravely defaulted in the same.
- y. That it is submitted that the Respondent has acted strictly in accordance with the terms and conditions of the Agreement between the parties. There is no default or lapse on the part of the Respondent. The allegations made in the Complaint inter-alia that the Respondent has failed to comply with the obligations under the

agreement. On the contrary, it is the Complainants who is in clear breach of the terms of the Agreement by not remitting the outstanding amount of the said unit in question within the stipulated time. That the Respondent has duly fulfilled its obligations under the Buyer's Agreement. There is no default or lapse in so far as the Respondent is concerned. The allegations levelled by the Complainants are totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold.

11. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of those undisputed documents and submissions made by the parties.
12. Written submissions filed by the parties are also taken on record and considered by the authority while adjudicating upon the relief sought by the complainant.

E. Jurisdiction of the authority

13. 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) (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) 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 complainants at a later stage.

F. Findings on the objections raised by the respondent:

F.I. Objection regarding maintainability of complaint on account of complainant being investor

17. The respondent took a stand that the complainants are investors and not consumers and therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. However, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he 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 allotment letter, it is revealed that the complainant is buyer, and they have paid a considerable amount to the respondent-promoter towards purchase of 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 buyer's agreement executed between promoter and complainant, it is crystal clear that the complainant are allottee(s) as the subject unit was allotted to them 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". Thus, the contention of the promoter that the allottee being investor are not entitled to protection of this Act also stands rejected.

G. Findings on the relief sought by the complainant.

G.I. Direct the respondent to pay delay possession charges at prescribed rate of interest from the due date of possession till actual handing over of the physical possession of the subject unit.

19. In the present matter the authority observed that the buyers' agreement executed between the original allottees & respondent entered into buyers' agreement on 13.09.2017. Thereafter the complainants endorsed the said agreement and the respondent issued letter of assignment of the

subject unit in favour of the complainants on 01.10.2021. Clause 44 provides for the handing over of possession of the subject unit within a period of 54 months with a further grace period of 6 months, from 1 September 2017. Accordingly, the due date of handing over of possession of the subject unit comes out to be 01.09.2022. As per the documents available on record the respondent offered the possession of the unit on 15.01.2022 after obtaining OC from the competent authority on 24.12.2021.

20. The complainants in the present matter have pleaded that the respondent offered the constructive offer of possession whereas the respondent as per the BBA was obligated to offer the actual physical possession of the unit. On the contrary the respondent, contended that as per clause 33 there was a leasing arrangement between the parties and moreover as per application form it was clearly written in clause 43 that the said unit is not for self-occupation rather is for the purpose of leasing.
21. The authority herein observes that the complainants were very well aware of the fact that the said unit was not for the purpose of self-occupation rather is to be put on lease as clear from clause 43 of application form and 33 of the agreement. Further nowhere in the agreement it is specifically mentioned that the respondent shall handover the actual physical possession of the unit rather the terminology used is handing over of possession. The relevant clauses are produced herein below for the ready reference:

“Clause 43

The applicant has clearly understood that the unit is not for the purpose of self-occupation and use by the applicant and is for the purpose of leasing to third parties along with combined units as larger area. The applicant has given unfettered rights to the company

to lease out the unit along with other combined units as a larger area on the terms and conditions that the company would deem fit. The applicant shall at no point of time object to any such decision of leasing by the company.

Clause 33

At the request of the allottee, the company agrees to put the unit, individually or in combination with other adjoining units, on lease, for and on behalf of the allottee, from the date of signing of this agreement. The allottee has clearly understood the general risks involved in giving any premises on lease to third parties and has undertaken to bear the said risks exclusively without any liability whatsoever on the part of the Company....."

22. Accordingly, the physical possession was never the intent at the stage of booking of the unit itself and therefore, the constructive possession of the unit dated 15.01.2022 is valid. Moreover, the above clauses have to be read in continuation to application form duly signed by the original allottee wherein it was clearly stipulated that the unit is for leasing purposes and not for self-use. In view of the above findings no delay in handing over the possession of the subject unit on part of respondent is established and accordingly no case of delay possession charges is made out.

G.II. Direct the respondent to pay assured return as promised in the buyer's agreement.

23. The complainants are seeking unpaid assured returns on monthly basis as per the builder buyer agreement read with the addendum to the agreement at the rates mentioned therein. It is pleaded that the respondent has not complied with the terms and conditions of the agreement. Though for some time, the amount of assured returns was paid but later on, the respondent refused to pay the same by taking a plea that the same is not payable in view of enactment of the Banning of Unregulated Deposit Schemes Act, 2019 (hereinafter referred to as the

Act of 2019), citing earlier decision of the authority (Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd., complaint no 141 of 2018) it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the issue of assured returns was involved to be paid by the builder to an allottee but at that time, neither the full facts were brought before the authority nor it was argued on behalf of the allottees that on the basis of contractual obligations, the builder is obligated to pay that amount. Thereafter, the authority after detailed hearing and consideration of material facts of the case in *CR/8001/2022 titled as Gaurav Kaushik and anr. Vs. Vatika Ltd.* rejected the objections raised by the respondent with respect to non-payment of assured return due to coming into the force of BUDS Act, 2019. The authority in the said matter very well deliberated 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. 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. Also, 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. 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. Further, section 2(4)(i) deals with the exception wherein 2(4)(i)(ii) specifically mention that deposit does not include an 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. In the present matter 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 as agreed between the allottee and the builder in terms of buyer's agreement, MoU or addendum executed inter-se parties. 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. 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. The Act of 2019 does not create a bar for payment of assured returns even after coming into operation as the payments made in this regard are protected as per section 2(4)(I)(II) of the Act of 2019. Thus, the plea advanced by the respondent is not sustainable in view of the aforesaid reasoning and case cited above.

24. The builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement defines the builder-buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allottee arises out of the same relationship and is marked by the original agreement for sale.
25. It is not disputed that the respondent is a real estate developer, and it had not obtained registration under the Act of 2016 for the project in question. However, the project in which the advance has been received by the developer from the allottee is an ongoing project as per section 3(1) of the Act of 2016 and, the same would fall within the jurisdiction of the authority for giving the desired relief to the 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. In view of the above, the respondent is liable to pay assured return to the

complainants-allottees in terms of the builder buyer agreement read with addendum to the said agreement.

26. On consideration of documents available on record and submissions made by the complainant and the respondent, the authority is satisfied that the respondent is in contravention of the provisions of the Act. As per the agreement executed between the parties on 13.09.2017, the assured return is payable to the allottees on account of clause 32 of the buyer's agreement. The promoter had agreed to pay to the complainants allottee ₹37,583/- on monthly basis from 04.03.2017 till the date of issue of notice of possession of the unit. It is matter of record that the amount of assured return was paid by the respondent promoter till December 2021. Thereafter the respondent offered the possession of the said unit in January 2022 accordingly, the respondent's liability w.r.t. payment of assured return amount shall end on date of issuance of notice for offer of possession.
27. Accordingly, the respondent is directed to pay the outstanding accrued assured return amount till 15.01.2022 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.
28. In the present case, the authority (Shri. Arun Kumar, Hon'ble Chairperson, Shri. Vijay Kumar Goyal, Member & Shri. Sanjeev Kumar Arora, Member) heard the complaint and reserved the order on 14.05.2024, the same was fixed for pronouncement of order on 27.08.2024. The same could not be pronounced on that day and the matter was adjourned to 22.10.2024 and then to 10.12.2024. On

16.08.2024, one of the member Shri. Sanjeev Kumar Arora got retired and has been discharged from his duties from the Authority. Hence, rest of the presiding officers of the Authority have pronounced the said order.

H. Directions of the authority:

29. 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):

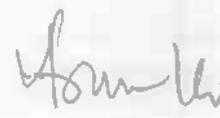
- a. The respondent is directed to pay the amount of assured return as agreed in clause 32 of the agreement executed inter se parties till the date of issue of notice of possession of the unit i.e., till 15.01.2022.
- b. The respondent is directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of this order after adjustment of outstanding dues, if any, from the complainants and failing which that amount would be payable with interest @ 9.10% p.a. till the date of actual realization.

30. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.

31. True certified copies of this order be placed on the case file of each matter.

32. Files be consigned to registry.


(Vijay Kumar Goyal)
Member


(Arun Kumar)
Chairperson

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.12.2024