BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**3417 of 2021**
Date of filing complaint:		**03.09.2021**
First date of hearing	**:**	**30.09.2021**
Date of decision	**:**	**25.11.2021**

Mohan Yadav
R/o: Village/post Garhi Harsaru **Complainant**

Versus

M/s Venetain LDF Project LLP
R/o SCO 320, second floor, near Croma Store,
Sector 29, Gurugram **Respondent**

CORAM:

Dr. K.K. Khandelwal **Chairman**

Shri Vijay Kumar Goyal **Member**

APPEARANCE:

Sh. Vandana Aggarwal (Advocate) Complainant

None Respondent

EXPARTE 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 unit details, sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Name and location of the project	"83 Avenue", Sector 83 revenue estate, Village Sihi, Teshil Manesar, District Gurugram
2.	Nature of the project	Commercial complex
3.	Area of the project	2.3625 acres
4.	DTCP license	12 of 2013 dated 15.03.2013
	License validity/ renewal period	12.03.2019
5.	RERA registered/not registered	registered vide no. **04 dated 16.01.2019**
	HRERA registration valid up to	**30.09.2020**
6.	Unit no.	G-36, ground floor (page 42 of complaint)
7.	Unit measuring	400 sq. ft.
8.	Allotment letter	12.01.2015 (As per annexure C-5, page 36 of complaint)
9.	Date of execution of Space buyer's agreement	20.02.2016 (Page 39 of complaint)
10.	Date of execution of memorandum of understanding	15.05.2013 [Page 16 of complaint]
11.	Payment plan	Installment Payment Plan (Page no. 62 of complaint)
12.	Total sale consideration	Rs 42,88,000/-

		as per allotment letter dated 12.01.2015 (page 36 annexure C-5 of complaint)
13.	Total amount actually paid by the complainant	Rs 40,02,299/- as per averment of complainant (page 5 of complaint)
14.	Due date of delivery of possession	20.02.2019 *Note: The due date of possession can be calculated by the 36 months from the singing of the agreement (20.02.2016) or 36 months from the date of start of construction (23.10.2013) whichever is later.
15.	Assured return clause	**3. Assured return** **3.1** Till the notice for offer of possession is issued, the developer shall pay to the allottee an assured return at the rate of Rs. 125.98/- per sq.ft. of super area of premises per month (herein referred as to the "assured return"). The assured return shall be subject to tax deduction at source, which shall be payable on or before 7th day of every English calendar month on due basis. (page 23 of complaint)
16.	Offer of possession	Not offered
17.	Occupation certificate	Not obtained
18.	Whether any amount of assured return paid as per clause 3.1 of the MOU	The respondent paid the assured return amount till December 2016. No specific amount is mentioned.

B. Facts of the complaint

3. The complainant is the resident of above-mentioned address and is the citizen of India. He booked a commercial unit no. G-036 in "83 Avenue" on Sector 83 revenue estate of village Sihi, Tehsil Manesar,

District Gurugram (Haryana) in Venetian LDF Projects LLP project. The complainant signed the memorandum of understanding dated 15.05.2013 for booking of commercial unit of 400 sq.ft. by making a payment of Rs. 40,02,299/-.

4. The above payment is inclusive of Service Tax of Rs. 1,43,099/- and balance amount of Rs.4,28,800/- have to be paid by the complainant at the time of offer of possession. As per MOU till the notice of offer of possession is issued the developer shall pay to the allottee an assured return @ of Rs.125.98/- per square feet of super area of premises per month i.e., Rs.50,392/- per month after deducting TDS of Rs. 5039/- balance is Rs.45,363/- per month to the complainant. The respondent paid assured return till December 2016. This amount shall be payable on or before 7th day of every calendar month on due basis.

5. The respondent has issued a cheque of Rs.45,363/- to the complainant bearing cheque no. 248198 dated 22.01.2017 of Axis Bank Ltd. for the month of January 2017. After January 2017 complainant visited several times to the office of respondent for assure return cheques of January and thereafter, but the respondent did not pay any heed to the just and genuine request of the complainant. That the respondent is bound to pay the assure return to the complainant from January 2017 to till the date of offer of possession. The complainant issued a legal notice to the respondent through his advocate Vandana Aggarwal dated 04.12.2017 and demanded cheques of assure return from December 2016 to December 2017 but no reply was ever given by

the respondent. After the issuance of legal notice complainant again visited the office of respondent and respondent assure the complainant that respondent will issue cheques of assure return within one month, but till date respondent have not issued any cheque of assure return to the complainant after December 2016.

6. The respondent allotted the unit no G-036 in "83 Avenue" in Sector 83 revenue estate of Village Sihi, Tehsil Manesar, District Gurugram (Haryana) to the complainant in Venetian LDF Projects LLP project. The respondent executed "space buyer agreement" dated 20.02.2016 after 33 months and 95% amount was taken by the respondent on 08.05.2013 from the complainant because the complainant opted down payment plan. As per clause 38 of "space buyer agreement" the developer/LLP will be based on his present plan and estimates contemplates to offer possession of said unit to the allottee within 36 months of signing of this agreement or within 36 months from the date of start of construction of the said building whichever is later with the grace period of three months. The possession of the unit was due on 19.05.2019 and there is a delay of 27 months in handing over the possession.

7. The complainant has invested his hard-earned money in this project but from January 2017 neither the complainant received any assure return payment/cheque does not offer of possession which is creating a huge loss to the complainant which cannot be compensated in any manner. The act and conduct of the respondent show that they had only one intention i.e. to grab a handsome amount from the complainant by making false grounds by using

unfair trade practices, which shows the deficiency in service on the part of the respondent, hence the present complaint. It is quite apparently clear that respondent have a dishonest, malafide and mischievous intention not to pay the assure return to the complainant and to obtain wrongful gain and causing wrongful loss to complainant. Now, in the present circumstances the complainant is seeking assure return on entire paid amount which is due from January 2017 along with interest @24% P.A as well as delay possession compensation of 27 months.

C. Relief sought by the complainant:

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

   i. Direct the respondent to pay the complainant assure return of Rs.50,392/- per month after deducting TDS of Rs.5,039/- balance Rs.45,363/- on amount paid by complainant at the time of booking and thereafter from January 2017 to till the offer of the possession.

   ii. Direct the respondent to pay delayed possession compensation of 27 months on amount paid by complainant at the time of booking and thereafter from June 2019 to till the date of offer of possession.

9. The authority issued a notice dated 10.09.2021 of the complaint to the respondent by speed post and also on the given email address at info@vlprojects.com. The delivery reports have been placed in the file. Despite service of notice, the respondent has preferred

neither to put in appearance nor file reply to the complaint within the stipulated period. Accordingly, the authority is left with no other option but to decide the complaint ex-parte against the respondent.

10. 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 submissions made by the parties.

E. Jurisdiction of the authority

11. 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

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

E. II Subject-matter jurisdiction

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;

The provision of assured returns is part of the memorandum of understanding, as per clause 3.1 of the MOU dated 15.05.2013. Accordingly, the promoter is responsible for all obligations /responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

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 of 2016 quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the relief sought by the complainant:

F.I. Direct the respondent to pay the complainant assured return of Rs.50,392/- per month after deducting TDS of Rs.5039/- balance is Rs.45,363/- on amount paid by the complainant at the time of booking and thereafter from January 2017 till the offer of possession.

20. While filing the claim petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 20.02.2016, the claimant has also sought assured returns on monthly basis as per clause 3.1 of MOU at the rate of Rs 125.98/- per sq. ft. of super area per month till the notice for offer of

possession is issued by the developer. It is pleaded by the claimant that the respondent has not complied with the terms and conditions of the agreement. Though for some time the amount of assured returns was paid but later on, the respondent refused to pay the same by taking a plea 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. However, the complainant admittedly the respondent is paid the amount of assured return upto the January 2017 but did not pay assured return amount after coming into force of the Act of 2019 as the same was declared illegal. Clause 3.1 of the memorandum of understanding stipulates that: -

> *3. ASSURED RETURN*
> *3.1 Till the notice for offer of possession is issued, the Developer shall pay to the Allottee an assured return at the rate of Rs.125.98/- (Rupees One Hundred Twenty-Five and paisa Ninety-Eight only) per sq. ft. of super area of premises per month (hereinafter referred as to the "Assured return").*
> *The assured return shall be subject to tax deduction at source, which shall be payable on or before 7th day of every English calendar month on due basis.*

21. An MOU can be considered as an agreement for sale interpretating 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 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. Therefore, different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral parts 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 return between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate regulatory authority has complete jurisdiction to deal with assured return cases as the contractual relationship arise out of agreement for sale only and between the same parties as per the provisions of section 11(4)(a) of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the

agreement for sale till the execution of conveyance deed of the unit in favour of the allottees. Now, three issues arise for consideration as to:

i. Whether authority is within the jurisdiction to vary its earlier stand regarding assured return 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

22. 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 allottee 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 a 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 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 returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum , memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement for sale defines the builder-buyer relationship. So, it can be said that the agreement for assured returns between the promoter and 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 arise 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 returns 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. Then 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.

23. 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 returns to an allottee. But again, the plea taken in this regard is devoid of merit. Section 2(4) of the above mentioned Act defines the word ' deposit' as *an amount of money received by way of an advance or loan or in any other form, by any deposit taker with a promise to return whether after a specified period* or otherwise, either in cash or in kind or in the form of a specified service, *with or without any benefit in the form of interest, bonus, profit or in any other form, but does not include*

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

24. 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 a 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 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.

25. 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.

26. 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.

27. Moreover, the developer is also bound by promissory estoppel. As per this doctrine, the view is that if any person has made a promise and the promisee has acted on such promise and altered his position, then the person/promisor is bound to comply with his or her promise. When the builders failed to honour their commitments, a number of cases were filed by the creditors at different forums such *as* ***Nikhil Mehta, Pioneer Urban Land and Infrastructure*** which ultimately led the central government to enact the Banning of Unregulated Deposit Scheme Act, 2019 on 31.07.2019 in pursuant to the Banning of Unregulated Deposit Scheme Ordinance, 2018. However, the moot question to be decided is as to whether the schemes floated earlier by the builders and promising as assured returns on the basis of allotment of units are covered by the abovementioned Act or not. A similar issue for consideration arose before Hon'ble RERA Panchkula in case ***Baldev Gautam VS Rise Projects Private Limited*** (*RERA-PKL-2068-2019*) where in it was held on 11.03.2020 that a builder is liable to pay monthly assured returns to the complainant till possession of respective apartments stands handed over and there is no illegality in this regard.

28. 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.*

29. 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.

30. 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. 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.

31. The builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement defines the builder/buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allotee arises out of the same relationship and is marked by the original agreement for sale.

F. II Direct the respondent to pay delayed possession compensation of 27 months on amount paid by the complainant at the time of booking and thereafter from June 2019 to till the date of offer of possession.

32. In the present complaint, the complainant intends to continue with the project and is seeking possession of the subject unit and delay possession charges as provided under the provisions of section 18(1) of the Act which reads as under.

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

33. The builder buyer agreement dated 20.02.2016 was executed between the parties. As per clause 36 months from the date of start of construction of the building whichever is later with a grace

period of 3 months, subject to force majeure events or governmental action.

Possession clause 38

> *The developer/LLP will based on its present plans and estimates contemplates to offer of possession of the said unit to the allottee(s) within 36 months (refer cl. 37 above) signing of this agreement or within 36 months from the date of start of construction of the said building whichever is later with a grace period of 3 months, subject to force majeure events or governmental action/inaction. If the completion of the said building is delayed by said reasons slow down, strike or due to a dispute with the construction agency employed by the developer/LLP lock out or departmental delay or civil commotion or by reason of war or enemy action or terrorist action or earthquake or any act of God or by any other reason beyond the control of the developer/LLP, the developer/shall be entitled to extension of time for delivery of possession of the said premises.....*

34. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions is not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by him in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in

the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

35. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said flat within 36 months of singing of this agreement or 36 months from the date of start of start of construction of the said building whichever is later and has further extension of a period of 3 months (after the expiry of the said 36 months) subject to force majeure events or governmental action/inaction. But he has not mentioned as to what force majeure circumstances he is being referring to on the happening on which, he would become entitled for the said extension of period. In such eventuality the authority cannot grant such extension and hence the grace period is disallowed.

36. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has

been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
>
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

37. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

38. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 25.11.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

39. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.
Explanation. —For the purpose of this clause—
(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;
(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

40. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainant in case of delay possession charges.

41. The authority further observes that now, the proposition before it is as to whether an allottee who is getting/entitled for assured return even after expiry of due date of possession, can claim both the assured return as well as delayed possession charges?

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 the date of making down payment till offer of possession. The rate at which assured return has been committed by the promoter is Rs.125.98 per square feet 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 at the rate of more than 12% whereas the delayed possession charges are payable at the rate of 9.30% per annum. By way of assured return, the promoter has assured the allottee that he will be entitled for this specific amount till offer of possession. Accordingly, the interest of the allottee is protected even after the due date of possession is over as the assured returns are payable till offer of possession. 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 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.

The authority directs the respondent/promoter to pay assured return from the date the payment of assured return was stopped till offer of possession and declines to offer any amount on account of delayed possession charges as his interest has been protected by granting assured returns till the offer of possession of the allotted unit.

F.III Award of cost of Rs.1,00,000/- towards litigation expenses in favour of complainant and against respondent.

42. The complainant is claiming compensation in the present relief. The authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee can claim. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

G. Directions of the authority

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

i. The respondent/promoter is directed to pay the arrears of assured return to the complainant/allottee from January 2017

@ Rs.125.98/- per sq. ft. of super area (i.e. 400 sq. ft.) till the notice for offer of possession is issued by it as per memorandum of understanding.

ii. Since, the complainant/allottee has been allowed assured return being reasonable and comparable with delayed possession charges, so his interest is protected even after due date of possession is over and the assured return being payable till the notice for offer of possession. So, he is not entitled to any delayed possession charges as claimed.

iii. The respondent shall not charge anything from the complainant which is not part of the agreement of sale.

44. Complaint stands disposed of.

45. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 25.11.2021

Judgement uploaded on 17.12.2021