BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**4282 of 2020**
Date of filing complaint:		**25.11.2020**
First date of hearing:		**11.01.2021**
Date of decision	**:**	**17.11.2021**

	S.K Mittal R/o: H.no K-1/07, Chitranjan Park, New Delhi-110019	**Complainant**
	Versus	
	M/s Neo Developers Private Limited R/o: 32 B, Pusa Road, New Delhi-110005	**Respondent**

CORAM:	
Dr. K.K Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Ashwariya Sinha (Advocate)	Complainant
Sh. Venket Rao (Advocate)	Respondent

ORDER

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

A. Unit and project related details

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

S.No.	Heads	Information
1.	Project name and location	"Neo Square" Sec 109, Dwarka Expressway, Gurugram
2.	Project area	3.06 acres
3.	Nature of the project	Commercial colony
4.	DTCP license no. and validity status	102 of 2008 dated 15.05.2008 valid up to 14.05.2022
5.	Name of licensee	M/s Shrimaya Buildcon Pvt. Ltd
6.	RERA Registered/ not registered	**Registered vide registration no. 109 of 2017 dated 24.08.2017**
	RERA Registration valid up to	**23.08.2021**
7.	Unit no.	Priority no. 24 A, 5th floor [Page no. 43 of complaint]
8.	Unit measuring (super area)	300 sq. ft.
9.	Date of allotment letter	N/A
10.	Date of execution of builder buyer agreement	05.01.2017 [Page no. 37 of complaint]
11.	Date of Memorandum of understanding	05.01.2017 [Page no. 63 of complaint]
12.	Date of commencement of construction of the project	The construction date has not provided in the file. The counsel for the respondent submitted

		that for the same project in other matters, the authority has decided the date of construction as 15.12.2015 which was agreed to be taken as date of start of construction.
13.	Payment plan	"Assured Return Plan" [Page 75 of the complaint]
14.	Total sale consideration	Rs. 12,30,000/- [Page 40 of the complaint]
15.	Total amount paid by the complainant	Rs. 14,89,050/- [As per account statement dated 18.11.2020 on page 72 of the reply]
16.	Due date of completion of construction	05.01.2020 **No specific due date of possession has been mentioned in the BBA OR MOU. But to safeguard the interest of allottee, a provision of assured return has been made which comes out to be more than the delayed possession charges applicable, if there was a stipulation of specific due date of possession and penalties/compensation applicable thereafter.**
17.	Possession clause	**Clause 3** of MOU 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 agreement or from the start of construction whichever is later. As the date of execution of agreement is later, accordingly period of 36

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		months is considered from the date of execution of agreement. Accordingly, the date of possession/completion of construction comes out to be 05.01.2020. However as per clause 5.2 of the BBA, construction completion date shall be deemed to be the date when application for grant of certificate is made. The completion/occupancy application for OC was moved on 29.02.2020 as per reply. The OC for the tower in which unit is situated has not been granted by DTCP so far. The possession of the unit can only be handed over once OC is granted.
18.	Offer of possession	Not offered
19.	Occupation Certificate	Not received
20.	Delay in delivery of possession	Can't be ascertained in view of provisions for assured return

B. Facts of the complaint:

3. That in the Jan 2017, the representative of the respondent approached the complainant and allured him to invest in the upcoming commercial project (fixed for food court & entertainment in the Neo Square) of the respondent upon the land for which license No. 102/2008 dated 15.05.2008 issued by the DTCP, Haryana while, in fact, no project, did exist as on that date. The representatives made lucrative offers of assured return and promised to deliver the possession of the unit in upcoming project of the respondent within 36 months from the date of execution of the agreement.

4. That believing on the assurances and representations given by the representatives of the respondent the complainant booked unit no. 24A having super area admeasuring 300 sq. ft, on 5th floor intended to be a food court at the project for basic sales consideration of Rs. 12,30,000/- @ Rs. 4100 per square feet under the assured return plan.

5. That, as per assured return plan, the complainant paid the booking amount of Rs. 2,50,000/- to the respondent vide receipt No. 0594/16-17 dated 14.09.2016 along with the application form for allotment of unit in the project. That as per assured return plan, the complainant paid Rs. 12,85,350/- to the respondent vide receipt no. 0692/16-17 dated 05.01.2017 towards balance amount of the total basic sale consideration including the service tax.

6. That after making the full payment of basic sale consideration by the complainant to the respondent, the respondent offered to sign & execute buyer's agreement (BBA) in respect of the said unit. The BBA offered to be signed and executed was one sided having all terms in favour of the respondent. After making the full payment of the basic sales consideration, the complainant, having no say in negotiating the terms of the BBA, just played in hands of the respondent and signed the BBA on 05.01.2017. A memorandum of undertaking (MOU), supplement to the BBA, was also executed between the complainant and the respondent on 05.01.2017, under the scheme of "Assured Return Plan" for an assured monthly payment of Rs. 19,500/- by the respondent to the complainant with effect from the date of execution BBA with

supporting MOU, on 05.01.2017. That the complainant paid Rs. 1,42,200/- to the respondent vide cheque no. 307247 dated 03.10.2017 towards EDC and IDC. Further to this, the respondent demanded VAT @ 5% on Rs. 12,30,000 on 30.03.2017 and the complainant paid to the respondent the required amount of Rs. 61,500/- vide receipt No. 0929/17-18 dated 15.05.2017 towards VAT. Thus, the complainant paid total amount of Rs. 14,89,050/- to respondent towards 100% sales consideration (including EDC, IDC, Service Tax & VAT) of the unit no. 24 A booked by the complainant in the project.

7. It is pertinent to mention here that in term of the BBA read with clause 3 of the supporting MOU, it is specifically mentioned that the company shall complete the construction of the project within 36 months from the date of execution of the BBA & MOU. The complainant visited the site in August 2020 and recently on 02.11.2020 The complainant was shocked to see the construction progress which is very far from the completion. The construction of the building, wherein the unit of the complainant situated has reached up to the casting of 2nd floor only and construction of the said building standstill. It is vital to note that no explanation with regard to delay in construction has been provided by the respondent to the complainant yet.

8. That as per clause 4 of the MOU executed with the BBA, the respondent was liable to pay a monthly assured return of Rs. 19,500/- staring from date of execution of MOU. Clause 4 of the MOU stipulates that -

> *".....The Company shall pay a monthly assured return of Rs. 19,500/- on the total amount received with effect from*

05 January, 2017 before deduction of Tax at source and service tax, cess or any other levy which is due and payable by the Allottee (s) to the Company..... . The monthly assured return shall be paid to the Allottee(s) until the commencement of the first lease on the said unit. ....."

It is pertinent to mention here that the respondent paid the monthly assured return up to June 2019 only and thereafter stopped to make the monthly assured return without any reason. The complainant requested the respondent many times to release the outstanding dues of the monthly assured return, but all went in vain.

9. That the respondent has changed the building plans of the project without keeping the allottees in loop. The last revised building plan approved on 16.10.2019 by DTCP. The respondent never informed and nor took NOC from the allotees for change in the building plans. This is clear violation of section 14 of the Act. The BBA signed with MOU, the respondent has inserted clause for non-information of any change or alteration in the layout and building plan by the respondent to the complainant to suppress the rights of the complainant. As per clause 5.1-

"..... The Company at its discretion without any prior approval from the allottee may carry out such additions, alterations, deletions, and modifications in the layout and building plans including the number of floors as the Company may consider necessary or maybe required by any competent authority to be made in them or any of them while sanctioning the building plans or at any time thereafter. The Allotee agrees that no future consent of the allottee shall be required for this purpose. Alterations may inter-alia involve all or any of the changes in the said complex such as change in position of the said space, change in its dimensions, change in its area or change in its number or change in the height of the building, change in the number of floors, change in zoning or change in usage.

The Allottees has also given the separate NOC reflecting the consent to carry out the modifications/ alterations and the same is annexed

as Annexure-II. That to implement all or any of the above changes, if necessitated the intimation of the same shall be provided to the allotees by the Company, however, if the change is after the execution of the sale deed in favour of the Allottee then the supplementary sale deed or deed(S) if necessary will be got executed and registered by the Company. If, as a result of the abovementioned alterations prior to execution of sale deed, there is either a reduction or increase in super area of the said space or change in its location, no claim no monetary or otherwise will be raised or accepted except that the agreed rate per Sq ft. and other charges will be applicable for the changed area i.e. at the same rate at which the said space was allotted and as a consequence of such reduction or increase in the super area, the Company shall be liable to refund without interest only the extra price and other pro-rata charges recovered or shall be entitled to recover from the Allottees additional price and other proportionate charges without any interest as the case maybe. If the change is in after the execution of the sale deed, then either way no monies would be demanded or paid or claimed by both the parties.

It is pertinent to note that the respondent also got signed the NOC, attached with the BBA, in advance by the complainant. Forcing the buyers to sign such NOC depicts nothing but the mala fide intention of the respondent from the very starting

10. That the complainant was subjected to unethical trade practices as well as subject of harassment, BBA clause of rental income, not mentioning of details fitting and fixture of unit & many hidden charges, as tactics and practice, used by the respondent are biased, arbitrary and discriminatory.

11. The complainant was allured by a scheme of "assured return plan" wherein respondent was informed that the basic sale price for the space in the food court/ entertainment area on 5th floor would be Rs. 4100/- per sq. ft. It was informed that on payment of Rs. 12,30,000/-, the respondent would be entitled for this scheme which turned to be a hoax and fraud. Believing the plain words of

respondent in utter good faith, the complainant was duped of their hard-earned monies which they saved from bonafide resources.

12. From the above it is abundantly clear that the respondent has shown the rosy picture about project and committed rental income & sold the unit in 2017, extracted the amount of Rs 14,89,050/- from innocent buyer by giving false milestone and commitment and wish to done by executing illegal, unilateral, one-sided BBA Agreement.

13. That the respondent collected govt. dues from the complainant at the time of booking and execution of BBA in calendar year 2017 and also collected the EDC, IDC, VAT in the calendar year 2017 yet respondent continued demanding VAT in calendar year 2020 on account of ambiguity and confusion . The charge being illegal and forceful is just a mala fide intention of the respondent to loot the complainant.

14. That the respondent company, under the guise of being a reputed builder and developer, has perfected a system through organized tools and techniques to cheat and defraud the unsuspecting, innocent and gullible public at large. The respondent informed the complainant that they have already entered into agreements with brands like Pizza Hut, McDonald's, KFC, Nike etc. The respondent further claimed that INOX cinema would be opening a nine-screen multiplex with gold class in the project.

15. That the respondent sent lease proposal document vide No. NEOD/NS01/ 411 which is yet another hoax to cheat the complainant as without completion of the construction work of the tower wherein the said unit no. 24A booked by the

complainant, there arises no question of leasing out. This was yet another attempt at the part of respondent to relieve themselves from the obligation of payment of assured return. The unit can be leased out only after receiving the completion certificate of the project.

C. Relief sought by the complainant:

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

    i. Direct the respondent to immediately handover the possession of the unit with all amenities as mentioned in the brochure.

    ii. Pass an order for delay interest on paid amount of Rs.14,89,050/- alongwith pendent lite and future interest till actual possession thereon @ 18%.

    iii. Direct the respondent to quash the VAT charges.

D. Reply by respondent

17. That at the outset, it is relevant to state that Neo Developers Pvt. Ltd is a company registered under the Companies Act, 1956 having its registered office at 32B, Pusa Road, New Delhi-110005 and corporate office at 12the Floor, Tower B, Signature Tower, Gurugram-122001 being promoter of the project titled as "Neo Square" in Sector -109 , Dwarka Express way, Gurugram is engaged in the business of the development and construction of the real estate projects and is one of the reputed names in the real estate sector in the State of Haryana.

18. That at the very outset, it is stated that the instant complaint has been preferred by the complainant on frivolous and unsustainable grounds and the complainant has not approached this learned

authority with clean hands. The instant complaint is not maintainable in the eyes of law and is devoid of merit and is fit to be dismissed in limine.

19. That the present complaint is an abuse of the process of this Hon'ble authority and is not maintainable. The complainant is trying to suppress material facts relevant to the matter. The complainant is making false, misleading, frivolous, baseless, unsubstantiated allegations against the respondent with malicious intent and sole purpose of extracting unlawful gains from the respondent.

20. It is submitted that the complaint is devoid of merits and should be dismissed with costs. The present complaint is filed with the oblique motive of harassing the respondent company and to extort illegitimate money while making absolutely false and baseless allegations against the respondent.

Retrospective Application of provisions of RERA Act, 2016 is unconstitutional

21. That the buyer's agreement dated 05.01.2017 was executed between the complainant and the respondent prior to fully coming into force of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as "RERA Act, 2016"). The terms of this agreement were as per the applicable laws at that point of time.

22. That the delay penalty, if any, that can be claimed from the respondent is only as per the terms and conditions of the buyer's agreement. If delay penalty is awarded in addition to the prescribed rate as per the buyer's agreement, then the differential

amount will be in the nature of "Compensation". It is most humbly submitted that, awarding of compensation is not within the jurisdiction of the Ld. authority.

23. That it is further submitted that if a project registered with RERA, it can be held liable only for future deadlines, those it might breach after registration with the authority. Any default before the registration is beyond the ambit of RERA and beyond the purview of the RERA Act, 2016 and hence beyond the jurisdiction of the Ld. Authority. It is submitted that in this particular case the obligation of the promoter to complete the project as per RERA registration is 23.08.2021.

No Cause of Action - Complaint is Pre-mature/Infructuous

24. It is submitted that the complaint is devoid of cause of action and merits as the due date of possession of the said commercial space, in coherence with the registration certificate granted by this Ld. Authority at the time of project registration by way of registration no. 109/2017 is 23.08.2021. Therefore, in the light of the said fact the reliefs sought by the complaint are not just out of place and but wholly infructuous.

25. That as per clause 5.2 of the buyer's agreement, it was agreed between the complainant and the respondent that the construction completion date shall be deemed to be the date when the application for grant of occupancy certificate is made. Clause 5.2 of the buyer's agreement is reiterated for ready reference:

> *"5.2 That the construction completion date shall be deemed to be the date when the application for grant of completion/occupancy certificate is made."*

Occupancy Certificate Applied Dated 24.02.2020

26. That it is brought to the attention of this Hon'ble Authority that the respondent herein has already applied for the issuance of the occupation certificate by way of application dated 24.02.2020 and the same is pending before the concerned competent authority. Further, the respondent has received "Approval of Fire Fighting Scheme" on 24.04.2020. Therefore, it cannot be concluded by any stretch of imagination that the respondent has not shown due prudence in the timely execution of the project. But the complainant has conveniently ignored all these facts and has chosen to harp upon baseless and ill-founded allegations in the present complaint in order to take the benefit of his own wrong. Therefore, the said complaint is liable to be dismissed with costs.

27. It is further submitted that as per clause 3 of the memorandum of understanding (hereinafter referred to as "MOU") dated 05.01.2017 the construction of the said building/complex, within which the space of the complainant is located, is to be completed within 36 months from the date of execution of the MOU or from start of construction, whichever is later, subject to force majeure conditions. It is humbly submitted that the respondent is well within its timeline for completion and even keeping the on-going covid situation has maintained the timeline of delivery and has accordingly applied for the occupation certificate. Therefore, it is most humbly submitted that the due date of possession has not arisen, and the complaint is premature.

No relation of Builder-Buyer between the complainant and respondent

28. Further it is brought to the attention of this Hon'ble authority that the MOU dated 05.01.2017 clearly states at Recital 4 that the complainant herein "warrants and represents that he is not an end user and is an investor". The said para is reproduced herein:

> *"AND WHEREAS the Allottee(s) has approached the Company and shown interest in the said Project. The allottee further warrants and represents that he is not an end user and is an investor and consequently the allottee has opted for the "Assured Return Plan".*

29. That the reading of the abovementioned clause from the MOU clearly stipulates that the relationship of the complainant and respondent is not that of a builder-buyer to the extent of timely delivery of possession, therefore there arise no grounds that can be adjudicated by this forum. Therefore, the complaint deserves to be dismissed at the very outset for want of jurisdiction.

30. It is noteworthy that the complainant had entered into two different agreements with the respondent, namely, buyer's agreement and memorandum of understanding. Both the agreements are two distinct and different agreements. Buyer's agreement is a builder buyer agreement which casts various obligations on the promoter to complete and deliver a real estate project. However, the MOU only pertains to the assured return. That there may be cross references between two agreements or certain clauses maybe superseding each other. However, such cross reference or supersession does not amount to novation and thus both these agreements cannot be read to be one single agreement. Each agreement has their own distinct liability, obligations and terms and conditions imposed on the parties and are confined to that specific agreement only.

Jurisdiction of the Authority – Arbitration Clause

31. That it is submitted that the complaint at hand is not maintainable before this Hon'ble authority, as this authority is barred by the presence of an arbitration clause i.e. **clause 17** of the MOU which clearly provides :

> *"That in case of any dispute/ difference between the parties, including in respect of interpretation of the present Agreement, the same shall be referred to arbitration of a sole arbitrator appointed by the parties mutually. The venue of Arbitration shall be New Delhi and the language of arbitration shall be English. The Cost of arbitration shall be borne jointly by parties. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996."*

Complainant's own Wrongs – Dues Pending

32. That it is pertinent to note herein that the buyer's agreement in clause 4.4, 4.5 and 4.6 executed between the parties clearly stipulates that the entire relationship of the builder and the complainant herein is founded on timely payments by the complainant and the complainant being in default of the same cannot complain about the incapacity of the respondent to timely complete the project. Further it is brought to the attention of the authority that though the complainant may have cleared the basic sale price of the said commercial property, there exist vast outstanding amounts to the tune of Rs. 1,57,592/- inclusive of GST, EDC/IDC & VAT, that stand due and payable on part of the complainant till date. Further, the complainant is also liable to pay stamp duty and registration charges, which shall be payable at the time of registration based on prevailing rates along with third party charges including govt. charges and taxes, fitout charges as applicable, shall be extra. The same can be perused from the statement of accounts. That in the light of the facts mentioned herein, the complainant cannot be allowed to take the benefit of

his own wrong. Therefore, the complaint shall be dismissed right at the very outset.

Payment of Assured Return

33. It is submitted that the respondent has already paid, as assured return, an amount of Rs. 5,24,160/- to the complainant till date.

BANNING OF UNREGULATED DEPOSIT SCHEMES ACT, 2019

34. It is noteworthy in the present situation, that in order to provide a comprehensive mechanism to ban the unregulated deposit schemes, other than the deposits taken in the ordinary course of business, Parliament has passed an act titled as "The Banning of Unregulated Deposit Schemes Act, 2019" (hereinafter referred to as "**BUDS Act**").

35. As per Sub-Section 4 of Section 2 of the BUDS Act provides that deposit means:

> *"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—*
>
> *(a) amounts received as loan from a scheduled bank or a co-operative bank or any other banking company as defined in section 5 of the Banking Regulation Act, 1949;*
>
> *(b) amounts received as loan or financial assistance from the Public Financial Institutions notified by the Central Government in consultation with the Reserve Bank of India or any non-banking financial company as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 and is registered with the Reserve Bank of India or any Regional Financial Institutions or insurance companies;*
>
> *(c) amounts received from the appropriate Government, or any amount received from any other source whose repayment is guaranteed by the appropriate Government, or any amount received from a statutory authority constituted under an Act of Parliament or a State Legislature; (d) amounts received from*

foreign Governments, foreign or international banks, multilateral financial institutions, foreign Government owned development financial institutions, foreign export credit collaborators, foreign bodies corporate, foreign citizens, foreign authorities or person resident outside India subject to the provisions of the Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder; (e) amounts received by way of contributions towards the capital by partners of any partnership firm or a limited liability partnership;

(f) amounts received by an individual by way of loan from his relatives or amounts received by any firm by way of loan from the relatives of any of its partners;

(g) amounts received as credit by a buyer from a seller on the sale of any property (whether movable or immovable);

(h) amounts received by an asset re-construction company which is registered with the Reserve Bank of India under section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;

(i) any deposit made under section 34 or an amount accepted by a political party under section 29B of the Representation of the People Act, 1951;

(j) any periodic payment made by the members of the self-help groups operating within such ceilings as may be prescribed by the State Government or Union territory Government;

(k) any other amount collected for such purpose and within such ceilings as may be prescribed by the State Government;

(l) an amount received in the course of, or for the purpose of, business and bearing a genuine connection to such business including—

(i) payment, advance or part payment for the supply or hire of goods or provision of services and is repayable in the event the goods or services are not in fact sold, hired or otherwise provided;

(ii) advance received in connection with consideration of an immovable property under an agreement or arrangement subject to the condition that such advance is adjusted against such immovable property as specified in terms of the agreement or arrangement;

(iii) security or dealership deposited for the performance of the contract for supply of goods or provision of services; or

(iv) an advance under the long-term projects for supply of capital goods except those specified in item (ii): Provided that if the amounts received under items (i) to (iv) become refundable, such amounts shall be deemed to be deposits on the expiry of fifteen days from the date on which they become due for refund:

Provided further that where the said amounts become refundable, due to the deposit taker not obtaining necessary permission or approval under the law for the time being in force, wherever required, to deal in the goods or properties or services for

which money is taken, such amounts shall be deemed to be deposits.."

36. It is also provided that in respect of a respondent, "*deposit*" shall have the same meaning as assigned to it under the Companies Act, 2013. Sub Section 31 of Section 2 of the Companies Act provides that "deposit" includes any receipt of money by way of deposit or loan or in any other form by a respondent but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India. The companies (Acceptance of Deposits) Rules, 2014(herein after referred to as "***deposit rules***") in sub – rule 1(c) of Rule 2 sets out what is not included in the definition of deposits.

37. One of the amounts as set out in sub rule (1)(c)(xii)(b) of Rule 2 of the Deposit Rules (i.e. which is not a deposit) is an advance, accounted for in any manner whatsoever, received 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. Therefore, the agreements of these kinds, may, after 2019, and if any assured return is paid thereon or continued therewith may be in complete contravention of the BUDS Act,2019.

38. It is submitted that the respondent has adopted general advertisement practice and not made any lucrative offers and only adopted legal practices in the form of assured returns, which was not under dispute at that point of time. The complainant in fact approached the respondent with the willingness to book a unit in the project of the respondent for investment purposes.

39. However, it is pertinent to mention here that the complainant was still liable to pay stamp duty, registration fee, maintenance charges, service tax, VAT, BOCW cess, other charges including taxes as required by law.

40. However, it is vehemently denied that the said buyer's agreement is one-sided, and the complainant has no say in negotiating the terms of the agreement. It is humbly submitted that the terms of the agreement are in compliance of the rules laid down by the Ld. Haryana Real Estate Regulatory Authority. Further, the complainant signed the buyer's agreement after being fully satisfied with all the terms and conditions and after due negotiation and several rounds of discussion between the complainant and the respondent company. Further, it is also submitted that the complainant was never pressurized by the respondent to sign any agreement and all the documents were signed and executed under the free will and consent of the complainant. Further, the complainant wanted to invest in the said unit and hence opted for the assured return plan and executed the MOU dated 05.10.2016 by own volition.

41. It is pertinent to mention that the covenants incorporated in the buyer's agreement are to be cumulatively considered in their entirety and selected clauses of the same cannot be considered in isolation. The time period for handing over the possession of the said unit to the complainant was is subject to various conditions being fulfilled by the complainant. In fact, the complainant has completely misinterpreted and misconstrued the covenants incorporated in the buyer's agreement. No rigid or fixed timeline

for execution of the project and delivery of physical possession of the apartment was incorporated or provided in the buyer's agreement. The indicated timelines contained in the MOU were subject to occurrence of various eventualities and to other circumstances mentioned therein which have not been reproduced for the sake of brevity. This issue has already been addressed in the preliminary submissions and not reiterated here for the sake of brevity.

42. However, it is submitted that the respondent has already paid, as assured return, an amount of Rs. 5,24,160/- the complainant till date. Further, the Central Government vide The Banning of Unregulated Deposit Scheme Act, 2019 made such assured return as illegal. Therefore, the agreements of these kinds, may, after 2019, and if any assured return is paid thereon or continued therewith may be in complete contravention of the BUDS Act.

43. It is submitted that the respondent has executed the buyer's agreement along with the NOC under the free will of the complainant and only after several round of discussions held between the parties. The recital of the buyer's agreement clearly mentions that the area allotted is tentative and subject to change at the time of approval of building plans and completion of the project. The compliant had also confirmed that he has applied for the said space with full knowledge of the terms and conditions. Further, it is submitted that the clause 5.1 of builder buyer's agreement states as follows:

> *"5.1 That the Company shall be authorized by the allottee to carry out the construction as per design finalized by the management of the company and no approval of the allottee shall be required for the same. The company at its*

discretion without any prior approval from the allottee may carry out such additions, alterations, deletions and modifications in layout and building plans including the number of floors as the Company may consider necessary or may be required by any competent authority to be made in them or any of them while sanctioning the building plans or at any time thereafter....."

However, it is to be made clear that the respondent never forced the buyers to sign NOC and there is absolutely no malafide intention on the part of the respondent.

It is submitted that the terms of BBA and MOU are not at all one sided. It is submitted that the complainant with his malicious intention had only brought the clauses on the record which supported him but has failed to notice other clauses embodied under the same buyer's agreement. It is submitted that as per of the builder buyer agreement the respondent company will not be held liable for delay in handing over the possession if it is caused due to reasons beyond the control of the respondent and the date of possession shall stand automatically extended, without any further act or deed on the part of the company, by the period during the force majeure event. Therefore, it is denied that the respondent company has miserably failed in handing over the possession of the unit. It is submitted that the complainant is not entitled to get the compensation for the delay of the unit since there is no delay in the project pertaining to the complainant and the present compliant is premature.

E. Written arguments filed by both the parties

44. Both the parties have filed their written arguments. The complainant has submitted the written arguments on 15.07.2021 in the court and the respondent has submitted their written

arguments on 28.07.2021 in compliance of order dated 15.07.2021 and reiterated their earlier version as contended in the pleadings.

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

F. Jurisdiction of the authority:

46. The plea 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.

F. I Territorial jurisdiction

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.

F. II Subject matter jurisdiction

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.

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

G. Findings on the objections raised by the respondent:

G.I Objection regarding complainant is in breach of agreement for non-invocation of arbitration.

47. The respondent has raised an objection that the complainant has not invoked arbitration proceedings as per the provisions of flat buyer's agreement which contains provisions regarding initiation of arbitration proceedings in case of breach of agreement. The following clause has been incorporated w.r.t arbitration in the buyer's agreement:

"Clause 22: That in case of any dispute/ difference between the parties, including in respect of interpretation of the present agreement, the same shall be referred to arbitration of a sole arbitrator appointed by the parties mutually. The venue of arbitration shall be New Delhi and the language of arbitration shall be English. The costs of arbitration shall be borne jointly by parties. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1966.

48. The respondent contended that as per the terms & conditions of the application form duly executed between the parties, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional booked unit by the complainant, the same shall be adjudicated through arbitration mechanism. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainant and builders could not circumscribe the

jurisdiction of a consumer. The relevant paras are reproduced below:

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -*
>
> *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
>
> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.*
>
> *...*
>
> *56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainant and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."*

49. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the Hon'ble Supreme Court in case titled as ***M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017*** **decided on 10.12.2018** has

upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant para of the judgement passed by the Supreme Court is reproduced below:

> *"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."*

Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainant is well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act,1986 and Act of 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily

H. Findings regarding relief sought by the complainant:

H.1 Direct the respondent to give delay possession interest on paid amount of Rs.14,89,050/- alongwith pendent lite and future interest till actual possession thereon @18%.

50. While filing the claim petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 05.01.2017, the claimant has also sought assured returns of Rs.19,500/- on monthly basis i.e. 05.01.2017 until the commencement of first lease deed as per clause 4 of memorandum of understanding dated 05.01.2017. It is pleaded that the respondent has not complied with the terms and conditions of the agreement. Though for some time the amount of assured return was paid but later on, the respondent refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019 (herein after referred to as the Act of 2019). But that Act does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act. The plea of respondent is otherwise and who took a stand that though it paid the amount of Rs.5,24,160 as assured returns as promised vide memorandum of understanding but did not pay the same amount after coming into force of the Act of 2019 as it was declared illegal. Clause 4 of the Memorandum of understanding stipulates that -

> *"..... The Company shall pay a monthly assured return of Rs. 19,500/- on the total amount received with effect from 05 October, 2016 before deduction of Tax at source and service tax, cess or any other levy which is due and payable by the Allottee (s) to the Company..... . The monthly assured return shall be paid to the Allottee(s) until the commencement of the first lease on the said unit.*

51. An MoU can be considered as an agreement for sale interpreting the definition of the "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 understanding 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 different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral part of this agreement is the transaction of assured return inter-se parties. The "agreement for sale" after coming into force of this Act (i.e., Act of 2016) shall be in the prescribed form as per rules but 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. Since the agreement defines the buyer-promoter relationship therefore, it can be said that the agreement for assured returns between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate authority has complete jurisdiction to deal with assured return cases as the contractual relationship arise out of agreement for

sale only and between the same parties as per the provisions of section 11(4)(a) of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the agreement for sale till the execution of conveyance deed of the unit in favour of the allottee. Now, three issues arise for consideration as to:

i. Whether authority is within the jurisdiction to vary its earlier stand regarding assured returns due to changed facts and circumstances.

ii. Whether the authority is competent to allow assured returns to the allottees in pre-RERA cases, after the Act of 2016 came into operation.

iii. Whether the Act of 2019 bars payment of assured returns to the allottees in pre-RERA cases.

52. While taking up the cases of ***Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd. (complaint no 141 of 2018)***, and ***Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP"*** (complaint no 175 of 2018) decided on 07.08.2018 and 27.11.2018 respectively, 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. However, there is no bar to take a different view from the earlier one if new facts and law have been brought before an adjudicating authority or the court. There is a

doctrine of ***"prospective overruling"*** and which provides that the law declared by the court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. A reference in this regard can be made to the case of ***Sarwan Kumar & Anr Vs. Madan Lal Aggarwal*** Appeal (civil) 1058 of 2003 decided on 06.02.2003 and wherein the hon'ble apex court observed as mentioned above. So, now the plea raised with regard to maintainability of the complaint in the face of earlier orders of the authority in not tenable. The authority can take a different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. It is now well settled preposition of law that when payment of assured return is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum , memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement for sale defines the builder-buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allotee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arises out of the agreement for sale only and between the same contracting parties to agreement for sale. In the case in hand, the issue of assured return is on the basis of

contractual obligations arising between the parties. Then in case of ***Pioneer Urban Land and Infrastructure Limited & Anr. v/s Union of India & Ors.*** (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019, it was observed by the Hon'ble Apex Court of the land that "*...allottees who had entered into "assured return/committed returns' agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of agreement till the date of handing over of possession to the allottees*". It was further held that 'amounts raised by developers under assured return schemes had the "commercial effect of a borrowing' which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code" including its treatment in books of accounts of the promoter and for the purposes of income tax. Then, in the latest pronouncement on this aspect in case ***Jaypee Kensington Boulevard Apartments Welfare Association and Ors. vs. NBCC (India) Ltd. and Ors.*** (24.03.2021-SC): MANU/ SC/0206 /2021, the same view was followed as taken earlier in the case of ***Pioneer Urban Land Infrastructure Ld & Anr.*** with regard to the allottees of assured returns to be financial creditors within the meaning of section 5(7) of the Code. Moreover, after coming into force the Act of 2016 w.e.f 01.05.2017, the builder is obligated to register the project with the authority being an ongoing project as per proviso to

section 3(1) of the Act of 2017 read with rule 2(o) of the Rules, 2017. The Act of 2016 has no provision for re-writing of contractual obligations between the parties as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.,*** (supra) as quoted earlier. So, the respondent/builder can't take a plea that there was no contractual obligation to pay the amount of assured returns to the allottee after the Act of 2016 came into force or that a new agreement is being executed with regard to that fact. When there is an obligation of the promoter against an allottee to pay the amount of assured returns, then he can't wriggle out from that situation by taking a plea of the enforcement of Act of 2016, BUDS Act 2019 or any other law.

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

   i. *an amount received in the course of, or for the purpose of, business and bearing a genuine connection to such business including—*
   ii. *advance received in connection with consideration of an*

immovable property under an agreement or arrangement subject to the condition that such advance is adjusted against such immovable property as specified in terms of the agreement or arrangement.

54. 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 an immovable property.
ii. as an advance received and as allowed by any sectoral regulator or in accordance with directions of Central or State Government.

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 return 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.

55. 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 mentioned above.

56. It is evident from the perusal of section 2(4)(l)(ii) of the above-mentioned Act that the advances received in connection with consideration of an immovable property under an agreement or arrangement subject to the condition that such advances are adjusted against such immovable property as specified in terms of the agreement or arrangement do not fall within the term of deposit, which have been banned by the Act of 2019.

57. Moreover, the developer is also bound by promissory estoppel. As per this doctrine, the view is that if any person has made a promise and the promisee has acted on such promise and altered his position, then the person/promisor is bound to comply with his or her promise. When the builders failed to honor their commitments, a number of cases were filed by the creditors at different forums such *as* ***Nikhil Mehta, Pioneer Urban Land and Infrastructure*** which ultimately led the central government to enact the Banning of Unregulated Deposit Scheme Act, 2019 on 31.07.2019 in pursuant to the Banning of Unregulated Deposit Scheme Ordinance, 2018. However, the moot question to be decided is as to whether the schemes floated earlier by the builders and promising as assured returns on the basis of allotment of units are covered by the abovementioned Act or not. A similar issue for consideration arose before Hon'ble RERA Panchkula in case ***Baldev Gautam VS Rise Projects Private***

***Limited* (*RERA-PKL-2068-2019*)** where in it was held on 11.03.2020 that a builder is liable to pay monthly assured returns to the complainants till possession of respective apartments stands handed over and there is no illegality in this regard.

58. The definition of term 'deposit' as given in the BUDS Act 2019, has the same meaning as assigned to it under the Companies Act 2013, as per section 2(4)(iv)(i) **i.e.**, explanation to sub-clause (iv). In pursuant to powers conferred by clause 31 of section 2, section 73 and 76 read with sub-section 1 and 2 of section 469 of the Companies Act 2013, the Rules with regard to acceptance of deposits by the companies were framed in the year 2014 and the same came into force on 01.04.2014. The definition of deposit has been given under section 2 (c) of the above-mentioned rules and as per clause xii (b), as advance, accounted for in any manner whatsoever received in connection with consideration for an immovable property under an agreement or arrangement, provided such advance is adjusted against such property in accordance with the terms of agreement or arrangement shall not be a deposit. Though there is proviso to this provision as well as to the amounts received under heading 'a' and 'd' and the amount becoming refundable with or without interest due to the reasons that the company accepting the money does not have necessary permission or approval whenever required to deal in the goods or properties or services for which the money is taken, then the amount received shall be deemed to be a deposit under these rules however, the same are not applicable in the case in hand. Though it is contended that there is no necessary permission or approval to take the sale consideration as advance and would be

considered as deposit as per sub-clause 2(xv)(b) but the plea advanced in this regard is devoid of merit. First of all, there is exclusion clause to section 2 (xiv)(b) which provides that unless specifically excluded under this clause. Earlier, the deposits received by the companies or the builders as advance were considered as deposits but w.e.f. 29.06.2016, it was provided that the money received as such would not be deposit unless specifically excluded under this clause. A reference in this regard may be given to clause 2 of the First schedule of Regulated Deposit Schemes framed under section 2 (xv) of the Act of 2019 which provides as under: -

> *(2) The following shall also be treated as Regulated Deposit Schemes under this Act namely: -*
>
> *(a) deposits accepted under any scheme, or an arrangement registered with any regulatory body in india constituted or established under a statute; and*
>
> *(b) any other scheme as may be notified by the Central Government under this Act.*

59. 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 return 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.

60. It is not disputed that the respondent is a real estate developer, and it had obtained registration under the Act of 2016 for the project in question on 24.08.2017. 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 complainant to the builder is a regulated deposit accepted by the later from the former against the immovable property to be transferred to the allottee later on. 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.

61. 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 returns. 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.

62. Now, the proposition before the authority is as to whether an allottee who is getting/entitled for assured return even after expiry of due date of possession, is entitled to both the assured return as well as delayed possession charges?

To answer the above proposition, it is worthwhile to consider that the assured return is payable to the allottee on account of a provision in the BBA or in a MoU having reference of the BBA or an addendum to the BBA/MoU or allotment letter. The assured return in this case is payable from 05.01.2017 until the commencement of the first lease of the said unit as per clause 4 of MOU. The promoter has committed to pay monthly assured return of Rs.19,500 which is more than reasonable in the present

circumstances. If we compare this assured return with delayed possession charges payable under proviso to section 18 (1) of the Real Estate (Regulation and Development) Act, 2016, the assured return is much better i.e. the assured return in this case is payable as a sum of Rs.19,500 monthly whereas the delayed possession charges are payable at the rate of 9.30% per annum. By way of assured returns, the promoter has assured the allottee that he will be entitled for this specific amount till the commencement of the first lease. Accordingly, the interest of the allottee is protected even after the due date of possession is over as the assured returns are payable till commencement of the first lease. The purpose of delayed possession charges after due date of possession is over and payment of assured return after due date of possession is over as the same to safeguard the interest of the allottee as his money is continued to be used by the promoter even after the promised due date and in return, he is being paid either the assured return or delayed possession charges whichever is higher.

Accordingly, the authority decides that in cases where assured return is reasonable and comparable with the delayed possession charges, allottee is entitled under section 18 and is payable even after due date of possession is over till offer of possession then after due date of possession is over, the allottee shall be entitled only assured return or delayed possession charges whichever is higher without prejudice to any other remedy including compensation.

Considering the above-mentioned facts, as per clause 5.2 of the BBA dated 05.01.2017, the construction completion date of the project was to be counted as the due date of filling application for grant of completion/occupancy certificate but the same was to be applicable in case the allottee receives possession in terms of clause 10.2 of MOU dated 05.01.2017 entered into between the parties. A further perusal of clause 3 of MOU shows the due date for completion of construction as 36 months from the date of execution of that document or from the date of start of construction whichever is later and apply for grant of completion/occupancy certificate. So, calculated as per that clause the due date for completion of project of the allotted unit comes to be 05.01.2020. No doubt the respondent applied for OC of the project on 24.02.2020 but the same has not been received up to now. There is a separate provision in the MOU with regard to assured return and an amount of Rs.5,24,160 has been admittedly paid to the complainant as per account statement dated 18.11.2020.

63. The counsel for the complainant was specifically asked whether there is any specific mention of due date of possession and the answer was in the negative. This is a peculiar case where no specific due date of possession has been mentioned but to safeguard the interest of the allottee, a provision of assured return has been made which is not only applicable uptil the date of offer of possession but even beyond that i.e. up to commencement of the first lease of the unit. It is also worthwhile to point that the assured return as per MoU/BBA is more than what is payable to the allottee as delayed possession charges. The provision of

delayed possession charges was made in the Act to safeguard the interest of the allottee in case possession is delayed and in case of delay, only a meagre sum is payable by the promoter to the allottee as compensation/penalty to the allottee. Hence in view of these facts, the authority directs the promoter to pay assured return from 05.10.2016 until the commencement of the first lease of the said unit as per terms and conditions of memorandum of understanding dated 05.10.2016.

H.2 Direct the respondent to handover the possession of the unit with all the amenities as mentioned in the brochure

64. The respondent has applied for OC of the above-mentioned project on 24.02.2020. So, in such a situation no direction can be given to the respondent to handover the possession of the subject unit, as the possession cannot be offered till the occupation certificate for the subject unit has been obtained.

H.3 Direct the respondent to quash the VAT charges.

65. Neither the complainant was specific in pointing out as what VAT charged by the promoter is unauthorized nor the respondent replied specifically. In large number of judgments, this authority has clarified that VAT is not chargeable in those cases where for the period 01.04.2014 to 30.06.2017 if amnesty scheme has been availed by the promoter. If for this period any VAT has been paid the same is refundable in case of availing amnesty scheme availed by the promoter. Without providing justification and admissibility of VAT demand being raised now is quashed.

I. Directions of the authority

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

i. The respondent is directed to pay assured return as agreed upon till the commencement of first lease of the allotted unit as per clause 4 of the memorandum of understanding dated 05.01.2017.

ii. Since the assured return has been allowed till the first lease of the allotted unit and being beneficial than delay possession charges, so the amount on account of delay possession charges as agreed upon between the parties is disallowed.

iii. It has been clarified by the authority in a number of orders that VAT is not chargeable in those cases where for the period 01.04.2014 to 30.06.2017 if amnesty scheme has been availed by the promoter. If for this period any VAT has been paid, the same is refundable in case of availing amnesty scheme availed by the promoter. Thus, without providing justification and admissibility of VAT demand being raised now is quashed.

67. Complaint stands disposed of.

68. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. KK Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 17.11.2021