# BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

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| **Complaint no.** | : | **4680 of 2021** |
| **Date of filing complaint:** | | **02.12.2021** |
| **First date of hearing:** | | **25.01.2022** |
| **Date of decision** | : | **25.01.2022** |

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| | Richi Gadihoke<br>Both R/o: 470, Lords CHGS Limited, Plot no. 7, Sector -19B, Dwarka, Delhi | **Complainant** |
| | Versus | |
| | M/s Neo Developers Private Limited<br>R/o: 32 B, Pusa Road, New Delhi-110005 | **Respondent** |

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

## ORDER

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

## A. Unit and project related details

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

| S.No. | Heads | Information |
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| 1. | Project name and location | "Neo Square" Sec 109, Dwarka Expressway, Gurugram |
| 2. | Project area | 3.06 acres |
| 3. | Nature of the project | Commercial colony |
| 4. | DTCP license no. and validity status | 102 of 2008 dated 15.05.2008 valid up to 14.05.2022 |
| 5. | Name of licensee | M/s Shrimaya Buildcon Pvt. Ltd. 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. | 52, 2nd floor [Annexure C1 at page no.22 of the complaint] |
| 8. | Change in unit no. | 7-A on 2nd floor [Annexure C1 on page 17 of the complaint] |
| 9. | Unit measuring (super area) | 494 sq. ft. [Annexure C1 at page no.22 of the complaint] |
| 10. | Date of allotment letter | N/A |
| 11. | Date of execution of builder buyer agreement | 22.07.2019 |

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| | | [Annexure C2 at page no.20 of the complaint] |
| 12. | Date of Memorandum of understanding | 22.07.2019<br>[Annexure C3 at page no.31 of the complaint] |
| 13. | Payment plan | Down Payment plan<br>[Annexure 1 at page no. 29A of the complaint] |
| 14. | Assured return clause | **Clause 4 of MOU**<br>The company shall pay a penalty of Rs.53,846/- per month on the said unit on the total amount received with effect from 23.07.2020 subject to TDS, taxes, cess or any other levy which is due and payable by the allottee and which shall be adjusted in total sale consideration, the balance total sale consideration shall be payable by the allottee to the company in accordance with the payment schedule. The penalty shall be paid to the allottee from end of effective date II until the offer of possession letter date on pro rata basis. |
| 15. | Total sale consideration | Rs.24,70,000/-<br>[Annexure C3 at page no.32A of the complaint]<br>Rs. 27,66,400/-<br>[As per payment schedule annexed at page no.36 of the complaint] |
| 16. | Total amount paid by the complainant | Rs.27,66,400/-<br>[As per account statement at page 54 of the reply] |
| 17. | Offer of possession | Not Offered |
| 18. | Occupation Certificate | Not Obtained |

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| 19. | Assured amount received by the complainant | No amount received till date |

**B. Facts of the complaint:**

3. The complainant had booked a shop bearing no.52, on second floor, having its super area 494 Sq. ft. in the project of the respondent named "Neo Square" situated in Sector-109, Dwarka Expressway, Gurugram for a total basic sale consideration of Rs.24,70,000/-, which includes the IFMS, IDC, EDC and other expenses and the complainant had paid a sum of Rs.27,66,400/- However, the complainant was re-allotted the unit shop no.7-A, on second floor, measuring an area of 494 sq. ft., in the same project by the respondent on dated 12.11.2021, through the allotment letter.

4. The respondent is in right to exclusively develop, construct and build commercial building, transfer or alienate the unit's floor space and to carry out sale deed, agreement to sell, conveyance deeds, letters of allotments etc. The buyer's agreement and memorandum of understanding were executed between the parties on 22.07.2019.

5. The complainant had purchased the above said unit on "Assured Return Plan", whereby the developer has assured the complainant to pay a monthly assured return of Rs.53,846/- with effect from 23.07.2020 until the commencement of first lease on the said unit.

6. That, as per clause-4 of the MOU dated 22.07.2019, the respondent was/is under legal obligation and is bound to pay the assured return of Rs.53,846/- with effect from 23.07.2020.The respondent has not paid even a single penny to the complainant

against the sum assured return in utter contravention of its own commitment from the effective date i.e. 23.07.2020.

7. The complainant has 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 complainant and completely ignored the request of the complainant.

8. That, till today the complainant had not received any satisfactory reply from the respondent regarding payment of monthly assured returns to him. The respondent has not paid assured return to the complainant 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. 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,

**C. Relief sought by the complainant:**

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

   i. Direct the respondent to pay the assured return as per the terms and conditions of the MOU dated 22.07.2019.

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

**D. Reply by respondent**

10. It is submitted that, for the allotted unit the complainant agreed to pay basic sale price of Rs.24,70,000/-. In addition, the complainant 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 complainant has paid Rs.24,70,000/- against the unit which includes the Basic Sale Price and GST/S. Tax of Rs. 2,96,400/-.

11. It is submitted that the complainant was 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 complainant had agreed to opt for the "Assured Return Plan" floated by the respondent. Accordingly, a completely separate Memorandum of Understating dated 22.07.2019 was executed between the complainant and the respondent. This MOU governed the terms of paying assured returns and leasing thereof. It is pertinent to note that the complainant 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.

12. Further it is brought to the attention of this Hon'ble authority that a reading of the MOU clearly stipulated that the complainant had booked the premise only for the purpose of gaining commercial advantage and not for self-use. It is pertinent to note that, the complainant 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 complainant 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: -**

13. 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**

14. 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**").

15. 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.

16. 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.

17. 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.

18. 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.

19. 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**

20. 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 complainant 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.*

21. That the on-set of unforeseeable covid-19, the ongoing of the pandemic situation and the subsequent lock-downs has severely affected the real estate sector and has caused unanticipated delays and increased costs to the project of the respondent that were beyond the respondent's control. That the construction work by the respondent company was hampered, as there was no supply of raw materials like cement and steel for construction activity. As a consequence of the aforesaid reasons, the performance on the part of the respondent company to pay monthly rent and the construction of the unit was directly impacted. The respondent intimated about the situated to the complainant vide email dated 09.04.2020. It was further informed that the performance of all obligations as per the MOU and the buyer's agreement shall be extended for the period of lock down and approximate 06(six) months thereafter.

That the complainant was further informed, vide a letter dated 10.09.2020, that restrictions have been laid on the company to withdraw funds from the escrow bank accounts to make payments towards monthly interest. Therefore, the same shall be settled at the time of possession.

22. 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.

23. 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:

24. 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 complainant at a later stage.

**F. Findings on the objections raised by the respondent:**

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

25. The respondent has raised an objection that the complainant has not invoked arbitration proceedings as per the provisions of flat buyer's agreement which contains provisions regarding initiation

of arbitration proceedings in case of breach of agreement. The following clause has been incorporated w.r.t arbitration in the buyer's agreement:

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

26. The respondent contended that as per the terms & conditions of the application form duly executed between the parties, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional booked unit by the complainant, the same shall be adjudicated through arbitration mechanism. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority

would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainant and builders could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:

> *"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act"). Section 79 of the said Act reads as follows: -*
>
> *"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*
>
> *It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellant Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.*
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> ...
>
> *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."*

27. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder buyer agreement, the Hon'ble Supreme Court in case titled as ***M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017*** **decided on 10.12.2018** has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant para of the judgement passed by the Supreme Court is reproduced below:

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

Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainant is well within their rights to seek a special remedy available in a beneficial Act such as the Consumer Protection Act,1986 and Act

of 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily

**G. Findings regarding relief sought by the complainant:**

**G.1 Direct the respondent to pay the assured return as per the terms and conditions of the MOU dated 22.07.2019**

28. As per the case of complainant she was allotted the unit bearing no 52 at second floor at and later changed to 7 A on the same floor measuring 494 sq. ft. against total sale consideration of Rs 24,70, 000/-. It leads to execution of BBA as well as as MOU on 22.07.2019 .The allotment of the unit was made to her under down payment plan and she paid a total sum of Rs 27,66,400/- There is clause 4 in the MOU dated 22.07.2019 which provides for payment of penalty of Rs. 53,846/- per month wef 23.07.2020. It was also provided that the penalty would to the paid to the allottee from end of effective date until the offer of possession letter on pro rata basis. Though later on instead of penally, the word of assured return has been used but a change in nomenclature just to deceive innocent buyers. Even otherwise as per the dictionary meaning of the word penalty it refers to punishment, fine or a negative result of an act and an example of penalty is having to attend traffic school for & getting a speedy ticket. A punishment, handicap or a less of advantage imposed on a team or a competitor for infra-action of a rule. It also refers to a sum established by a contract to be forfeited in lieu of actual damages in the event of a breach of contract. So, taking into

consideration all these, it can be said that the word penalty under clause 4 of MOU refers to the sum established by the contract.

29. The complainant has sought assured return of Rs.53,846/- per month on the total amount received with effect from 23.07.2020 until the offer of possession as per clause 4 of memorandum of understanding dated 22.07.2019. It is pleaded that the respondent has not complied with the terms and conditions of the agreement. 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. Clause 4 of the Memorandum of understanding stipulates that -

> *The company shall pay a penalty of Rs.53,846/- per month on the said unit on the total amount received with effect from 23.07.2020( Effective date II) subject to TDS, taxes, cess or any other levy which is due and payable by the allottee and which shall be adjusted in total sale consideration, the balance total sale consideration shall be payable by the allottee to the company in accordance with the payment schedule annexed as Annexure I. The penalty shall be paid to the allottee from end of effective date II until the offer of possession letter date on pro rata basis.*

30. An MoU can be considered as an agreement for sale interpreting the definition of the "agreement for sale" under Section 2(c) of the Act and broadly by taking into consideration the objects of the Act. Therefore, the promoter and allottee would be bound by the obligations contained in the memorandum of understanding and the promoter shall be responsible for all obligations, responsibilities, and functions to the allottee as per the agreement for sale executed inter se them under section 11(4)(a) of the Act.

An agreement defines the rights and liabilities of both the parties i.e., promoter and the allottee and marks the start of new contractual relationship between them. This contractual relationship gives rise to future agreements and transactions between them. The different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral 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.

31. 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.

32. 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.*

33. 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.

34. 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.

35. It is evident from the perusal of section 2(4)(I)(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.

36. 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 complainant till possession of respective apartments stands handed over and there is no illegality in this regard.

37. 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.*

38. 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.

39. It is not disputed that the respondent is a real estate developer, and it had obtained registration under the Act of 2016 for the project in question on 24.08.2017. The authority under this Act has been regulating the advances received under the project and its various other aspects. So, the amount paid by the complainant to the builder is a regulated deposit accepted by the later from the former against the immovable property to be transferred to the allottee later on. If the project in which the advance has been received by the developer from an allottee is an ongoing project as per section 3(1) of the Act of 2016 then, the same would fall

within the jurisdiction of the authority for giving the desired relief to the complainant besides initiating penal proceedings.

40. 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(penalty) from 23.07.2020 till the offer of possession as per clause 4 of MOU dated 22.07.2019.

The respondent is also liable to pay the arrears of assured return(penalty) 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.

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:**

41. 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.

## H. Directions of the authority

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

i. The respondent is directed to pay assured return (penalty) from 23.07.2020 till the offer of possession as per clause 4 of the memorandum of understanding dated 22.07.2019.

ii. The respondent is also liable to pay the arrears of assured return(penalty) 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(penalty) accrued besides interest would be paid to the complainant within a period of 90 days from the date of this order, after adjustment dues if any from the complainant 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 shall not charge anything from the complainant which is not part of the agreement of sale.

43. Complaint stands disposed of.

44. File be consigned to registry.

V.I-

**(Vijay Kumar Goyal)**
Member

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

**Dated: 25.01.2022**