BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**4677 of 2021**
Date of filing complaint:	**02.12.2021**
First date of hearing:	**25.01.2022**
Date of decision :	**25.01.2022**

1.	Jogender Kapoor	**Complainants**
2.	Angad Kapoor Both R/o: ECI-F-401, Essel Tower, M.G. Road, Gurugram	
	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. Hemant Phogat (Advocate)	Complainants
Sh. Venket Rao (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the

rules and regulations made 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 complainants, 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	2.71 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. and 4 others
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.	Food Court [Annexure C1 at page no.19 of the complaint]
8.	Unit measuring (super area)	200 sq. ft. [Annexure C1 at page no.19 of the complaint]
9.	Date of allotment letter	N/A
10.	Date of execution of builder buyer	03.07.2015 [Annexure C1 at page no.16 of the

	agreement	complaint]
11.	Date of Memorandum of understanding	03.07.2015 [Annexure C2 at page no.33 of the complaint]
12.	Payment plan	Assured Return plan [Annexure C2 at page no.41of the complaint]
13.	Assured return clause	**Clause 4 of MOU** The company shall pay a monthly assured return of Rs.18,000/- on the total amount received with effect from 03.07.2015 after deduction of tax at source and service tax, cess or any other levy which is due and payable by the allottee to the company in accordance with the payment schedule annexed as annexure I. The monthly assured return shall be paid to the allottee until the commencement of the first lease on the said unit.
14.	Total sale consideration	Rs.19,63,600/- [Annexure C2 at page no.35 of the complaint]
15.	Total amount paid by the complainants	Rs.20,46,071/- [As per account statement at page 59 of the reply]
16.	Offer of possession	Not offered
17.	Occupation Certificate	Not received
18.	Assured amount received by the complainants	Rs.8,62,800/- [As per account statement at page 59 of the reply]

B. Facts of the complaint:

3. It is submitted that the complainants had booked a food court, having its super area of 200 sq. ft. in the upcoming project of the respondent named "Neo square" situated in sector-109, Dwarka Expressway, Gurugram for a total Basic Sale consideration of Rs.19,63,000/- and complainants had paid a sum of Rs.21,52,247/- ,which includes the service tax, EDC and IDC.

4. The buyer's agreement and memorandum of understanding were executed between the respondent and the complainants on 03.07.2015. The complainants had purchased the above said unit on "Assured Return Plan", whereby the developer has assured the complainants to pay a monthly assured return of Rs.18,000/- with effect from 03.07.2015 until the commencement of first lease on the said unit.

5. That, as per clause-4 of the MOU dated 03.07.2015, the respondent was/is under legal obligation and is bound to pay the assured return of Rs.18,000/- with effect from 03.07.2015.The respondent in an illegal manner stopped paying the assured return, which is due from July 2019 in utter contravention of its own commitment.

6. The complainants have taken all possible requests and gestures to persuade the respondent, whereby requesting it to pay the monthly assured return but the respondent miserably failed in doing so and to meet the just and fair demand of the complainants and completely ignored the request of the complainants. That, till today the complainants had not received any satisfactory reply

from the respondent regarding payment of monthly assured returns to them. The respondent has not paid assured return to the complainants despite promises done and representation made by the respondent. In this way, the respondent has violated the terms and conditions of the buyer's agreement /MOU and promises made at the time of booking of said unit.

7. The respondent has committed grave deficiency in services by not paying assured returns as was promised at the time of sale of the said unit, which amounts to unfair trade practice which is immoral and illegal. The respondent has also criminally misappropriated the money paid by the complainants as sale consideration of the said unit by not paying the assured returns to the complainants. The respondent has also acted fraudulently and arbitrarily by inducing the complainants to buy the unit on the basis of its false and frivolous promises and representations about the *assured returns.*

8. The respondent has also illegally and unlawfully imposed interest for delayed payment of VAT. However, the complainants have paid all the payments as per the payment schedule and the charges related to VAT were supposed to be paid during the possession, as conveyed by the respondent. The cause of action accrued in favour of the complainants and against the respondent, when complainants had booked the said unit and it further arose when respondent failed/neglected to pay the assured returns. The cause of action is continuing and is still subsisting on day-to-day basis.

C. Relief sought by the complainants:

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

   i. Direct the respondent to pay the assured return as per the terms and conditions of the MOU dated 03.07.2015.

   ii. Direct the respondent to pay Rs.30,000/- as litigation expenses.

   iii. Direct the respondent to waive off the delayed interest on the payment of VAT amounting to Rs.77,477/-

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

D. Reply by respondent

11. It is submitted that, for the allotted unit the complainants agreed to pay basic sale price of Rs.19,63,600/-. In addition, the complainants agreed to pay on demand of the respondent EDC, IDC, IFMS, Security Deposit, PLC, GST, developmental charges, all taxes, charges, levies, cesses, stamp duties, registration charges, administrative charges, property tax, as may be applicable on the unit. That till date the complainants have paid Rs.20,46,071/- against the unit which includes the Basic Sale Price and GST/S. Tax of Rs. 82,471/-.

No Cause of Action as No relation of Builder-Buyer between the Complainants and Respondent

12. It is submitted that the complainants were in search of making investment in the real estate sector, thus visited the sales office of

the respondent and had a meeting with the representatives of the respondent. After being satisfied with the competency and capacity of the respondent builder the complainants had agreed to opt for the "Assured Return Plan" floated by the respondent. Accordingly, a completely separate Memorandum of Understating dated 03.07.2015 was executed between the complainants and the respondent. This MOU governed the terms of paying assured returns and leasing thereof. It is pertinent to note that the complainants had purchased the commercial space not for their personal use as an end user but to earn return on the same, as an investor. Thus, there is no cause of action arising for filing of the present complaint nor any visible understanding to book the respondent for any legal charges.

13. That in terms of the MOU, it is submitted that the respondent has already paid an amount of Rs. 8,62,800/- as assured return to the complainants till date.

14. Further it is brought to the attention of this Hon'ble authority that a reading of the MOU clearly stipulated that the complainants had booked the premise only for the purpose of gaining commercial advantage and not for self-use. It is pertinent to note that, the complainants agreed that it shall not utilise the premises for its own personal usage and can be used only for the purposes of leasing through the respondent, in accordance with the terms of the MOU. The clauses from the MOU clearly specifies that the relationship of the complainants with the respondent is not that of a builder-buyer. It is also pertinent to mention that the MOU and

the buyer's agreement are two distinct and separate agreements, each having its own purpose.

Buyer's Agreement" and "Assured Return Agreement" are two separate Agreement: -

15. The buyer's agreement and the assured return agreement both contain rights and obligations of parties which are not identical of each other, even though the agreements are connected. Therefore, both these documents cannot be treated as a single document enumerating the same rights and obligations. This has been held by the High Court of Delhi in the matter of ***M/S SERENITY REAL ESTATE PRIVATE LIMITED VS BLUE COAST INFRASTRUCTURE DEVELOPMENT PRIVATE LIMITED (ARB. P. 796/2016***) in clause 11.

> *"11. It is apparent from the above that the Arbitration clause in the Assured Return Agreement is materially different from the Arbitration clause contained in the Space Agreement. Although the Agreements are connected the rights and obligations of the parties under the said agreements are not identical. Thus, it is difficult to accept the Respondent's contention that the arbitration clause in the space agreement would prevail over the Arbitration clause in the later agreement.*

Banning Of Unregulated Deposit Schemes Act, 2019

16. 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**").

17. 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.

18. 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.

19. 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. It is submitted that for this very reason post coming into force of the said BUDS Act in 2019, the respondent was forced to stop payment of any assured return.

20. The BUDS Act provides for two forms of deposit schemes, namely regulated deposit schemes and unregulated deposit schemes. Thus, for any deposit scheme, for not to fall foul of the provisions of the BUDS Act, must satisfy the requirement of being a 'Regulated Deposit Scheme' as opposed to unregulated deposit

scheme. Hence, the main object of the BUDS Act is to provide for a comprehensive mechanism to ban unregulated deposit scheme.

21. Further, any orders or continuation of payment of any assured return or any directions thereof may be completely contrary to the subsequent act passed post RERA Act, which, is not violating the obligations or provisions of the RERA Act. Therefore, enforcing an obligation on a promoter against a Central Act which is specifically banned, may be contrary to the central legislation which has come up to stop the menace of unregulated deposit.

Jurisdiction of the Authority – Arbitration Clause

22. It is most humbly submitted that the complaint at hand is not maintainable before this Ld. Authority as the Ld. Authority does not have the jurisdiction to try & decide the present matter, as the dispute is arising from the clauses of the MOU and not from the clauses of the buyer's agreement. That as per the terms of the MOU any dispute arising from the MOU will be resolved by way of Arbitration only. It was mutually agreed in Clause 17 and Clause 18 of MOU, executed between the complainants and the respondent, that in case of dispute and differences between the parties, the matter shall be referred for arbitration of a sole arbitrator appointed in terms of Arbitration and Conciliation Act, 2015, or the courts at Delhi only shall have the jurisdiction to entertain any dispute between the parties. Thus, this Authority is barred by the presence of the arbitration clause.

Clause 17 are reproduced herein below for the ready reference:

> *Clause 17: "That in case of dispute and differences between the parties arising out of or in relation to this MOU, the matter shall be*

referred for arbitration to a sole arbitrator to be appointed in terms of Arbitration and Conciliation Act, 2015. The award tendered by the arbitrator shall be final and binding upon the parties. The fee of the arbitrator and expenses of the arbitration shall be equally divided between the parties. The proceedings shall be governed by Arbitration and Conciliation Act, 1996. The venue of Arbitration shall be New Delhi alone and the language of arbitration shall be English. The award given by the arbitrator shall be final and binding between the Parties."

Clause 18 is reproduced hereinunder for the ready reference:

Clause 18: "That the Courts at Delhi only shall have the jurisdiction to entertain any dispute between the parties. No other court shall have any jurisdiction to adjudicate upon the dispute between the parties.

23. It is apparent from the facts of the present complaint that the main purpose of the present complaint is to harass the respondent by engaging and igniting frivolous issues with ulterior motives to pressurize the respondent company. The complainants want to gain unjust enrichment from the respondent, even after the respondent has paid an amount of Rs.8,62,800/- as assured return to the complainants

Violation of the Duties of An Allottee & Complainant's own Wrongs –Dues Pending

24. It is relevant to mention that the complainants herein have clearly violated the duties of an allottee provided under section 19(6) of the Real Estate (Regulation and Development) Act, 2016. That as per Section 19 (6) of the Act, it is the duty of the allottee to make timely payments in the manner as agreed between the parties and within the time specified in the agreement signed between the allottee and the builder/promoter. That the relevant portion of Section 19 (6) of the Real Estate (Regulation and Development) Act, 2016 is reproduced herein below for the ready reference:

Section 19 (6) : "Every Allottee, who has entered into an agreement or sale to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any."

25. That in the present case, the complainants have not obliged its duties as per the buyer's agreement and further has not made the payments as per the agreed timeline. In these circumstances, the complainants are estopped from raising any allegations against the promoter as the complainants themselves are at fault. Further it is brought to the attention of the Authority that though the complainants may have cleared the basic sale price of the said commercial property, but they are still liable to pay all other charges such as IFMS, security deposit, duties, taxes, levies etc. when demanded. The same has been clearly agreed to in clause 6 of the MoU.

26. That there exist outstanding amounts to the tune of Rs. 4,25,109/- that stands due and payable on part of the complainants till date. That in the light of the facts mentioned herein, the complainants cannot be allowed to take the benefit of his own wrong.

27. It is submitted that the respondent had on many occasions intimated the complainants regarding the outstanding dues and requested them to make the payments, but the complainants had paid no heed to them. Therefore, the complainants are in violation of provisions of section 19 of the RERA Act, by not paying its dues

TIMELY PAYMENT IS THE ESSENCE OF THE AGREEMENT:

28. That it is pertinent to note herein that the buyer's agreement in **Clause 4.4** executed between the parties clearly stipulates that the entire relationship of the builder and the complainants herein is founded on timely payments by the complainants. That timely payment of installments is the essence of the agreement. Any default in such payments hampers the construction process of the said space as well as the whole project. The complainants agreed to make all payments as per the payment plan annexed to the agreement and/or when demanded as per clause 4.4 of the agreement. Clause 4.4 is reiterated for ready reference:

> *"That the timely payment of installments as stated in Payment Plan (Annexure-I) and applicable stamp duty, registration fee, maintenance charges, service tax, BOCW Cess, and other charges and taxes payable under this Agreement and/or law as and when demanded is the essence of this Agreement."*

It is also to be noted that the complainants being in default of the same cannot complain about the incapacity of the respondent to timely complete the project.

Demand of VAT as per statutory regulations

29. It is humbly submitted that the respondent is raising the VAT demands as per government regulations. That the rate at which the respondent is charging the VAT amount is as per the provisions of the Haryana Value Added Tax Act 2003. That VAT amount is payable on any amount received from the allottee till June 2017. Accordingly, the VAT amounts have been demanded from the complainants, as the same has been assessed and demanded by the Competent Authority.

30. It is further submitted that the respondent has not availed the Amnesty Scheme namely, Haryana Alternative Tax Compliance

Scheme for Contractors, 2016, floated by the Government of Haryana, for the recovery of tax, interest, penalty or other dues payable under the said HVAT Act, 2003. To further substantiated the same, the name of the respondent is not appearing in the list of Builders, as circulated by the Excise & Taxation Department Haryana, who have opted for Lumpsum Scheme/Amnesty Scheme under Rule 49A of HVAT Rules, 2003

31. It is further submitted that the demand of VAT is done as per clause 11 of the buyer's agreement. The aforesaid mentioned clause clearly states that the allotee is liable to pay interest on all delayed payment of taxes, charges etc. The said clause is reiterated below for ready reference:

> *"That the Allotee agrees to pay all taxes, charges, levies, cesses, applicable as on dated under any name or category/heading and/ or levied in future on the land and/or the said complex and/or the said space at all times, these would be including but not limited to Service Tax, VAT, Development charges, Stamp Duties, Registration Charges, Electrical Energy Charges, Property Tax, Fire Fighting Tax and the like. These shall be paid on demand and in case of delay, these shall be payable with interest by the Allottee".*

Accordingly, the complainants are liable to pay the VAT amount, as raised by the respondent.

32. That the various contentions and claims as raised by the complainants are fictitious, baseless, vague, wrong and created to misrepresent and misled this Ld. Authority, for the reasons stated above. That it is further submitted that none of the reliefs as prayed for by the complainants are sustainable before this Ld. Authority and in the eyes of law. Hence, the complaint is liable to be dismissed with imposition of exemplary cost for wasting the precious time and resources of the Ld. Authority. That the present

complaint is an utter abuse of the process of law, and hence deserves to be dismissed.

33. It is humbly submitted that the complainants are liable to pay all balance sale consideration as may be demanded by the respondent from time to time for being eligible to receive any return from the respondent. It is pertinent to note that the respondent is himself a defaulter and has pending dues amounting to Rs. 4,25,109/- till date. That the complainants agreed to make payment of all balance sale consideration otherwise the MOU would be entitled to be terminated. Therefore, the default is on the part of the complainants himself. Furthermore, till date the respondent has already paid an amount of Rs. 8,62,800/- as assured return to the complainants.

34. It is reiterated that respondent has already paid an amount of Rs. 8,62,800/- as assured return to the complainants. It is most humbly submitted that the grievances and allegation levied against the respondent pertains to terms and conditions of the MOU. It is noteworthy than the RERA Act, 2016 governs only the buyer's agreement which creates the relation of builder-buyer between the complainants and the respondent. The respondent has fulfilled all its obligations as per the buyer's agreement as a promoter thus there is no violation of section 11(4)(a) of the RERA Act, 2016. Further, the Ld. Authority has no jurisdiction to adjudicate on the MOU executed between the parties, which is a completely distinct and separate agreement. Moreover, the respondent has not violated any terms and conditions of the MOU as well.

35. It is submitted that respondent has not criminally misappropriated any money paid by the complainants but have only utilized the same to complete the construction of the project. It is pertinent to note that despite of all the force majeure conditions and unforeseen circumstances that have risen in the last couple of years, the respondent has already applied for the occupation certificate and anticipates that the same will be issued by the competent authority very soon.

36. 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.

E. Jurisdiction of the authority:

37. 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.

E. 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.

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;*

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 complainants at a later stage.

F. Findings on the objections raised by the respondent:

F.I Objection regarding complainants is in breach of agreement for non-invocation of arbitration.

38. The respondent has raised an objection that the complainants have 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.*

39. 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 complainants, 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 complainants 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."*
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> *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."

40. 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 complainants are 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

G. Findings regarding relief sought by the complainants:

G.1 Direct the respondent to pay the assured return as per the terms and conditions of the MOU dated 03.07.2015.

41. The complainants have sought assured return of Rs.18,000/- on monthly basis i.e. 03.07.2015 till commencement of first lease deed as per clause 4 of memorandum of understanding dated 03.07.2015. 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 return 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.8,62,800/- as assured return 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. 18,000/- on the total amount received with effect from 3rd July, 2015*

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.

42. 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 allottees 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 allottees 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 allottees 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 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 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.

43. 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 return 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 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. 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.

44. 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.

45. 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 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.

46. 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.

47. 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.

48. 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.

49. 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.*

50. 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.

51. 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 complainants to the builder is a regulated deposit accepted by the later from the former against the immovable property to be transferred to the allottee later on. 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 complainants besides initiating penal proceedings.

52. 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.

The authority directs the promoter to pay assured return from the date the payment of assured return was stopped till the commencement of the first lease of the said unit as per terms and conditions mentioned in this regard in the MOU dated 03.07.2015.

The respondent is also liable to pay the arrears of assured returns as agreed upon up to the date of order with interest@ 7.30% p.a. on the unpaid amount as per proviso to the section 34(1) of the CPC i.e., the rates at which lending of moneys is being made by the nationalized banks to commercial transactions.

The relevant provisions of Section 34 of Civil Procedure Code 1908, are being produced hereinafter for a ready reference providing as under:

> *PROVIDED that where the liability in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six percent per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, the rate at which moneys are lent or advanced by nationalized banks in relation to commercial transactions.*

G.2 Cost of litigation:

The complainants are 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.3 Direct he respondent to waive off the delay interest on the payment of VAT amounting to Rs.77,477/-

As per clause 11 of the BBA which is reproduced below:

> *"That the Allotee agrees to pay all taxes, charges, levies, cesses, applicable as on dated under any name or category/heading*

and/or levied in future on the land and/or the said complex and/or the said space at all times, these would be including but not limited to Service Tax, VAT, Development charges, Stamp Duties, Registration Charges, Electrical Energy Charges, Property Tax, Fire Fighting Tax and the like. These shall be paid on demand and in case of delay, these shall be payable with interest by the Allottee".

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.

The respondent is directed to submit detailed calculation of delay interest charged from the complainants as no such document has been placed on record.

H. Directions of the authority

53. 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 from the date of payment of assured return was stopped till the commencement of the first lease of the said unit as per clause 4 of the memorandum of understanding dated 03.07.2015.

ii. The respondent is also liable to pay the arrears of assured returns as agreed upon up to the date of order with interest@

7.30% p.a. on the unpaid amount as per proviso to the section 34(1) of the CPC i.e., the rates at which lending of moneys is being made by the nationalized banks for commercial transactions.

iii. The arrears of assured return accrued besides interest would be paid to the complainants within a period of 90 days from the date of this order, after adjustment dues if any from the complainants and failing which that amount would be recoverable with interest at the rate of 7.30%. p.a. till the date of actual realisation.

iv. The respondent is directed to submit detail calculation of delay interest charged from the complainants.

v. The respondent shall not charge anything from the complainants which is not part of the agreement of sale.

54. Complaint stands disposed of.

55. File be consigned to registry.

V.I - 3

(Vijay Kumar Goyal)
Member

(Dr. KK Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 25.01.2022