BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**856 of 2024**
Date of complaint	**:**	**13.03.2024**
Date of order	**:**	**20.11.2024**

1. Sunita Mittal,
2. Tanmay Mittal,
Both R/o: - H. No. 50, Phase-1, Ashok Vihar, North West Delhi, Delhi-110052. **Complainants**

Versus

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

CORAM:
Ashok Sangwan **Member**

APPEARANCE:
Tanya (Advocate) Complainants
Venket Rao (Advocate) Respondent

ORDER

1. This 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 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the Rules and regulations made thereunder 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, delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details
1.	Name of the project	Neo Square, Sector-109, Gurugram
2.	Project area	2.71 acres
3.	Nature of the project	Commercial colony
4	Unit no.	Shop no.-92, Ground floor (As on page no. 25 of complaint) **Change of unit-** G-92 to G-09 on ground floor (letter dated 29.09.2022 on page 61 of complaint)
5.	Unit area admeasuring	661 sq.ft. (As on page no. 25 of complaint)
6.	Date of execution of buyer's agreement	16.04.2019 (As on page no. 22 of complaint)
7.	MoU	16.04.2019 (page 46 of complaint)
8.	Possession clause	***5.2*** *That the company shall complete the construction of the said building/complex within which the said space is located within* ***36 months from the date of execution of this agreement or from the start of construction whichever is later*** *and apply for grant of completion/occupancy certificate. The company on grant of occupancy/completion certificate shall issue final letters to the allottee who shall within 30 days, thereof remit all dues.* ***5.4*** *That the allottee hereby also grants an additional period of 6 months after the completion date as grace period to the company after the expiry of the aforesaid period.* *(Emphasis supplied)*

9.	Date of start of construction	The Authority has decided the date of start of construction as 15.12.2015 which was agreed to be taken as date of start of construction for the same project in other matters. In CR/1329/2019 it was admitted by the respondent in his reply that the construction was started in the month of December 2015.
10.	Due date of possession	16.10.2022 (Calculated from date of execution of buyer's agreement i.e. 16.04.2019 being later + Grace period of 6 months is allowed being unqualified)
11.	Total sale consideration	Rs. 51,42,923.72/- (As per payment plan on page no. 83 of reply)
12.	Amount paid by the complainant	Rs. 46,80,855/- (As on page no. 105 of reply)
13.	Occupation certificate /Completion certificate	14.08.2024
14.	Offer of possession	Not offered
15.	Reminder	29.06.2022 (page 59 of complaint)
16.	Cancellation letter	12.02.2024 (page 62 of complaint)

B. Facts of the complaint:

3. The complainants have made the following submissions: -

I. That on 16.04.2019, the parties entered into a buyer's agreement and memorandum of understanding ("MoU") wherein the complainants were allotted a unit bearing no. G-92, Ground Floor admeasuring super area of 661 sq. ft. in the project of the respondent named "Neo Square" at Sector 109, Gurugram for a total sale consideration of Rs.51,42,923.72/- against which the complainants had paid a sum of Rs.37,01,600/- i.e., advance/part consideration of the unit, before

execution of the MoU itself and thereafter, a payment of Rs.9,79,285/- was paid by them on 30.04.2019.

II. That as per the same Clause 4 of the MoU, the respondent had to pay returns/penalty of Rs.96,341/- per month on the unit in question with effect from 16.10.2020 till the time of offer of possession of the said unit.

III. That by virtue of clause 5 of BBA, it was also agreed to between the parties that if the respondent makes the offer of possession before 16.10.2020, the complainants shall pay early lease facilitation charges amounting to Rs.96,341/- per month on the unit in question with effect from date of offer of possession till 16.10.2020.

IV. That although the respondent had applied for the occupation certificate previously, the respondent sent a letter dated 01.02.2022 to the complainants, wherein the respondent admitted that subject to some faults on part of the respondent, occupation certificate is not yet obtained and therefore, they have withdrawn their application for grant of occupation certificate filed before the DTCP, Haryana and further committed to adjust the payment of returns/penalty towards the outstanding payment at the time of offer of possession.

V. That therefore, as per the arrangement entered into between the parties by virtue of letter dated 01.02.2022, the respondent had to pay Rs.14,93,285.50/- and the balance outstanding on part of the complainants i.e., Rs.14,41,323.72/- would be adjusted. Hence, nothing remains payable on part of the complainants, instead an excess amount of Rs.51,934.78/- had been paid by the complainants.

VI. That despite having the returns being adjusted and an excess payment already having been made by the complainants, to the utter surprise of the complainants, respondent sent a demand letter dated 29.06.2022 asking to clear the outstanding due of Rs.4,30,457/- before 15.07.2022.

VII. That not only was the adjustment of the outstanding dues agreed between the parties, but the complainants responded to the said letter of the respondent dated 29.06.2022 by virtue of e-mail dated 04.07.2022, wherein the complainants refuted the said demand of Rs.4,30,457/- as it was agreed that EDC/IDC and IFMS shall be paid at the stage of offer of possession as per the payment plan.

VIII. That since the respondents gave no response to e-mail sent by the complainants dated 04.07.2022, hence, they visited the office of the respondent and met Mr. Kamal from the CRM Team who informed the complainants that they will offer the possession of the unit to them as soon as occupation certificate will be received by them. While the negotiation talks were being carried on in the presence of channel partner Mr. Bhatia, the complainants were asked to deposit Rs.9,79,285/- towards the unit in question, and accordingly, an amount of Rs.9,79,285/- had been deposited in the bank account of the respondent. Accordingly, the total amount paid by the complainants comes out to be Rs.46,80,885/- against the total sale consideration of Rs.51,42,923.72/-. Thereafter, no dispute/claims of outstanding demands remained pending. However, the return/penalty remained unpaid.

IX. That thereupon, the respondent sent a letter dated 29.09.2022 informing the complainants of the change in unit from G-92 to G-09 on Ground Floor admeasuring super area 661 sq. ft.

X. That the said unit change was accepted by the complainant, pursuant to change in unit of the complainants, there had been no communication on the part of the respondent. No further demand was raised to make any payment or whatsoever. However, the complainants kept on visiting the office of the respondent to know about the status of the project and as to when the possession of the unit would be delivered. It is imperative

to note that the possession was promised to be delivered on 16.10.2020 as per the terms and conditions of the MOU and the respondent acting in utmost malafide had failed to deliver the same despite a delay of approximately 3.5 years. In fact, the occupation certificate is also not obtained by the respondent till date.

XI. That acting contrary to the expectations of the complainants, the respondent sent a cancellation letter dated 12.02.2024, wherein they cited the non-payment of Rs.4,30,457/- as a ground for cancellation of the unit. That the said decision of the respondent was refuted by the complainants by way of their e-mail dated 14.02.2024. The said cancellation is invalid as the unit no. 92 was cancelled, which no longer belongs to the complainants as the complainants are the allottees with respect to unit no. 09 with effect from 29.09.2022. the letter dated 29.09.2022 is an integral part of the executed buyer's agreement and MOU dated 16.04.2019 and the same was agreed between the parties.

XII. That neither did the respondent send any pre-cancellation letter, nor any reminders. The said cancellation is also invalid as per clause 9.3 of the model RERA agreement.

XIII. That over and above the outstanding returns/penalty amount of Rs.34,39,771.78/- further rental/penalty of Rs.96,341/- is also accruing and the arrears against the same also need to be paid by the respondent.

C. Relief sought by the complainants:

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

i. To set aside cancellation and re-instate the unit.

ii. Direct the respondent to pay assured return as per clause 4 of MoU.

iii. Direct the respondent to put the unit on lease under clause 5 of MoU.

iv. Direct the respondent to pay lease rental @119.25/- per sq.ft. per month and subject to other relevant terms and conditions specified in clause 8 (a) to clause 8 (d) of MoU.

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

D. Reply by the respondent.

6. The respondent contested the complaint by way of reply dated 08.05.2024 on the following grounds: -

i. That the complainants deliberately and intentionally failed to clear the outstanding dues against the unit. It is pertinent to mention that vide dues reminder letter dated 29.06.2022, it was brought to the very knowledge of the complainants that there exist an outstanding due of Rs.4,30,457/- which was required to be paid on or before 15.07.2022, failing which the respondent would be compelled to consider this failure of complainants as breach of the terms and conditions of the builder buyer agreement. That upon the failure of the complainants to clear the outstanding dues, the respondent was constrained to cancel the unit vide cancellation letter dated 12.02.2024.

ii. That the unit that was allotted to the complainants vide builder buyer agreement dated 16.04.2019 was unit bearing no. G-92 on ground floor admeasuring 661 sq. ft., however, vide letter dated 29.09.2022, the complainants were given an alternate unit bearing no. G-09 on ground floor admeasuring 661 sq. ft., which was accepted by them. In progression, the complainants did not pay the outstanding dues to the tune of Rs.4,30,457/- and the respondent issued a cancellation letter dated 12.02.2024 with reference to the unit of the complainants. However, due to a factual error and a clerical mistake, the respondent, instead of cancelling unit bearing no. G-09 on ground floor, which was the new revised unit, mistakenly cancelled unit bearing no. G-92 on ground floor, which was the old unit of the complainants.

iii. That post cancellation of the unit of the complainants, the respondent requested them to visit the office of the respondent for the purposes of handing over the original documents in the custody of the complainants for the purposes of executing the refund proceedings. However, the complainants despite of requests and reminders by the respondent deliberately and malafidely did not approach the respondent and due to which the refund proceedings could not be executed.

iv. At the outset, the complainants have erred gravely in filing the present complaint and misconstrued the provisions of the Act, 2016. It is imperative to bring the attention of this Authority that the RERA Act was passed with the sole intention of regularisation of real estate projects, and the dispute resolution between builders and buyers and the reliefs sought by the complainants cannot be construed to fall within the ambit of RERA Act. That the complainants have failed to provide the correct/complete facts that they are investors and not allottees therefore, the same are reproduced hereunder for proper adjudication of the present matter.

v. That the complainants with the intent to invest in the real estate sector as an investor, approached the respondent and inquired about the project i.e., "Neo Square" situated at Sector-109, Gurugram, Haryana being developed by the respondent. That after being fully satisfied with the project and the approvals thereof, the complainants decided to apply to the respondent by submitting a booking application form dated 11.03.2019, whereby seeking allotment of unit no. G-92, admeasuring 661 sq. ft super area on the ground floor of the project having a basic sale price of Rs.33,05,000/-. The complainants, considering the future speculative gains, also opted for the investment return plan being floated by the respondent for the instant project.

vi. That since the complainant had opted for the investment return plan, a Memorandum of Understanding dated 16.04.2019 was executed between

the parties, which was completely a separate understanding between the parties in regard to the payment of assured returns in lieu of investment made by the complainants in the said project and leasing of the unit/space thereof. It is pertinent to mention herein that as per clause 4 of the MoU, the returns were to be paid from 16.10.2020 and as per clause 4 of the MoU, the returns were to be paid till offer of possession. It is also submitted that as per clause 8 (a) of the MoU the responsibility to pay assured returns shall cease on the commencement of the first lease. Additionally, clause 9 of the MoU, the complainants had duly authorised the respondent to put the said unit on lease.

vii. That by no stretch of imagination it can be concluded that the complainants herein are "allottee/consumer." The complainants are simply investors who approached the respondent for investment opportunities and for a steady assured returns and rental income.

viii. That as the complainants in the present complaint are seeking the relief of assured return, which is not maintainable before the Authority upon enactment of the BUDS Act. Further, any orders or continuation of payment of assured return or any directions thereof may tantamount to contravention of the provisions of the BUDS Act.

ix. That the complainants in the present complaint are claiming the reliefs on basis of the terms agreed under the MoU between the parties which is a distinct agreement than the buyer's agreement and thus, the MoU is not covered under the provisions of the RERA Act, 2016. Thus, the said complaint is not maintainable on this basis that there exists no relationship of builder-allottee in terms of the MoU, by virtue of which the complainants are raising their grievance.

x. That as per clause 5.2 of the 'BBA', the respondent was obligated to complete the construction of the said complex within 36 months from the date of execution of the agreement or from start of construction, whichever

is later and apply for grant of occupancy/completion certificate. It is submitted that as per clause 5.4 of the agreement an additional 6 month grace period was allotted to the respondent post expiry of the aforesaid period. Accordingly, the due date of delivery of possession in the present case is 36 months + 6 months grace period to be calculated from 16.04.2019, and the due date of possession in the instant case comes out to be 16.10.2022.

xi. That the respondent issued demand request/reminder to the complainants to clear the outstanding dues against the booked unit. It is to be noted that the complainants miserably failed to comply the payment plan under which the unit was allotted to them and further on each and every occasion failed to remit the outstanding dues on time as and when demanded by the respondent. The complainants as per the records of the respondent had only paid Rs.46,80,885/- against the total due amount of Rs.50,44,556/-. It is to be noted that there is still an outstanding due of Rs.8,14,270/- which is to be paid by the complainants against the unit booked.

xii. That though the complainants may have cleared the basic sale price of the said commercial property, however, they are still liable to pay all other charges such as VAT, interest, registration charges, security deposit, duties, taxes, levies etc. as and when demanded.

xiii. That as per the agreement so signed and acknowledged, the completion of the said unit was subject to the midway hindrances which were beyond the control of the respondent and in case the construction of the said commercial unit was delayed due to such 'force majeure' conditions, the respondent was entitled for extension of time period for completion. It is to be noted that the development and implementation of the said project have been hindered on account of several orders/directions passed by various authorities/forums/courts which were beyond the power and control of the respondent. Due to the above reasons, the project in question got

delayed from its scheduled timeline. However, the respondent is committed to compete the said project in all aspect at the earliest.

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 these undisputed documents and submissions made by the parties.

E. Jurisdiction of the Authority:

8. The respondent has raised a preliminary submission/objection that the authority has no jurisdiction to entertain the present complaint. The objection of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial Jurisdiction

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E.II Subject-matter Jurisdiction

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

> ***Section 11(4)(a)***
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*

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

11. 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.

F. Findings on the objections raised by the respondent.

F. I Objection regarding the complainants being investor.

12. The respondent has taken a stand that the complainants are investors and not an allottee/consumer. Therefore, they are not entitled to the protection of the Act and is not entitled to file the complaint under section 31 of the Act. The Authority observes that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement dated 16.04.2019, it is revealed that the complainants are buyers, and they have paid total price of Rs.46,80,855/- to the promoter towards purchase of a unit in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

> *"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the agreement, it is crystal clear that the complainants are allottees as the subject unit was allotted to them by the promoter. Further, the concept of investor is not defined or referred in the Act. Moreover, the Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.*** has also held that the

concept of investor is not defined or referred in the Act. In view of the above, the contention of promoter that the allottees being investor are not entitled to protection of this Act stands rejected.

F. II Objection regarding force majeure conditions

13. The respondent/promoter has raised the contention that the construction of the project has been delayed due to force majeure circumstances such ban on construction due to orders passed by NGT, EPCA, Courts/Tribunals/Authorities etc. As per clause 5.2 & 5.4 of the agreement dated 16.04.2019, the possession of the unit in question was to be offered within a period of 36 months from the date of execution of buyer's agreement or start of construction whichever is later alongwith a grace period of 6 months. Accordingly, the due date of possession has been calculated as 36 months from the date of execution of buyer's agreement, being later. Further, a grace period of 6 months has already been granted to the respondent-promoter and thus, no period over and above grace period of 6 months can be given to the respondent-builder.

G. Findings on the relief sought by the complainants:

G.I To set aside cancellation and re-instate the unit.

G.II Direct the respondent to pay assured return as per clause 4 of MoU.

14. The complainants were allotted a unit bearing no. G-92, Ground Floor admeasuring super area of 661 sq. ft. in the project of the respondent named "Neo Square" situated at Sector-109, Gurugram vide buyer's agreement dated 16.04.2019 for a total sale consideration of Rs.51,42,923.72/- against which the complainants have paid a sum of Rs.46,80,855/- till date. The complainants have submitted that as per clause 4 of the MoU, the respondent had to pay returns/penalty of Rs.96,341/- per month on the unit in question with effect from 16.10.2020 till the time of offer of possession of the said unit. Further, by virtue of letter dated 01.02.2022, the respondent admitted that subject to some faults on its part, the occupation certificate is not yet obtained and therefore, they have withdrawn their application for grant of

occupation certificate filed before the DTCP, Haryana and further committed to adjust the payment of returns/penalty towards the outstanding payment at the time of offer of possession. Therefore, the respondent had to pay Rs.14,93,285.50/- and the balance outstanding on part of the complainants i.e., Rs.14,41,323.72/- would be adjusted. Hence, nothing remains payable on part of the complainants, instead an excess amount of Rs.51,934.78/- had been paid by them. Despite having the returns being adjusted and an excess payment already having been made by the complainants, the respondent sent a demand letter dated 29.06.2022 asking to clear the outstanding due of Rs.4,30,457/- before 15.07.2022. The complainants responded to the said letter of the respondent by virtue of e-mail dated 04.07.2022, wherein the complainants refuted the said demand of Rs.4,30,457/- as it was agreed that EDC/IDC and IFMS shall be paid at the stage of offer of possession as per the payment plan. While negotiation talks were being carried on in the presence of channel partner Mr. Bhatia, the complainants were asked to deposit Rs.9,79,285/- towards the unit in question, and accordingly, an amount of Rs.9,79,285/- had been deposited in the bank account of the respondent. Thus, no dispute/claims of outstanding demands remained pending. Thereupon, the respondent sent a letter dated 29.09.2022 informing the complainants of the change in unit from G-92 to G-09 on Ground Floor admeasuring super area 661 sq. ft. The said unit change was accepted by the complainants and pursuant to said change, there had been no communication on the part of the respondent and no further demand was raised to make any payment or whatsoever. However, acting contrary to the expectations of the complainants, the respondent sent a cancellation letter dated 12.02.2024, wherein they cited the non-payment of Rs.4,30,457/- as a ground for cancellation of the unit. The respondent has submitted that the complainants deliberately and intentionally failed to clear the outstanding dues against the unit. It is pertinent to mention that vide dues reminder letter

dated 29.06.2022, it was brought to the very knowledge of the complainants that there exist an outstanding due of Rs.4,30,457/- which was required to be paid on or before 15.07.2022, failing which the respondent would be compelled to consider this failure of complainants as breach of the terms and conditions of the builder buyer agreement. That upon the failure of the complainants to clear the outstanding dues, the respondent was constrained to cancel the unit vide cancellation letter dated 12.02.2024. However, due to a factual error and a clerical mistake, the respondent, instead of cancelling unit bearing no. G-09 on ground floor, which was the new revised unit, mistakenly cancelled unit bearing no. G-92 on ground floor, which was the old unit of the complainants. Now the question before the Authority is whether the cancellation made by the respondent vide letter dated 12.02.2024 is valid or not.

15. On consideration of documents available on record and submissions made by both the parties, the authority is of the view that on the basis of provisions of allotment, the complainants have paid an amount of Rs.46,80,855/- against the total sale consideration of Rs.51,42,923.72/-. The due date for handing over of possession as per clause 5.2 & 5.4 of the agreement was 16.10.2022 and the OC/CC of the project in question was received from the competent authorities on 14.08.2024. The respondent has contended that despite reminder letter dated 29.06.2022, the complainants have failed to clear their outstanding dues due to which their allotment was cancelled vide cancellation letter dated 12.02.2024. The Authority observes that as per the payment plan agreed between the parties vide agreement dated 16.04.2019, the total amount payable prior to possession/registration of the unit was Rs.46,43,287/- and an amount of Rs.4,99,636.68/- was payable at the time of possession/registration of the unit. However, in the instant case, the complainants have already paid a sum of Rs.46,80,855/- to the respondent back in May 2022 and the OC/CC of the project in question was obtained by

the respondent on 14.08.2024. Thus, the demand raised by the respondent vide reminder letter dated 29.06.2022 without any justification/bifurcation and even prior to receipt of occupation certificate cannot be held valid in the eyes of law. Moreover, the respondent vide letter dated 01.02.2022 had itself committed to adjust the payment of returns/penalty towards the outstanding payment at the time of offer of possession. In view of the above, cancellation made by the respondent vide letter dated 12.02.2024 in continuation of the reminder letter dated 29.06.2022 is hereby set aside.

16. The complainants in the present complaint are seeking an additional relief w.r.t payment of assured return as per the terms of the MoU dated 16.04.2019. The complainants have submitted that as per clause 4 of the MoU, the respondent had to pay returns/penalty of Rs.96,341/- per month on the unit in question with effect from 16.10.2020 till the time of offer of possession of the said unit.

17. At this stage, it is important to stress upon the definition of term allottee under the Act, 2016. The definition of "allottee" as per section 2(d) of the Act of 2016 provides that an allottee includes a person to whom a plot, apartment or building has been allotted, sold or otherwise transferred by the promoter. Section 2(d) of the Act of 2016 has been reproduced 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;"*

Keeping in view the above-mentioned facts and the definition of allottee as per Act of 2016, it can be said that the complainants are allottees.

18. The complainants are seeking unpaid assured returns on monthly basis as per the MOU dated 16.04.2019 at the rates mentioned therein. It is pleaded

by the complainants that the respondent has not complied with the terms and conditions of the said MoU.

19. The MoU dated 16.04.2019 can be considered as an agreement for sale interpreting the definition of the agreement for "agreement for sale" under section 2(c) of the Act and broadly by taking into consideration the objects of the Act. Therefore, the promoter and allottee would be bound by the obligations contained in the memorandum of understandings and the promoter shall be responsible for all obligations, responsibilities, and functions to the allottee as per the agreement for sale executed inter-se them under section 11(4)(a) of the Act. An agreement defines the rights and liabilities of both the parties i.e., promoter and the allottee and marks the start of new contractual relationship between them. This contractual relationship gives rise to future agreements and transactions between them. The "agreement for sale" after coming into force of this Act (i.e., Act of 2016) shall be in the prescribed form as per rules but this Act of 2016 does not rewrite the "agreement" entered between promoter and allottee prior to coming into force of the Act as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.,*** (Writ Petition No. 2737 of 2017) decided on 06.12.2017.

20. It is pleaded on behalf of respondent/builder that after the Banning of Unregulated Deposit Schemes Act of 2019 came into force, there is bar for payment of assured returns to an allottee. But the plea advanced in this regard is devoid of merit. Section 2(4) of the above mentioned Act defines the word '*d*eposit' as *an amount of money received by way of an advance or loan or in any other form, by any deposit taker with a promise to return whether after a specified period or otherwise, either in cash or in kind or in the form of a specified service, with or without any benefit in the form of interest, bonus, profit or in any other form, but does not include:*

(i) an amount received in the course of, or for the purpose of business and bearing a genuine connection to such business including
(ii) advance received in connection with consideration of an immovable property, under an agreement or arrangement subject to the condition that such advance is adjusted against such immovable properly as specified in terms of the agreement or arrangement.

A perusal of the above-mentioned definition of the term 'deposit', shows that it has been given the same meaning as assigned to it under the Companies Act, 2013 and the same provides under section 2(31) includes any receipt by way of deposit or loan or in any other form by a company but does not include such categories of, amount as may be prescribed in consultation with the Reserve Bank of India. Similarly rule 2(c) of the Companies (Acceptance of Deposits) Rules, 2014 defines the meaning of deposit which includes any receipt of money by way of deposit or loan or in any other form by a company but does not include:

(i) *as an advance, accounted for in any manner whatsoever, received in connection with consideration for on immovable property*
(ii) as an advance received and as allowed by any sectoral regulator or in accordance with directions of Central or State Government;

21. So, keeping in view the above-mentioned provisions of the Act of 2019 and the Companies Act 2013, it is to be seen as to whether an allottee is entitled to assured returns in a case where he has deposited substantial amount of sale consideration against the allotment of a unit with the builder at the time of booking or immediately thereafter and as agreed upon between them.

22. The Government of India enacted the Banning of Unregulated Deposit Schemes Act, 2019 to provide for a comprehensive mechanism to ban the unregulated deposit schemes, other than deposits taken in the ordinary course of business and to protect the interest of depositors and for matters connected therewith or incidental thereto as defined in section 2 (4) of the BUDS Act 2019.

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

builder promised certain amount by way of assured returns for a certain period. So, on his failure to fulfil that commitment, the allottee has a right to approach the authority for redressal of his grievances by way of filing a complaint.

24. The Authority under this Act has been regulating the advances received under the project and its various other aspects. So, the amount paid by the complainants to the builder is a regulated deposit accepted by the latter from the former against the immovable property to be transferred to the allottee later on. If the project in which the advance has been received by the developer from an allottee is an ongoing project as per section 3(1) of the Act of 2016 then, the same would fall within the jurisdiction of the authority for giving the desired relief to the complainant besides initiating penal proceedings. The promoter is liable to pay that amount as agreed upon. Moreover, an agreement/MoU defines the builder-buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allottee arises out of the same relationship and is marked by the said memorandum of understanding.

25. In the present complaint, the assured return was payable as per clause 4 of MoU, which is reproduced below for the ready reference:

> 4. *"The Company shall pay a Penalty of* ***Rs.96,341/-*** *(Rupees Ninety Six Thousand Three Hundred Forty One Only)* ***per month*** *on the said Unit, On the total amount received with effect from 16-Oct -2020 (Effective Date-II Subject to TDS, Taxes, cess or any other levy which is due and payable by the Allottee(s) and which shall be adjusted in Total Sale Consideration; the balance total sale consideration shall be payable by the Allottee(s) to the Company in accordance with the Payment Schedule annexed as Annexure-1. The penalty shall be paid to the Allottee(s) from end of effective date II* ***until the offer of possession letter date****, on prorata basis."*

Thus, the assured return was payable @Rs.96,341/- per month w.e.f. 16.10.2020, till the letter for offer of possession is issued to the complainants.

26. In light of the reasons mentioned above, the authority is of the view that as per the MoU dated 16.04.2019, it was obligation on the part of the respondent to pay the assured return. It is necessary to mention here that

the respondent has failed to fulfil its obligation as agreed inter se both the parties in MoU dated 16.04.2019. Accordingly, the liability of the respondent to pay assured return as per MoU is still continuing. Hence, the respondent/promoter is directed to pay assured return to the complainants at the agreed rate i.e., @Rs.96,341/- per month from the date i.e., 16.10.2020 till the offer of possession is issued to the complainants as per the memorandum of understanding dated 16.04.2019.

G.III Direct the respondent to put the unit on lease under clause 5 of MoU.
G.IV Direct the respondent to pay lease rental @119.25/- per sq.ft. per month and subject to other relevant terms and conditions specified in clause 8 (a) to clause 8 (d) of MoU.

27. The complainants are seeking additional reliefs w.r.t putting the unit on lease as well as lease rental under clause 5 and clause 8(a)-(d) of the MoU dated 16.04.2019. The Authority observes that vide clause 5 of the MoU, it was mutually agreed between the parties that the respondent/promoter will employ out of the way resources to facilitate the lease of the subject unit. Further, vide clause 8(a) of the MoU, it was agreed between the parties that the allottees shall also be entitled to receive the lease rentals at the assured lease of Rs.119.25/- per sq.ft. per month subject to other relevant terms and conditions specified in clause 8(a)-(d) of the MoU dated 16.04.2019. Since, the occupation certificate of the project in question has already been received by the respondent-promoter from the competent authority on 14.08.2024, the respondent is directed to put the unit allotted to the complainants on lease and to pay lease rental at the agreed rate as per the terms of the memorandum of understanding dated 16.04.2019.

F. Directions of the authority:

28. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

i. The cancellation letter dated 12.02.2024 is set aside.

ii. The respondent is directed to pay assured return to the complainants at the agreed rate i.e., @Rs.96,341/- per month from the date i.e., 16.10.2020 till the offer of possession is issued to the complainants as per the memorandum of understanding dated 16.04.2019.

iii. The respondent is directed to pay arrears of accrued assured return as per MoU dated 16.10.2020 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.

iv. The respondent is directed to offer possession of the subject unit to the complainants within a period of 60 days from the date of this order.

v. The respondent shall not charge anything from the complainants which is not the part of the BBA/MoU dated 16.04.2019.

vi. The complainants are directed to pay outstanding dues, if any, after adjustment of payable assured returns.

vii. The respondent is directed to put the unit allotted to the complainants on lease and to pay lease rental at the agreed rate as per the terms of the memorandum of understanding dated 16.04.2019.

29. Complaint stands disposed of.

30. File be consigned to registry.

Dated: 20.11.2024

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