BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**7170 of 2022**
Date of filing:		**28.11.2022**
Date of decision	:	**10.12.2024**

1. Mr. Rajat Rana
2. Mrs. Shanti Rana
   Both RR/O: C-403, Unique Aartments, Plot no. 38, Sector-6, Dwarka, New Delhi-110075 **Complainants**

Versus

1. M/s Advance India Projects Limited
   Regd. office: 232-B, 4th floor, Okhla Industrial Estate, Phase-III, New Delhi-110020
2. Baakir Real Estate Private Limited
   Regd. Office: 232-B, Fourth floor, Okhla InDUSTRIAL Estate, Phase III, New Delhi – 110020 **Respondents**

CORAM:	
Shri. Arun Kumar	**Chairperson**
Shri. Vijay Kumar Goyal	**Member**

APPEARANCE WHEN ARGUED:	
Dhruv Lamba (Advocate)	Complainants
Sh. Harshit Batra (Advocate)	Respondent no. 1
None	Respondent no. 2

ORDER

1. The present complaint has been filed by the complainant/allottees under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and

functions under the provision of the Act or the rules and regulations made there under or to the allottees as per the agreement for sale executed inter se.

A. Unit and project related details

2. 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:

S. N.	Particulars	Details
1.	Name of the project	"AIPL Business Club, Sector- 62, Gurugram.
2.	Project area	3.9562 acres
3.	Nature of the project	IT Park
4.	DTCP license no. and validity status	**86 of 2010 dated 23.10.2010**
5.	Name of licensee	Baakir Real Estates Pvt. Ltd.
6.	RERA Registered/ not registered	166 of 2017 dated 29.08.2017 valid up to 30.06.2019
7.	Unit no.	Food Spa no. 1, Ground Floor, Tower T2 (Page 69 of the complaint)
8.	Area admeasuring (Super area)	501.81 sq. ft. (Page 71 of complaint)
9.	Allotment letter	03.08.2016 (Page no. 27 of the complaint)
10.	Date of execution of agreement for sale	22.08.2016 (Page no. 33 of the complaint)
11.	Mail by respondent for executing new BBA in terms of RERA	16.05.2019 [pg. 63 of complaint]
12.	Date of execution of new registered buyer's agreement	08.07.2019 [Page 66 of the complaint]
13.	Possession clause as per new buyer agreement dated 08.07.2019	***7. POSSESSION OF THE UNIT*** ***7.1 Schedule for possession of the unit:*** *- The Promoter agrees and understands that timely delivery of possession of the Unit to the Allottee and the Common Areas to the association of allottees or the Governmental Authority, as the case may be, as provided under Rule 2(1)(f) of Rules, 2017, is the essence of the Agreement.*

		(Page no. 78 of the complaint)
14.	Assured return clause as per buyer's agreement dated 22.08.2016	**33. *ASSURED RETURN:*** *Where the Allottee has opted for Payment Plan as per Annexure-A, attached herewith and accordingly,* ***the company has agreed to pay Rs.70,255/- per month by way of assured return to the allottee from 06.08.2016, or the date of execution for this agreement till the date of offer of possession of the unit****. The return shall be inclusive of all taxes whatsoever payable or due on the return.* (Page no. 46 of the complaint)
15.	Due date of possession	30.06.2019 (As mentioned in clause 5 of page 78 of complaint)
16.	Sale consideration	Rs. 37,83,647/- (As per SOA dated 15.04.2023 on page 188 of the reply)
17.	Amount paid by the complainant	Rs.42,83,063/- (As per SOA dated 15.04.2023 on page 189 of the reply)
18.	Occupation certificate /Completion certificate	28.11.2019 (Page 176 of the reply)
19.	Offer of possession	13.12.2019 (Page no. 177 of the reply)
20.	Reminder letters	02.01.2020, 27.01.2020, 05.02.2020
21.	Pre termination letter	12.05.2020 (Page no. 187 of the reply)
22.	Assured return paid till November 2019	Rs.10,33,201/- (Page 192 of the reply)

B. Facts of the complaint

3. The complainants have submitted as under:

a. That on 22.04.2016, the present complainants namely Mr. Rajat Rana and Ms. Shanti Rana had booked a unit (along with 01 car parking space) in the subject project and in lieu of the same paid an amount of Rs.5,00,000/-. The payment was acknowledged by the respondent's company and accordingly a booking receipt was issued.

b. That on 03.08.2016, an allotment letter was issued by the respondent's company M/s. Advance India Projects Limited in the name of the present complainants namely Mr. Rajat Rana and Ms. Shanti Rana vide which a Food Spa (along with 01 car parking space) bearing no. T2-1-GF-Kiosk on Ground Floor having a super area of 501.82 sq. ft. was allotted at BSP @ Rs.7,000/- per sq. ft., EDC/IDC @ Rs.390/- per sq. ft. and IFMS @ Rs.150/- per sq. ft. The present complainants opted for a down- payment plan.

c. That on 22.08.2016, a buyer's agreement was executed between M/s Advance India Projects Ltd. (hereinafter referred to as the respondent no.1), M/s Baakir Real Estates Pvt. Ltd. (hereinafter referred to as the respondent no.2) and Mr. Rajat Rana and Ms. Shanti Rana (hereinafter referred to as the complainants) wherein a unit (along with 01 car parking space) bearing no. 1 on Ground Floor in Tower-T2 having a super area of 501.82 sq. ft. was allotted. As per Annexure- A of the buyer's agreement, the total sale consideration of the subject unit was Rs.37,83,723/- (excl. tax). It is pertinent to mention over here that clause 46 of the said agreement talks about due date of possession, clause 11 specifies "procedure for taking possession" and clause 12 specifically talks about "handing over possession".

d. That the complainants got a communication from the respondent's company that the Real Estate (Regulation and Development) Act, 2016 has been enacted and notified, and hence a supplementary agreement to the buyer's agreement is required to be signed to align few terms of the buyer's agreement with the RERA guidelines. It is of grave importance to mention over here that the complainants were communicated only about the modification of a few clauses as per RERA guidelines and rest all the significant terms of the previous

agreement will remain the same. Further, the complainants asked the respondent's company to share the draft of the clauses that needs to be signed along with a written communication to this effect. Accordingly, the respondent's company mailed to the allottees but still no such draft was shared. The complainants relied and acted upon the false promises and representations and assurances made by the respondent's company that the process is being carried out only to give effect to the RERA guidelines, without making any change to the substantive rights of the complainants.

e. That accordingly, after reaching there at the sub-registrar office on the designated date and time, to the utter shock and surprise of the complainants, the respondent's representative requested the complainants to sign an entirely new buyer's agreement dated 08.07.2019. They objected to the same and said that it is not possible to read such a voluminous legal document in such a short span of time and requested that the registration process needs to be rescheduled to a later date so that the complainants get time to go through the terms of the new buyer's agreement. To this, the complainants were told that the date for the agreement's registration has been fixed-up after a lot of efforts and coordination with the authorities and also the registration fees challan has already been generated so the registration process has to be completed today itself. The complainants were also again informed that the new buyer's agreement is being executed in order to accommodate the RERA guidelines, without making any alterations to the main clauses of the previous agreement and due care has been taken so that the rights of the unit holders are not hampered.

f. That the respondent's company has misrepresented to the complainants that the terms of the new agreement were not changed

and are in accordance with the previous buyer's agreement. The clause 7 of the new buyer's agreement speaks about "Possession of The Unit" (corresponding to clause 11 and 12 of the previous buyer's agreement dated 22.08.2016) and fraudulently induced a new word "Constructive possession" in place of physical possession. Also, the clause which deals with the due date of possession was also changed which becomes apparently clear by seeing the possession clauses. As per clause 46 of the buyer's agreement dated 22.08.2016, the promoters have proposed to handover the possession of the subject unit to the allottees within a period of 48 months from the date of commencement of construction of the project, which shall mean the date of commencement of excavation work at the project land plus 6 months grace period. Further, it is clearly mentioned in the clause 46 that this date (date of commencement of excavation work at the project land) shall be duly communicated to the allottee, which was never done by the respondents. Accordingly, the due date of possession cannot be ascertained in the present matter but as per the clause 5 of the new agreement dated 08.07.2019, the due date of possession is mentioned to be 30.06.2019. It is further submitted that the new agreement has been executed after the Real Estate (Regulation and Development) Act,2016 came into force and the same is not in accordance with the model buyer's agreement which is again a clear-cut violation of the provisions of the Act of 2016 and Rules of 2017.

g. That in the execution of the new buyer's agreement it is a matter of fact that the consent of the present complainants was obtained by undue influence (as defined u/sec 16 of the Indian Contract Act, 1872) and misrepresentation (as defined u/sec 18 of the Indian Contract Act, 1872) and hence the same cannot be said to be the

"Free Consent" (as defined u/sec 14 of the Indian Contract Act, 1872). The respondents were in a dominant position vis-à-vis the allottees (the present complainants) who have given their hard-earned savings to the respondents as it is very apparent on the face of it that the respondents were in a position to dominate the will of the present complainants. In the light of the above and as per the provisions of the Indian Contract Act, 1872 the contract is voidable.

h. That on 13.12.2019, a notice of offer of possession was sent by the respondent company to the present complainants along with final statement of account. The possession offered vide the said notice was Constructive Possession of Unit.

VALIDITY OF OFFER OF POSSESSION

i. The said notice of offer of possession was completely illegal and unlawful as Firstly, it nowhere talks about physical handing over of possession. So, such an offer of possession where practically no physical possession is offered is itself null and void in the eyes of law. Secondly, the complainants were allotted a retail shop along with 01 car parking space. It is important to mention here that the said notice of offer of possession nowhere mentions or talks about the said car parking space. Thirdly, the said notice of offer of possession was accompanied with Indemnity Bond cum Undertaking. In view of the submissions made above, the said notice of offer of possession dated 13.12.2019 is illegal, unlawful and not valid in the eyes of law. It is most humbly prayed before this Hon'ble Authority to struck down the said notice of offer of possession and declare the same as unlawful and invalid. Further, it is also most humbly prayed that a direction w.r.t issuance of a fresh offer of possession in which physical possession of the subject unit is offered along with 01 car parking space be made. The present complainants had made all the

payments well on time as and when demanded by the respondent builder. It is a matter of fact that the complainants had made a payment of Rs.39,64,486.66 /- towards the total sale consideration of the subject unit.

j. That as per clause 33 of the buyer's agreement dated 22.08.2016, the company has agreed to pay Rs.70,255/- per month by way of assured return to the allottee from 06.08.2016 or the execution of the agreement till the date of offer of possession of the unit. It is of immense importance to submit here that no valid/ lawful offer of possession has been made to the complainants till date. In light of the submissions made above, the respondent's company is liable to pay assured return to the tune of Rs.70,255/- per month till the date a valid/ lawful offer of possession is made to the present complainants.

k. That furthermore, as per clause 46 of the buyer's agreement dated 22.08.2016, the promoters have proposed to handover the possession of the subject unit to the allottees within a period of 48 months from the date of commencement of construction of the project, which shall mean the date of commencement of excavation work at the project land plus 6 months grace period. Further, it is clearly mentioned in the clause 46 that this date (date of commencement of excavation work at the project land) shall be duly communicated to the allottee, which was never done by the respondents. Accordingly, the due date of possession cannot be ascertained in the present matter. The grace period of 6 months should not be allowed in the present case as it is a well stated law that "No one can take benefit out of his own wrong". But it's a matter of fact that till date, the possession of the subject unit is not handed over to the present complainants and in view of the same, the

respondents are liable to pay delay possession charges at the prescribed rate from the due date of possession till actual handing over of the physical possession as per the provisions of the Act of 2016.

l. That the respondents cannot charge Holding charges from the present complainants as per the law settled by the Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 dated 14.12.2020, the holding charges shall also not be charged by the respondent builder at any point of time even if they are part of the agreement.

GST INPUT CREDIT

m. That the CBEC clarified that under GST regime, full input credit would be available for offsetting the headline rate of 12%. As a result, the input taxes embedded in the flat will not (& should not) form a part of the cost of the flat/ complex. The input credits should take care of the headline rate of 12% and it is for this reason that refund of overflow of input tax credits to the builder has been disallowed. The builders are expected to pass on the benefits of lower tax burden under the GST regime to the buyers of property by way of reduced prices/ installments. It is, therefore, advised to all builders/ construction companies that in the flats under construction, they should not ask customers to pay higher tax rate on instalments to be received after imposition of GST. Despite this clarity on law position, if any builder resorts to such practice, the same can be deemed to be profiteering under section 171 of GST law. Therefore, the Respondent may kindly be directed to allow credit of an appropriate amount of GST, in accordance with law and directions of the CBEC/ CBIC (around 4-5%). Furthermore, the Respondent may kindly also be directed to pay interest thereon

@18% p.a. (under the GST legislation) from the date when the above amount was profiteered/ collected.

Arbitrary and Illegal Demand of VAT

n. That it is completely shocking to have a notice of demand for an exorbitant amount of Rs.1,40,509.60/- towards VAT in Dec, 2019 on the amounts already paid long back by the allottees.

CAM Charges

o. That CAM charges should be charged from the date of handing over of the actual physical possession of the subject unit. That due to the acts of the respondents and the deceitful intent as evident from the facts outlined above, the complainants have been unnecessarily harassed mentally as well as financially, and therefore the opposite party is liable to compensate the complainants on account of the aforesaid unfair trade practice. Without prejudice to the above, the complainants reserves the right to file a complaint before the Hon'ble Adjudicating Officer for compensation.

C. Relief sought by the complainants:

4. 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 as per the provisions of the Act of 2016.

b. Direct the respondent to pay assured return as promised in the clause 33 of the buyer's agreement dated 22.08.2016 till actual handing over of the physical possession of the subject unit.

c. Direct the respondent to allow credit of an appropriate amount of GST, in accordance with law and directions of the CBEC/ CBIC (around 4-5%) and interest thereupon@18%.

d. Direct the respondent to refund the illegally charged VAT amount of Rs.1,40,509.60 in Dec, 2019 on the amounts paid by the complainants long back.

e. Direct the respondent to charge CAM charges from the date of handing over of the actual physical possession of the subject unit.

f. Direct the respondent to not charge "Holding charges" from the complainants.

g. Direct the respondent to not charge anything from the present complainants which is not part of the agreement.

h. To penalise the respondent u/sec 61 of the Act of 2016 for violation of various provisions of the Act of 2016 as mentioned in the complaint itself.

5. 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 no. 1

6. The respondent no. 1 has contested the complaint on the following grounds:

a. That at the very outset, it is submitted that the present complaint is untenable both in facts and law and is liable to be dismissed at the very outset. Moreover, the Complaint is filed without any cause of action and hence is liable to be dismissed. 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 no. 1 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 no. 1 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 present complaint is not maintainable in law or on facts. The present complaint raises several such issues which cannot be decided in summary proceedings. The said issues require extensive evidence to be led by both the parties and examination and cross-examination of witnesses for proper adjudication. Therefore, the disputes raised in the present complaint can only be adjudicated by the Civil Court. The present complaint deserves to be dismissed on this ground alone. 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 Authority with clean hands and have suppressed vital and material facts from this Authority. The correct facts are set out in the succeeding paras of the present reply. That the complainants being interested in the real estate development of the respondent no. 1, known under the name and style of "AIPL Business Club" located at Sector 62, Gurugram, Haryana ("Project") booked a unit. At the very outset, it is pertinent to mention that the project has all the necessary approvals and permissions. It was granted the license no. 86 of 2010 dated 23.10.2010 from Director, Town and Country Planning, Haryana (DTCP) and is also registered with the Hon'ble Authority vide Registration no. 166 of 2017 dated 29.08.2017.

b. That the complainants booked an office space vide an application form, subsequent to which, was allotted a unit no. T2-1-GF-Kiosk, tentatively admeasuring super area 501.81 sq. ft. and carpet area 98.38 sq. ft. The complainants prior to approaching the respondent no. 1, had conducted extensive and independent enquiries regarding

the project and it was only after the complainants were fully satisfied with regards to all aspects of the project, including but not limited to the capacity of the respondent no. 1 to undertake development of the same, that the complainants took an independent and informed decision to purchase the unit, un-influenced in any manner by the respondent no. 1. The complainants consciously and willfully opted for down payment plan as per their choice for remittance of the sale consideration for the unit in question and further represented to the Respondent No. 1 that they shall remit every installment on time as per the payment schedule. That the respondent no. 1 had no reason to suspect bonafide of the complainants.

c. That since the very beginning, the intention of the parties has been ex facie and prima facie clear to take the constructive possession of the unit to earn the rental income from the unit. The booking of the unit by the complainants was made with the said categorical understanding, as noted in clause 41 of the application form. That the sole intention of booking was to lease the unit and with that understanding, an offer was made by the complainants by filing the application form, upon the acceptance of which, an allotment was made on 03.08.2016. That the unit allotted was provisional and subject to change as was categorically agreed between the parties. That thereafter, buyer's agreement dated 22.08.2016 was executed between the parties. That pursuant to the execution of the buyer's agreement, an agreement to sell dated 08.07.2019 was executed between the complainants and the respondents on the mutually agreed terms and conditions, upon guidelines issued after introduction of the Real Estate (Regulation and Development) Act, 2016 read with the applicable rules to the state of Haryana. That at this stage, it is pertinent to highlight clause 38 of the agreement

which establishes the fact that the agreement dated 08.07.2019 is the entire agreement and supersedes all the previous agreements and understandings. Clause 38 of the agreement is as under:

> *"38. Entire Agreement:*
> *The Allottee agrees that this Agreement including the preamble along with its annexures and the terms and conditions contained in the Agreement constitutes the entire Agreement between the Parties with respect to the subject matter hereof and supersedes any and all understandings, any other agreements, correspondences, arrangements whether written or oral, if any, between the Parties hereto. This Agreement or any provision hereof cannot be orally changed, terminated or waived. Any changes or additional provisions must be set forth in writing in a separate Agreement duly executed and signed by and between the Parties."*

d. That the execution of the new agreement amounts to novation of contract as falls within the ambit of section 62 of the Indian Contract Act, 1872 which is reiterated hereunder:

> *"62. Effect of novation, rescission, and alteration of contract. —If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract, need not be performed."*

e. That the execution of the agreement dated 08.07.2019 amounts to recission of the previous contract and makes the parties bound by the new agreement dated 08.07.2019 and frees the parties from the obligations of the old agreement. That accordingly, the rights and obligations between the parties is to be seen from the agreement dated 08.07.2019. At this instance, it is also submitted that the said agreement was executed between the parties, willingly, voluntarily, and without any coercion or undue influence, whatsoever. That upon the communication of the execution of new agreement, the Parties executed the new agreement, without any demur, whatsoever. That the complainants have, acting on their whims and fancies, wrongfully and malafidely challenged the agreement dated 08.07.2019 in their complaint, however, have miserably failed in

substantiating the same. That the Complainants' allegations of the execution of the agreement under coercion, etc., is gravely unsubstantiated and under no circumstance whatsoever, can the same be accepted. That it is a settled principle of law that the burden of proof of proving the same falls on the complainants and until and unless the complainants have fully discharged their burden of proof, no assumption towards the allegations of the complainants can be made and the respondent cannot be required to disprove the same.

f. That there is no iota of evidence put forth by the complainants to show that the agreement dated 08.07.2019 was executed under coercion. In fact, it is a matter of fact that no objection/protest whatsoever, was made by the complainants at any point in time since the execution of the said agreement till the date of filing this complaint. On the contrary, the parties executed the subsequent agreement, supplanting the original agreement, after having read and understood all the terms and conditions therein, as evident from clause J of the agreement dated 08.07.2019, which is reiterated hereunder:

> *"The Parties hereby confirm that they are signing this Agreement with full knowledge of all the laws, rules, regulations, notifications, etc., applicable in the State of Haryana and related to the Project. The Allottee confirms having obtained independent advice/forming independent opinion on all the aspects and features before deciding to proceed further. Accordingly, the Allottee confirms executing this Agreement with full knowledge and understanding of its terms and conditions, including their legal implications. The execution of this Agreement is an independent, informed and unequivocal decision of the Allottee. The Allottee has relied upon personal discretion, independent judgment and investigation and being fully satisfied with the present Agreement has decided to enter into this Agreement for the purchase of the Unit. The Allottee further confirms having considered, reviewed, evaluated and satisfied himself/ herself/ itself with the specific features of the said Project and other projects in*

and around Gurugram after visiting Project as well as nearby projects;"

g. That in such a circumstance whatsoever, no challenge to the duly and lawfully executed agreement can be made and the allegations of the Complainants should be rejected in toto. That furthermore, the terms and conditions of the agreement further clarify the terms and conditions of the contractual relationship between the Parties as is also an established principle of law that the intention of the parties to a contract is established from the terms and conditions of the Contract. That there has been no ambiguity with respect to the delivery of constructive possession of the Unit, clauses 5 and 7.1 of the Agreement categorically state that possession shall always mean constructive possession and not the physical handover of the unit. That in addition to the above and the categorical understanding between the parties, it was on the request of the allottee that the promoter has agreed to put the unit in combination with other units for their leasing. That complainants categorically agreed to lease the unit by entering into a leasing arrangement with the respondent. The allottee had also understood the general risks involved in giving the premises on lease. Allottee specifically intended to lease the unit to earn rental income from the unit post the lease of the unit to a third party, all of which is evident from the clause 21. In addition to the above, with respect to the delivery of physical possession of the unit, it has been categorically agreed between the parties that the physical possession of the unit shall be given only if the unit has not been leased.

h. That from all the above-mentioned, the intention of the parties is ex facie clear, from every part of the agreement, with respect to the allottee receiving the constructive possession of the unit and the leasing arrangement between the parties; having executed the

agreement with open eyes and free will, without any coercion or undue influence, of any sort, whatsoever, the same cannot be challenged. That the terms of the agreement need to be upheld as a whole. That complainant cannot be allowed to cherry pick the clauses that they like and leave the rest. Moreover, the agreement between the parties and the delivery of constructive possession does not violate the development permissions as under the license. That the relationship between the parties is contractual in nature and is governed by the agreement executed between the parties. The rights and obligations of the parties flow directly from the Agreement. At the outset, it must be noted that the complainants willingly, consciously, and voluntarily entered into the agreement after reading and understanding the contents thereof to their full satisfaction, as is also evident from clause j of the agreement. Hence, the complainant agreed to be bound by the terms and conditions in the application form and the agreement.

i. That from the clause reiterated hereinabove, it is clear that the Allottee entered into a future lease agreement with the respondent. it is an entrenched principle of law that a lease may be limited to take effect either immediately or from a future date. It is ex facie evident that the complainants had entered into a future lease agreement. That the complainants agreed to put the unit on lease after the notice of offer of possession. That by virtue of such an agreement, the complainant allottee enjoys the rights of the lessor and hence, enjoys the constructive possession of the unit, after the notice of offer of possession. That the respondent no. 1 was miserably affected by the ban on construction activities, order by the NGT and EPCE, demobilization of labour, etc. being the circumstances beyond the control of the Respondent and force majeure circumstances, that the

construction was severely affected during this period. That the present complaint is a frivolous attempt of the complainant to extract monies out of the respondent and harass the respondent. that there exists no cause of action for the complainants to file the present complaint. That the respondent has made good on all parts of its responsibilities and obligations under the agreement, under the law, rules and regulations. That for the reason of non-existence of an existing cause of action, this complaint is liable to dismissed.

j. That furthermore, it needs to be seen that the development of the Unit and the project as a whole is largely dependent on the fulfilment of the allottees in timely clearing their dues. That upon the existing default of the allottee, the respondent builder went over and above its contractual responsibilities in serving reminders for payment. That it needs to be categorically highlighted that there has been no delay in the offer of possession of the unit. That the due date for application of the occupancy certificate was 30.06.2019, as per clause 5 of the agreement. The Respondent applied for occupancy certificate on 11.09.2019 rightly received the occupancy certificate on 28.11.2019, after which, offered the possession on 13.12.2019.

k. That the respondent is one of the renowned developers in the industry. The act of timely offer of possession on part of the respondent needs to be appreciated and seen in line with the fact that the respondent has not stood in breach of any obligation. However, on the other hand, the complainant allottee has miserably violated the terms of the agreement. It needs to be categorically noted that as per clause 7.3 of the agreement, the complainant was obligated to take constructive possession of the unit within 30 days from the notice of offer of possession, however, the same was not

done and consequently, reminders dated 02.01.2020, 27.01.2020, and 05.02.2020 were sent to the complainants.

l. That the complainants have had a shortage of funds and had written about the same to the respondent on 27.11.2020. That at this stage, it is pertinent to note that the complainants had duly accepted the constructive possession and had no grievance whatsoever in regards to the supplementary agreement or the constructive possession, and had only shortage of funds. This ex facie shows that the present complaint has been filed on the basis of whims and fancies of the complainants and in such a circumstance, the complainants cannot be allowed to turn back on their contractual obligations. That upon the continuous default of the allottee despite various reminders, the pre-termination letter dated 12.05.2020 was made to the complainants, despite which, payment was delayed and made in September 2020 and December 2020, as evident from the statement of accounts annexed. As on 18.04.2023, a sum of Rs.2,42,603 is pending is outstanding on part of the complainants in lieu of registration and stamp duty charges. Moreover, in compliance of the terms and conditions between the parties, the unit was put on lease with a brand known under the name and style of "Gokhana" and the same was communicated to the complainants vide letter dated 26.04.2022.

m. That in such circumstances, the Complainants cannot be allowed to go beyond their contractual obligation and the present Complaint needs to be dismissed. That relief of Assured Return sought by the complainant cannot be entertained, under any circumstance whatsoever. That as per the previous agreement, the assured returns were to be paid till offer of possession, however, after the execution of the agreement dated 08.07.2019, the said clause of

assured returns was rescinded, regardless of the same, in utmost bonafide, assured returns were duly paid to the complainant from 08.06.2016 to 28.11.2019. The respondent has duly fulfilled its obligation of the payment of assured returns till Nov. 2019.

n. That as noted above, upon the novation of the contract, the obligations of the prior agreement need not be followed and hence, the respondent cannot be made to oblige with the same. Regardless of the same, this issue of assured returns cannot be dealt with by this Authority, who does not have the jurisdiction to deal with the said issue. In this regard, the law is stated in the following paras.

o. That the complainant is praying for the relief of "Assured Returns" which is beyond the jurisdiction that this Authority has been dressed with. 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 developer and allottee with respect to the development of the project as per the agreement. That such remedies are provided under Section 18 of the Act, 2016 for violation of any provision of the Act, 2016. 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 by the Allottee. That it is relevant to mention here that nowhere in the said provisions, the Authority has been dressed with jurisdiction to grant "Assured Returns".

p. That the non-payment of assured return post October, 2018 as alleged by the complainant in his complaint is bad in law. That the payment of assured return is not maintainable before this Authority upon enactment of the Banning of Unregulated Deposits Schemes Act, 2019 [BUDS Act]. That any direction for payment of assured

return shall be tantamount to violation of the provisions of the BUDS Act. The assured returns or assured rentals under the said Agreement, clearly attracts the definition of "deposit" and falls under the ambit of "Unregulated Deposit Scheme". Thus, the respondent was barred under Section 3 of BUDS Act from making any payment towards assured return in pursuance to an "Unregulated Deposit Scheme". In this regard, it is most humbly submitted as under:

Issue regarding Assured Return is pending adjudication before the Hon'ble Punjab and Haryana High Court and Hon'ble Haryana Real Estate Appellate Tribunal.

q. The issue pertaining to the assured return is already pending for adjudication before the Hon'ble Punjab and Haryana High Court. Wherein, the Hon'ble High Court in the matter of 'Vatika Limited vs Union of India and Anr.' in CWP No. 26740 of 2022, had issued notice to the Respondent Parties and had also restrained the competent authorities from taking any coercive actions against the Respondent in this matter in criminal cases for seeking recovery against the deposits till the next date of hearing.

r. That the complainant cannot, under the garb of said the agreement, seek enforcement or specific performance of an investment return scheme before this Hon'ble Tribunal, which is specifically barred and banned under Section 3 of The BUDS Act, hence the present complaint deems dismissal.

s. That it is reiterated that the issues so raised in this complaint are not only baseless but also demonstrates an attempt to arm twist the respondent into succumbing to the pressure so created by the complainant in filing this complaint before this Authority and seeking the reliefs which the complainant is not entitled to raise before this Authority. Assured Returns cannot be paid after enactment of "The Banning of Unregulated Deposits Schemes Act,

2019 [BUDS ACT]": That the Respondent cannot pay "Assured Returns" to the Complainant by any stretch of imagination in the view of the prevailing legal position. That on 21.02.2019, the Central Government passed an ordinance "Banning of Unregulated Deposits, 2019", to stop the menace of unregulated deposits and payment of returns on such unregulated deposits.

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

u. That it is specifically mentioned under rule 2(1)(C) what is included in the meaning of deposits along with other transactions which does not constitute deposits. Under sub rule (1)(c)(xii)(b) of Rule 2 of the Deposit Rules, an amount shall not be termed as deposit if received in advance, accounted for in any manner whatsoever, in connection with consideration for an immovable property under an agreement or arrangement, provided that such advance is adjusted against such property in accordance with the terms of the agreement or the arrangement.

v. However, explanation to rule 2 (1) (c) clearly states that any amount received by the company as instalment or otherwise, from a person with promise or offer to give returns, in cash or kind shall be treated as a deposit. Therefore, it immediately requires compliance with the rules of MCA and relevant provisions of the companies Act to take

prior approval before accepting such deposits failing which punitive actions will follow.

w. That as per sub rule (1)(c)(xii)(b) of Rule 2 of the Deposit Rules, no advance shall be termed as deposit which is received and adjusted as consideration for an immovable property under an agreement. However, explanation of Rule 2(1) (c) specifically states that is the advance/instalment received with a promise to give returns shall be termed as deposit and the depositor will be under obligation to comply with MCA as given under Column III of first schedule of the BUDS Act. In case of non-compliance of norms of MCA as per first schedule, the same shall be termed as unregulated deposit schemes.

x. That column III of first schedule of the BUDS Act defines the various kind of deposit along with their regulators under column I. If any deposit as per Schedule I of BUDS Act fall under regulated deposits, then company is not in violation of the BUDS Act. However, if deposit is not in compliance with the procedure laid down under the Companies Act, the company would be not only in violation of the provisions of the companies Act but also under the BUDS Act and therefore will be exposed to penal actions under Section 76A of the Companies Act and deposit being unregulated will also fall foul and liable to be tried under penal provision of the BUDS.

y. Therefore, if Depositor accepts any deposit, it immediately required to take prior approval from the Regulator as mentioned under Schedule I of the BUDS Act. And therefore, for the present matter, the Regulator shall be Ministry of Corporate Affairs as provided under last entry of Schedule I. Therefore, if the respondent continues paying the assured returns which is deposit as per the relevant provisions of the Companies Act and BUDS Act, the same will be

contravention of the provisions of the Acts and the respondent will be exposed to the penal provisions thereunder.

z. That the BUDS Act is a central Act came subsequent to the Companies Act and the Act, 2016, therefore, directing the respondent to pay assured Returns shall be violation of the provisions of BUDS Act. It is also pertinent to note herein that for any kind of deposits and return over it shall be tried and adjudicated as per the relevant provisions of the BUDS Act by the competent Authority constituted under the Act. Further, any orders or continuation of payment of assured return or any directions thereof will tantamount to contravention of the provisions of the BUDS Act. In the catena of the above discussion, it is submitted that in the present complaint, the respondent no.1 has offered assured returns to the complainants in lieu of advance payments received in respect to a unit booked in the project. and upon coming into force of the buds act, any such unregulated deposits which are not approved has become illegal and continuing the same shall expose the respondent to strict penal provisions of the Act.

7. 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.

8. The present complaint was filed on 06.01.2023 in the authority. The notice for hearing was duly served to respondent no. 2. However, despite providing enough opportunity for filing the reply, no written reply has been filed by the respondent no. 2. Thus, keeping in view the opportunity given to the respondent no. 2, that despite lapse of one year the respondent has failed to file the reply in the registry. Therefore, in view of the above-mentioned fact, the defence of the respondent no. 2 is hereby

struck off by the authority. Further, respondent no. 2 failed to put in appearance before the authority and has also failed to file reply. In view of the same, the matter is proceeded ex-parte against respondent no. 2.

9. Written submissions filed by the complainant and respondent no. 1 are also taken on record and considered by the authority while adjudicating upon the relief sought by the complainant.

E. Jurisdiction of the authority

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

E. I Territorial jurisdiction

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

12. 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.*

13. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter 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

14. 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"*

15. 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 application under section 35 being filed by the complainant on 24.09.2024.**

16. On 24.09.2024 the respondent made an application under section 35 of the Act, 2016 in the present matter wherein the complainant prayed for appointment of inquiry officer/expert to examine the agreement executed in the year 2019 inter se parties and to ascertain whether the said agreement is in compliance with RERA Act, 2016 or not. Thereafter abrogate the clauses which are arbitrary and against the law and to initiate penal proceedings against the errant respondent promoter for violation of provisions of the Act, 2016 & Rules, 2017.

17. In the present matter the respondent firstly executed the buyers' agreement on 22.08.2016 and thereafter the respondent vide mail dated 16.05.2019 requested the complainant to execute the agreement to sell and get the same registered in terms of RERA Act, 2016. The complainants agreed to the same and executed the fresh buyers' agreement on 08.07.2019 which as per complainant is not in consonance with RERA Act, 2016. The authority considering the said request of complainants hereby directs the planning branch of the Authority to examine the BBA executed with the complainants and the draft BBA submitted by the respondent at the time of registration with the model Buyers' agreement as per RERA Rules, 2017 and issue show cause notice and initiate penal proceedings as per the Act, 2016 for any violation of the provisions thereof, if any.

18. Further, the complainants may approach the adjudicating officer for compensation under the Act, 2016 if the respondents are found guilty under the Act, 2016.

H. **Findings on the relief sought by the complainant.**

H.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 as per the provisions of the Act of 2016.

H.II. Direct the respondent to pay assured return as promised in the clause 33 of the buyer's agreement dated 22.08.2016 till actual handing over of the physical possession of the subject unit.

19. In the present matter the authority observed that the registered buyers' agreement executed inter se parties on 08.07.2019. Clause 7.1 provides for the handing over of possession of the subject unit as provided under rule 2(1)(f) of Rules, 2017. The said project is registered by the authority vide registration no. 166 of 2017 dated 29.08.2017 valid up to 30.06.2019. Accordingly, the due date of handing over of possession of the subject unit comes out to be 30.06.2019. As per the documents available on record the respondent offered the possession of the unit on 13.12.2019 after obtaining OC from the competent authority on 28.11.2019.

20. Before adjudicating upon the relief of delay possession charges it would be relevant to give observation upon the validity of the offer of possession dated 13.12.2019. The complainants in the present matter have pleaded that the respondent fraudulently changed the term possession with constructive possession in the BBA dated 08.07.2019 whereas as per the agreement dated 22.08.2016 the respondent was obligated to offer the actual physical possession of the unit. On the contrary the respondent, contended that the new agreement amounts to novation of contract and falls within the ambit of section 62 of Indian Contract Act, 1872 and therefore the agreement dated 08.07.2019 amounts to recession of previous contract and makes the parties bound by the new agreement.

21. The authority herein observes that the complainants have failed to put forth any document to show that the agreement dated 08.07.2019 was executed under coercion. Also, no objection/protest whatsoever, was

made by the complainants at any point of time since the execution of the new BBA. Therefore, the offer of possession dated 13.12.2019 is in terms of the agreement dated 08.07.2019 executed between the parties and is valid.

22. The complainants are also seeking assured returns on monthly basis as per the builder buyer agreement as well as delay possession charges. 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. The authority has rejected the aforesaid objections raised by the respondent in ***CR/8001/2022 titled as Gaurav Kaushik and anr. Vs. Vatika Ltd.*** wherein the authority has held 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 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)(l)(iii) of the Act of 2019. Thus, the plea advanced by the respondent is not sustainable in view of the aforesaid reasoning and case cited above.

23. The money was taken by the builder as a deposit in advance against allotment of immovable property and its possession was to be offered within a certain period. However, in view of taking sale consideration by way of advance, the builder promised certain amount by way of assured returns for a certain period. 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. 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.

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 allotee 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. In the present complaint, the complainants intend to continue with the project and are seeking possession of the subject unit and delay possession charges as provided under the provisions of section 18(1) of the Act which reads as under:

> *"**Section 18: - Return of amount and compensation***
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
> .....
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

27. A builder buyer agreement dated 08.07.2019 was executed between the parties. The due date is calculated as per clause 7.1 of BBA as provided under Rule 2(1)(f) of Rules 2017. Therefore, the possession was to be handed over by 30.06.2019. The relevant clause is reproduced below:

> *"**7.1 Schedule for possession of the unit:** - The Promoter agrees and understands that timely delivery of possession of the Unit to the Allottee and the Common Areas to the association of allottees or the Governmental Authority, as the case may be, as provided under Rule 2(1)(f) of Rules, 2017, is the essence of the Agreement."*

28. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges. Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> *"**Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
> *For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate*

prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:
Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public."

29. The legislature in its wisdom in the subordinate legislation under the rule 15 of the rules has determined the prescribed rate of interest. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 10.12.2024 is 9.10%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 11.10%.

30. On consideration of documents available on record and submissions made by the complainants and the respondent, the authority is satisfied that the respondent is in contravention of the provisions of the Act. The agreement executed between the parties on 08.07.2019, the possession of the subject unit was to be delivered within stipulated time i.e., 30.06.2019.

31. However now, the proposition before it is as to whether the allottee who is getting/entitled for assured return even after expiry of due date of possession, can claim both the assured return as well as delayed possession charges?

32. To answer the above proposition, it is worthwhile to consider that the assured return is payable to the allottees on account of provisions in the BBA. The assured return in this case is payable as per 33 of the agreement dated 22.08.2016. * (Note: the date of agreement referred for assured return has been inadvertently mentioned as 0807.2019 in the proceedings dated 10.12.2024 instead of 22.08.2016). The respondent agreed to pay an amount of ₹70,255/- per month from 06.08.2016 or the date of execution of this agreement till the date of offer of possession of the unit i.e., 13.12.2019.

33. By way of assured return, the promoter has assured the allottee that he would be entitled for this specific amount till offer of possession. The purpose of delayed possession charges after due date of possession is served on payment of assured return after due date of possession as the same is to safeguard the interest of the allottees as their money is continued to be used by the promoter even after the promised due date and in return. In the present matter the respondent has paid the assured return of ₹10,33,201/- till November 2019. The delay possession charges are payable from 30.06.2019 till 13.12.2019 and the respondent has already paid assured return for the said period except for 13 days therefore, the respondent cannot be held liable to pay interest for the period he has already compensated by way of paying assured return and hence no delay possession charges can be allowed. The respondent is directed to pay the amount of assured return as agreed in clause 33 of the agreement dated 22.08.2016 executed inter se parties till the date of issue of notice of possession of the unit i.e., till 13.12.2019.

H.III. Direct the respondent to allow credit of an appropriate amount of GST, in accordance with law and directions of the CBEC/ CBIC (around 4-5%) and interest thereupon@18%

34. It is contended on behalf of complainants that the respondent raised an illegal and unjustified demand towards GST. It is pleaded that the liability to pay GST is on the builder and not on the allottee. But the version of respondents is otherwise and took a plea that while booking the unit as well as entering into flat buyer agreement, the allottee agreed to pay any tax/ charges including any fresh incident of tax even if applicable retrospectively. It is important to note that the possession of the subject unit was required to be delivered by 31.12.2020 and the incidence of GST came into operation thereafter on 01.07.2017. The authority is of view that the due date of possession is after 01.07.2017 i.e., date of coming into force of GST, the builder is entitled for charging GST w.e.f. 01.07.2017.

The promoter shall charge GST from the allottees **where the same was leviable,** at the applicable rate, if they have not opted for composition scheme subject to furnishing of such proof of payments and relevant details.

H.IV. Direct the respondent to refund the illegally charged VAT amount of Rs.1,40,509.60 in Dec 2019 on the amounts paid by the complainants long back.

35. It is contended on behalf of complainants that the respondent raised an illegal and unjustified demand towards VAT. It is pleaded that the liability to pay VAT is on the builder and not on the allottee. But the version of respondent is otherwise and took a plea that while booking the unit as well as entering into flat buyer agreement, the allottee agreed to pay any tax/ charges including any fresh incident of tax even if applicable retrospectively. The promoter shall charge VAT from the allottees **where the same was leviable,** at the applicable rate, if they have not opted for composition scheme. However, if composition scheme has been availed, no VAT is liveable. Further, the promoter shall charge actual VAT from the allottees/prospective buyers paid by the promoter to the concerned department/authority on pro-rata basis i.e. depending upon the area of the flat allotted to the complainant vis- à-vis the total area of the particular project. However, the complainant(s) would also be entitled to proof of such payments to the concerned department along with a computation proportionate to the allotted unit, before making payment under the aforesaid heads.

H.V. Direct the respondent to charge CAM charges from the date of handing over of the actual physical possession of the subject unit.

36. In the present matter, although the respondent has offered the possession of the said unit on 13.12.2019 after receiving OC. But vide said letter dated 13.12.2019 only constructive possession has been offered by the respondent which means the complainants are not in actual physical possession of the said unit. The respondent has very specifically

mentioned in its application form and BBA executed inter se parties that physical possession was never to be handed over and is for the purpose of lease only. Furthermore, it is the obligation of respondent to put the said unit on lease. Accordingly, the CAM charges shall be payable by the lessee once the said unit is put on lease by the respondent and the complainants are not liable to pay the CAM charges.

H.VI. Direct the respondent to not charge "Holding charges" from the complainants.

H.VII. Direct the respondent to not charge anything from the present complainants which is not part of the agreement.

37. The complainant has also challenged the demand raised by the respondent builder in respect of holding charges. On the contrary, the respondent submitted that all the demands have been strictly raised as per the terms of the flat buyer agreement.

38. Although, this issue already stands settled by the Hon'ble Supreme Court vide judgment dated 14.12.2020 in civil appeal no. 3864-3889/202, whereby the Hon'ble Court had upheld the order dated 03.01.2020 passed by NCDRC, which lays in unequivocal terms that no holding charges are payable by the allottee to the developer.

39. Thus, the respondent is not entitled to demand holding charges from the complainant at any point of time even after being part of the buyer's agreement as per law settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

H.VIII. To penalise the respondent u/sec 61 of the Act of 2016 for violation of various provisions of the Act of 2016 as mentioned in the complaint itself

40. The complainant has not mentioned the specific provisions of the Act, 2016 being violated by the respondent accordingly, the said relief cannot be deliberated by the authority. The action for non-adherence of model BBA is being initiated by the Authority separately.

41. 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 02.07.2024, the same was fixed for pronouncement of order on 01.10.2024 and 22.10.2024 respectively. The same could not be pronounced on that day and the matter was adjourned 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.

I. Directions of the authority:

42. 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 33 of the agreement dated 22.08.2016 executed inter se parties till the date of issue of notice of possession of the unit i.e., till 13.12.2019.

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.

c. The CAM charges shall be payable by the lessee once the said unit is put on lease by the respondent and the complainants are not liable to pay the CAM charges since the said unit is not for the purpose of self-occupation.

d. The respondent is not entitled to demand holding charges from the complainant at any point of time even after being part of the buyer's

agreement as per law settled by Hon'ble Supreme Court in civil appeal nos. 3864-3889/2020 decided on 14.12.2020.

e. The planning branch of the Authority is directed to examine the BBA executed with the complainants and the draft BBA submitted by the respondent at the time of registration with the model Buyers' agreement as per RERA Rules, 2017 and issue show cause notice and initiate penal proceedings as per the Act, 2016 for any violation of the provisions thereof, if any.

f. A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

43. Complaint stands disposed of.

44. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Arun Kumar)
Chairperson

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.12.2024