BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.:	**610 of 2018**
Date of filing complaint:	**25.07.2018**
First date of hearing:	**21.11.2019**
Date of decision :	**27.01.2022**

Mr. Girish Kumar Agarwal
R/O: -G-150, Palam Vihar, Gurugram, Haryana-122017 **Complainant**

Versus

1.M/s Landmark Apartments Private Limited
2.Mr. Sandeep Chillar
3. Mr. Dinesh Kumar **Respondents**
All having their Regd. Office at: - Plot No. 265, Sector 44, Gurugram, Haryana-122003

CORAM:
Dr. K.K. Khandelwal **Chairman**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Sh. Manish Yadav (Advocate) Advocate for Complainant
Ms. Shriya Takkar (Advocate) Advocate for Respondents

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 allottees as per the agreement for sale executed inter se.

A. Unit and project related details

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

S.No.	Heads	Information
1.	Name of the project	Landmark Cyber Park, Sector 67, Gurugram, Haryana
2.	Nature of the project	IT Park
3.	Area of the project	8.3125 acres
4.	DTCP license no.	97 of 2008 dated 12.05.2008 valid up to 11.05.2020
5.	Name of License Owner	Landmark Apartments Pvt. Ltd.
6.	RERA registered/not registered	**Registered** vide no. 61 of 2019 dated 25.11.2019 for 4.48125 acres
	HRERA registration valid up to	26.12.2018
7.	Unit no.	N/A
8.	Unit area	1000 sq. ft.
9.	Date of execution of Memorandum of Understanding (MoU)	10.06.2008 (annexure-I on page no. 15 of complaint)
10.	Date of execution of builder buyer's agreement	N/A
11.	Total consideration	Rs. 41,30,000/-

		(annexure-I on page no. 16 of complaint)
12.	Total amount paid by the complainant.	Rs. 38,60,000/- (annexure-I on page no. 17 of complaint)
13.	Due date of delivery of possession	N/A
14.	Provision regarding assured return	**Clause 4:** - That the First Party will pay Rs. 51.3/- per sq. ft. on 1000 sq. ft. as an assured return in the form of monthly rent to Second Party till the date of possession.
15.	Offer of possession	N/A
16.	Occupation certificate	26.12.2018 (annexure-F on page no. 35 of reply)
17.	Delay in handing over possession till date of decision i.e., 27.01.2022	N/A

B. Facts of the complaint

The complainant has submitted as under: -

3. That the complainant is a law abiding and peace-loving person who is a senior citizen of 80 years of age and the respondent is a company incorporated and registered under Companies Act, 1956 and the respondents claim themselves as reputed builders and developers.

4. That the complainant opted for purchasing an office space from the respondents in their project titled as "Landmark Cyber Park", situated in sector-67, Gurugram, Haryana, in pursuance of which an MoU dated 10.06.2008 signed and executed between the

complainant and the respondents, thereby settling all the terms of purchase.

5. That the said MOU was signed and executed by and between the complainant and the respondents duly confirm the acceptance and stipulation of the following facts and clauses existing between them and the same are as under: -

- That the respondents agreed to sell/allot to the complainant space admeasuring the aggregate tentatively a super area of1000 sq. ft. subject to the final confirmation of area on completion of the building in the proposed IT-Park @ Rs. 4130/- of approx. sq. ft. super total area amounting to the consideration of Rs. 41,30,000/-
- That the complainant had made the payment of 93% of the total cost to the respondent and remaining all other charges like maintenance, parking and EDC according to the demand will be paid at the time of the possession.
- That the respondents will execute the sale deed/registry in favour of the complainant after receiving the balance amount as mentioned above.
- That the respondents will pay Rs. 51.3/- per sq. ft. on 1000 sq. ft. as assured return in form of monthly rent to the complainant till the date of possession.
- That the respondents will not charge any escalation charges for the above-mentioned unit and there will be no PLC for the allotted unit.

- That the respondents would give quarterly cheques for the sum assured to the complainant in individual names of all co-owner equally for every year till the possession of the unit or further subject to the deduction of TDS as per the rates described in IT Act, in the relevant period.
- That the respondents agreed to buy back the said unit @ Rs. 5400/- per sq. ft. as penalty in case of non-completion of the project along with the bank interest of 18% annually.

6. That at the time of entering the MOU, the complainant has paid the 93%of the total consideration of the unit i.e. a sum of Rs. 38,60,000/-and is willing to make the payment of the balance amount in terms of the agreement.
7. That the respondents have failed to abide by the terms and conditions of the memorandum of understanding executed with the complainant on 10.06.2008. As per the memorandum of understanding, respondents have agreed to pay the assured return in the form of monthly rent to the complainant till the offer of possession which they have not done till date and had even stopped paying the assured return to him from September 2012.
8. That on 12.06.2015, the respondents communicated to the complainant regarding the possession of the project stating that they have applied for occupation certificate. That on 13.07.2015, the complainant through email communicate to the respondents about the non-payment of the assured returns and it was also mentioned in the email that the respondents had stopped paying the assured return from September 2012 without any intimation

and informed the respondents that few cheques given by the respondents against the assured return had also got dishonoured.

9. That the respondents have offered possession to the complainant on the ground that they have applied for occupancy certificate from the appropriate authority. However, it is a settled principle of law that the possession offered without the occupancy certificate is non-est in the eyes of law.

10. That the complainant had requested the respondents several times to make the payment of the assured return as promised under the MOU.

11. That on 09.04.2018, the complainant sent a legal notice to the respondents asking them to provide the copy of the license, sanction plans, application for occupancy certificate and copy of occupation certificate the complainant also specifically demanded the remaining assured return along with the 18% p.a. within 15 days of issuance of the said legal notice. However, it is pertinent to mention here in that the respondents have not paid the due assured return and had also not provided the documents demanded by the complainant through the legal notice.

12. That the respondents until today have not received the occupation certificate for the above-mentioned project, and therefore this project falls under the jurisdiction of RERA.

13. That the respondents have not paid the assured return in terms of the agreement w.e.f 10.09.2012, and therefore, as on the date of filing of this complaint, a total sum of Rs. 36,93,600/- is due towards the respondents.

14. That the cause of action to file this present complaint firstly arose at the time of booking of the office space, thereafter it arose on each subsequent payment so made to the respondents, thereafter it again arose when the respondents did not paid the assured return to the complainant assured under MOU. The cause of action is continuous, and the present complaint is filed as expeditiously as possible.

15. That this hon'ble authority has jurisdiction to entertain and to adjudicate this present complaint for the very reason that the project of the respondent is situated within the jurisdiction of district Gurugram, and this authority has powers relegated under the Act to decide and adjudicate the present complaint in its present form.

C. Relief sought by the complainant.

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

- The complainant be awarded Rs. 36,93,600/- due against the assured return from September 2012 till date along with interest at the rate of 18% per annum compounded quarterly in terms of the provisions of the Act governing this present forum from the date of the same becoming due, until its realization.

- The complainant be awarded future assured return in accordance with the terms and conditions of the MOU along with interest at the rate of 18% per annum compounded quarterly in terms of the provisions of the Act governing this

present forum from the date of the same becoming due, until its realisation.

- The respondents be directed to provide copy of license, sanction plan.

D. Reply by the respondents.

17. That present reply on behalf of respondent no. 1 is being filed by Mr. Chetan Dhingra, who is authorized signatory of respondent and has been authorized vide board resolution dated 18th January 2020 to institute, sign, file and verify the present reply, sign affidavit/applications, execute vakalatnama in favour of advocates, depose in the court, compound/ compromise the matter and to do all other acts which are necessary for the just decision of the present complaint.

18. That complainant booked an IT space admeasuring 1000 sq. ft. in a project developed by the respondent by the name "Landmark Cyber Park" situated in sector-67, Gurugram. That one of the offer made by the respondent at that point of time was that the unit will have benefit of assured return. Thereafter, the complainant entered into an MoU dated 10thJune 2008 with the respondent determining all the rights and liabilities of the parties.

19. That the complainant as per the terms of the MOU made payments of Rs 38,60,000/- i.e., 93% payments towards the total cost of the unit to the respondent. However, in addition to the above, the complainant was also supposed to make other payments in the nature of EDC, IDC, FFC, maintenance, IFMS and any other

government taxes etc. as per the demands raised by the respondent.

20. That the as per the terms of the MOU, it was specifically agreed that the respondent will pay a sum of Rs. 51.3/- per sq. ft. on 1000 sq. ft. every month as assured return, payable quarterly till the date of possession. That clause 4 of the MOU clearly describes the liability of the respondent to pay the assured return till the date of the possession. Thus, there was no time limit provided under the MOU for handing over the possession of the unit. It is pertinent to mention here that time was not the essence of the contract for delivering the possession. However, it was mutually agreed upon that the complainant will be entitled to the benefit of assured return still the date of possession. It is further submitted that the benefits of assured return cannot be extended when the complainant has deliberately failed to take possession even after the offer of possession has been given by the respondent.

21. That as per MOU, the complainant was paid the assured returns till June 2013 to the tune of Rs 24,89,454/-. That thereafter in the month of June 2013 the complainant allottees was duly informed that the respondent would adjust the pending liabilities against his pending charges towards payment external development charges, interest free maintenance security deposit stamp duty, registration charges & other incidental charges.

22. That it is pertinent to mention here that the respondent successfully completed the project in the year 2015 and accordingly applied for the grant of OC on 17th April 2015.

23. That the respondent after applying the OC accordingly informed the tentative date of receiving the OC to all its buyers including the complainant vide letter dated 12th June 2015. Itis submitted that in the said letter of intimation of possession dated 12.06.2015, it never confirmed the date of receiving the occupation certificate; rather the respondent stated that the occupation certificate is expected to be received within next three months. Since, the building was complete in all respects; the respondent expected the OC to be received within a period of 3 months and accordingly requested the complainant also to clear all the pending dues of EDC, IDC, IFMS and other charges.

24. That despite the said intimation, the complainant failed to approach the respondent and make payments as per the agreed terms. It is pertinent to mention here that since the respondent had applied for the OC and since there was no objection raised by the competent authority; a deemed OC was already existing in favour of the respondent. The relevant rule under the Haryana Building Code, 2017 is reproduced herein below: -

> *"4.10 Occupation Certificate(4) After receipt of application, the Competent Authority shall communicate in writing within60 days, his decision for grant/refusal of such permission for occupation of the building in Form BR-VII. The-register shall be maintained as specified in Code-4.8 for maintaining record in respect of Occupation Certificate.*
> *(5) If no communication is received from the Competent Authority within 60 days of submitting the application for "Occupation Certificate", the owner is permitted to occupy building, considering deemed issuance of "Occupation certificate" and the*

application form BR-IV (A) or BR-IV(B)shall act as "Occupation Certificate". However, the competent authority may check the violations made by the and take suitable action."

25. That however, the issue of delay in handing over the possession is not applicable in the present case, since there was no time limit provided under the MOU and time was never made an essence of the contract.

26. That the project is already complete, and the respondent has also received the OC from the competent authorities. That the present case is not a fit case for awarding payment of assured return as the complainant has been in constant breach of the terms and condition of the agreement/MoU i.e., taking over of possession after clearance of its lawful dues.

27. That from the above list of dates and events, it becomes quite evident that the respondent has already applied for grant of OC in April 2015 when the building was complete all respects and based on the application occupation certificate was granted on26.12.2018.

28. That from the facts as narrated above, it become quite evident that despite the IT Space of the complainant being complete in all respects, the respondent could not hand over the physical possession of the IT Space due to non-payment of pending amount by the complainant. However, in the present case, the issue is not related to delay in handing over the possession of the unit as the time was not an essence of the contract and there was no time limit provided under the agreement between the parties.

However, still the respondent has offered possession in 2015 subject to clearance of the pending dues.

29. That the complaint is liable to be dismissed in view of the preliminary objections set out hereinafter. It is submitted that since the preliminary objections are of a jurisdictional nature which goes to the root of the matter, and as per the settled law, the same should be decided in the first instance. It is only after deciding the question relating to maintainability of the complaint that the matter is to be proceeded with further. The following preliminary and jurisdictional objections are being raised for dismissal of the complaint. Without prejudice to the contention that unless the question of maintainability is first decided, the respondent ought not to be called upon to file the reply on merits to the complaint, this reply is being filed by way of abundant caution, with liberty to file such further reply as may be necessary, in case the complaint is held to be maintainable.

30. It is submitted that the complaint filed is baseless, vexatious and is not tenable in the eyes of law and therefore, the complaint deserves to be dismissed at the very threshold.

31. That the OC was applied for the said project in April 2015 and asper the Haryana Real Estate (Regulation and Development) rules,2017, the current project is beyond the scope of this adjudicating authority.

32. That the present complaint is not maintainable as this authority has no jurisdiction to entertain the present complaint. That the present complaint pertains to payment of pending/future assured return along with interest and in the alternative, seeks refund

along with interest and compensation under 11, 12, 13, 14 18 of the Real Estate (Regulation &Development) Act, 2016 (hereinafter referred to as the "said Act"). That the complainant also seeks interim relief regarding restraining the respondent from claiming his lawful dues which is arbitrary and against the principles of natural justice. The authority can only deal with the complaint filed under section 18 of the Act and for rest of the grievances, the adjudicating officer is the appropriate authority. It is further submitted that grievances under section 11, 12, 13 and 14of the Act cannot be raised before the authority undersection 31 of the Act and thus, the present complaint is not maintainable.

33. That the complainant is seeking payment of pending/future assured return along with interest and in the alternative, also seeks refund along with interest and other reliefs. That the complainant has filed the present complaint under rule-28 of the said rules and is seeking the relief of payment assured return and in alternative seeks refund, and interest under section 18 of the said Act. It is submitted that the complaint, if any, as per the reliefs claimed is required to be filed before the adjudicating officer under rule-28 of the said rules and not before this authority as this authority has no jurisdiction whatsoever to entertain such complaint and as such, the complaint is liable to be rejected on this ground alone.

34. That in ***"MR. BRHIMJEET AND ANR. VERSUS M/S LANDMARK APARTMENTS PVT. LTD.*** "bearing CRN/141/2018, this authority has held as under:

"6. As per clause 4 of the MoU dt. 14.08.2010, the complainant is insisting that the RERA Authority may get the assured return of Rs 55,000 per month released in his favour.
7. However, the authority is of the view that a perusal of the RERA Act2016, reveals that as per the MoU, the assured return is not a formal clause with regard to giving or taking possession of unit for which, the buyer has paid an amount of Rs 55,00,000 to the builder which is not within the purview of RERA Act. Rather, itis a civil matter.
8. Since RERA Act deals with the builder buyer relationship to the extent of timely delivery of possession to the buyer deals with withdrawal from the project, as per provisions of section 18(1) of the Act.
9. The buyer is directed to pursue the matter with regard to getting assured return as per the MoU by filing a case before appropriate forum/ Adjudicating officer"

35. That in light of the aforesaid judgment passed by this authority in a similarly situated complaint seeking assured return, the respondent prays for outright dismissal of the complaint.

36. That in the above-mentioned matter of ***'Brhimjeet vs. M/S Landmark Apartments Pvt. Ltd'***, it was held by this Hon'ble Authority that as per the MOU between the parties, the assured returns were not a formal clause with respect to giving or taking possession of the unit and that the builder was not within the purview of the Act of 2016. This authority went on to further issue directions to the allottee in the case to file a case for assured returns before the appropriate forum. The above-mentioned order dated 07.08.2018 has further been upheld by this authority in the cases of ***'KailashDevi vs. M/s. Landmark Apartments Pvt. Ltd'***. (ComplaintNo. 355/2018) and ***'Geeta Rani vs. M/s. Landmark Apartments Pvt. Ltd'*** (Complaint No. 870/2018).It is submitted

that the same view has to be followed as per the 'Doctrine of Precedent' as held by the Hon'ble Apex Court in the matter of '***K. Ajit Babu& Ors. vs. Union of India & Ors.***' [1997 (6) SCC473), has clearly held as under:

> 6. *Consistency, certainty and uniformity in the field of judicial decisions are considered to be the benefits arising out of the "Doctrine of Precedent". The precedent sets a pattern upon which a future conduct may be based. One of the basic principles of administration of justice is that the cases should be decided alike. Thus, the doctrine of precedent is applicable to the Central Administrative Tribunal also. Whenever an application under Section 19 of the Act is filed and the question involved in the said application stands concluded by some earlier decision of the Tribunal, the Tribunal necessarily has to take into account the judgment rendered in earlier case, as a precedent and decide the application accordingly. The Tribunal may either agree with the view taken in the earlier judgment or it may dissent. If it dissents, then the matter can be referred to a larger bench/full bench and place the matter before the Chairman for constituting a larger bench so that there may be no conflict upon the two Benches. The large Bench, then has to consider the correctness of earlier decision in disposing of the later application. The larger Bench can over-rule the view taken in the earlier judgment and declare the law, which would be binding on all the Benches(See Jhon Lucas(supra). In the present case, what we find is that tribunal rejected the application of the appellants thinking that appellants are seeking setting aside of the decision of the tribunal in Transfer Application No. 263 of 1986. This view taken by the Tribunal was not correct. The application of the appellant was required to be decided in accordance with law"*

37. That the provisions of the Act have only prospective operation, especially when it inter alia seeks to impose new burden. It is a settled law that a statute shall operate prospectively unless retrospective operation is clearly made out in the language of the

statute. It is stated that the MOU in this case was executed prior to the Act came into force. Thus, it is not an agreement for sale as laid down in annexure-'A' of the rules and the provisions of the Act cannot be made applicable. That no delay can be attributed in the present case, since time was not the essence of the contract in the present case.

38. That it is pertinent to mention here that section 18 categorically provides that "if the promoter fails to complete or is unable to give possession of an apartment, plot or building - (a) in accordance with the terms of the agreement for sale or as the case may be, duly completed by the date specified therein. However, in the present case, the respondent has duly completed the project and has received occupation certificate from the competent authority. That the complainant is the defaulting party in the present case, as he has failed to take possession ever after receipt of intimation of possession.

39. That in the present case no time limit was prescribed under the MOU and thus no orders can be passed in the present case.

40. That in the instant complaint, the complainant has failed to implead "Girish Kumar Agrawal (HUF)" (hereinafter known as" omitted party") being one of the necessary party to the present complaint. That omitted party is a necessary party because it was a part of second party in the executed MOU dated 07.06.2008 and hence is the equal holder and owner of the property in dispute. That the outcome of the present complaint will have direct bearing on the rights and obligation of the omitted party.

41. That as per rule 13 of order 1 of the Code of Civil Procedure, all objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and hence the respondent prays for the dismissal of the present complaint on this score itself.

42. That the MOU was entered into between the parties and, as such, the parties are bound by the terms and conditions mentioned in the said agreement. The said agreement was duly signed by the complainant after properly understanding each and every clause contained in the agreement. The complainant was neither forced nor influenced by the respondent to sign the said agreement. It was the complainant who after understanding the clauses signed the said agreement in his complete senses.

43. That it is trite law that the terms of the agreement are binding between the parties. The Hon'ble Supreme Court in the case of ***"Bharti Knitting Co. vs. DHL Worldwide Courier (1996) 4 SCC 704"***observed that a person who signs a document containing contractual terms is normally bound by them even though he has not read them, and even though he is ignorant of their precise legal effect. It is seen that when a person signs a document which contains certain contractual terms, then normally parties are bound by such contract; It is for the party to establish exception in a suit. When a party to the contract disputes the binding nature of the singed document, it is for him or her to prove the terms in the contract or circumstances in which he or she came to sign the documents.

44. That the Hon'ble Supreme Court in the case of ***"Bihar State Electricity Board, Patna and Ors. Vs. Green Rubber Industries and Ors, AIR (1990) SC 699"*** held that the contract, which frequently contains many conditions, is presented for acceptance and is not open to discussion. It is settled law that a person who signs a document which contains contractual terms is normally bound by them even though he has not read them, even though he is ignorant of the precise legal effect.

45. That the complainant has approached the authority with unclean hands and has suppressed and concealed material facts and proceedings which have a direct bearing on the very maintainability of the purported complaint and if there had been disclosure of these material facts and proceedings, the question of entertaining the purported complaint would not have arisen. It is settled law as held by the Hon'ble Supreme Court in ***'S.P.Chengalvaraya Naidu v/s Jagannath 1994(1) SCC(1)'*** that non-disclosure of material facts and documents amounts to a fraud on not only the opposite parties but also on the court. A reference may also be made to the decision of the Hon'ble Supreme Court in cases of ***'Dilip Singh Vs State of UP 2010-2-SCC-114 and Amar Singh Vs Union of India 2011-7-SCC-69'*** and followed by the Hon'ble National Commission in the case of ***'Tata Motors Vs Baba Huzoor Maharaj being RP No. 2562 of 2012'*** decided on 25.09.2013.

46. The complainant has not approached this authority with clean hands. it is submitted that the complainant is attempting to raise

non-issues and is now, at a belated stage, attempting to seek a modification of the agreement entered into between the parties in order to acquire benefits for which the complainant is not entitled in the least.

47. That the complainant has wilfully agreed to the terms and conditions of the agreement and is now at this belated stage has raised issues and concerns regarding his contractual obligations.

48. That the complainant has suppressed many material facts, which are extremely relevant in order for a proper adjudication of the present dispute which tantamount to playing fraud upon this authority, he does not deserve any relief and the present complaint merits dismissal on this count itself. He had failed to disclose that he was given the assured returns as provided under the MoU.

49. That the complainant has failed to disclose that he was dutybound under the executed MOU to clear his outstanding dues at the time of intimation of possession. That the complainant further failed to disclose that he was provided a project update vide letter dated 14.05.2019, wherein the respondent again requested the complainant to clear outstanding dues and to take handover of possession or enter into a lease arrangement/ agreement with the respondent. The complainant has further failed to disclose that the due to non-clearance of the dues the respondent had again sent a letter dated 21.09.2019 for reminder of taking over of possession and also conveyed the outstanding dues of the complainant.

50. The complainant has not booked the unit for their personal need, but it was an investment to make profit and due to recession in real-estate industry, investment of complainant took nosedive as such under the garb of payment of assured return and delayed possession, they devised novel idea to demand return of their investment and also retain the property. However, in the present case, there is no delay since there was no time limit provided under the agreement.

51. That main grievance of the complainant in the complaint is that respondent has not handed over possession of unit to the complainant. However, it is pertinent to mention here that there was no time limit prescribed under the agreement and thus the allegation is wrong and hence denied. It is submitted herein that respondent has already sent letters to the complainant informing/reminding them to take possession of the unit after clearing outstanding dues, but it is the complainant who is not prepared to take possession of the unit after clearing the pending charges.

52. That it has been repeatedly held by Hon'ble Supreme Court of India and Delhi High Court that time is not essence of the contract when contract prescribed levy of penalty in case of non-completion of contract within the stipulated time or contains clause in respect to extension of time beyond the time as stipulated in the contract.

53. That if delay possession charges or payment of assured return are allowed, other buyers/ customers who have invested their hard-earned money in the IT project will suffer irreparable losses and

the IT project will never be made fully occupied if such an approach continues. Thus, to protect the interest of one person, the authority can't jeopardize the interest of others who are genuine purchasers and are not mere speculators.

E. Jurisdiction of the authority

54. The respondent has raised preliminary objection regarding jurisdiction of authority to entertain the present complaint. 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, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject-matter jurisdiction

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

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of

allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

Section 34-Functions of the Authority:

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

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

F. Findings on the relief sought by the complainant:

F. I Assured returns

55. The claimant has sought assured returns on monthly basis as per the MoU dated 10.06.2008 at the rate of Rs. 51.3/- per sq. ft. on 1000 sq. ft. per month till the date of possession. It is also pleaded by the claimant that the respondents have not complied with the terms and conditions of the MoU.

56. The MoU dated 10.06.2008 is a document which was executed between both the parties and can be termed as an agreement. The Act of 2016 defines "agreement for sale" means an agreement

entered into between the promoter and the allottee [Section 2(c)]. An agreement for sale is defined as an arrangement entered between the promoter and allottee with freewill and consent of both the parties. An agreement defines the rights and liabilities of both the parties i.e., promoter and the allottee and marks the start of new contractual relationship between them. This contractual relationship gives rise to future agreements and transactions between them. The different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral part of this agreement is the transaction of assured return inter-se parties. The "agreement for sale" after coming into force of this Act (i.e., Act of 2016) shall be in the prescribed form as per rules but this Act of 2016 does not rewrite the "agreement" entered between promoter and allottee prior to coming into force of the Act as held by the Hon'ble Bombay High Court in case ***'Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.', (Writ Petition No. 2737 of 2017)*** decided on 06.12.2017. Since, the agreement defines the buyer-promoter relationship therefore, it can be said that the agreement for assured return between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate regulatory authority has complete jurisdiction to deal with assured return cases as the contractual relationship arise out of agreement for sale only and between the same parties as per the provisions of section 11(4)(a) of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the agreement for sale till the execution of

conveyance deed of the unit in favour of the allottees. Now, the issues which arise for consideration are:

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

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

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

57. While taking up the cases of ***'Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd. (complaint no 141 of 2018)'***, and ***'Sh. Bharam Singh &Anr. Vs. Venetain LDF Projects LLP" (complaint no 175 of 2018')*** decided on 07.08.2018 and 27.11.2018 respectively, it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the issue of assured returns was involved to be paid by the builder to an allottee but at that time, neither the full facts were brought before the authority nor it was argued on behalf of the allottee that on the basis of contractual obligations, the builder is obligated to pay that amount. However, there is no bar to take a different view from the earlier one if new facts and law have been brought before an adjudicating authority or the court. There is a doctrine of "prospective overruling" and which provides that the law declared by the court applies to the cases arising in future only and its applicability to the cases which have attained finality

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

(Company Appeal (AT) (Insolvency) No. 74 of 2017)' and '***Nikhil Mehta and Sons (HUF) and Ors. vs. AMR Infrastructure Ltd. (CA NO. 811 (PB)/2018 in (IB)-02(PB)/2017)'*** decided on 02.08.2017 and 29.09.2018 respectively, it was held that the allottees are investors and have chosen committed return plans. The builder in turn agreed to pay monthly committed return to the investors. Thus, the amount due to the allottee comes within the meaning of 'debt' defined in Section 3(11) of the I&B Code. Then in case of ***'Pioneer Urban Land and Infrastructure Limited &Anr. v/s Union of India & Ors. (Writ Petition (Civil) No. 43 of 2019)'*** decided on 09.08.2019, it was observed by the Hon'ble Apex Court of the land that "...allottees who had entered into "assured return/committed returns' agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of agreement till the date of handing over of possession to the allottees". It was further held that 'amounts raised by developers under assured return schemes had the "commercial effect of a borrowing' which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code" including its treatment in books of accounts of the promoter and for the purposes of income tax. Then, in the latest pronouncement on this aspect in ***case 'Jaypee***

Kensington Boulevard Apartments Welfare Association and Ors. vs. NBCC (India) Ltd. and Ors. (24.03.2021-SC): MANU/ SC/0206 /2021', the same view was followed as taken earlier in the case of '***Pioneer Urban Land Infrastructure Ld & Anr.***' with regard to the allottees of assured returns to be financial creditors within the meaning of section 5(7) of the Code. Then after coming into force the Act of 2016 w.e.f 01.05.2017, the builder is obligated to register the project with the authority being an ongoing project as per proviso to section 3(1) of the Act of 2017 read with rule 2(o) of the Rules, 2017. The Act of 2016 has no provision for re-writing of contractual obligations between the parties as held by the Hon'ble Bombay High Court in case '***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.,* (Supra)'** as quoted earlier. So, the respondent/builder can't take a plea that there was no contractual obligation to pay the amount of assured returns to the allottee after the Act of 2016 came into force or that a new agreement is being executed with regard to that fact. When there is an obligation of the promoter against an allottee to pay the amount of assured returns, then he can't wriggle out from that situation by taking a plea of the enforcement of Act of 2016, BUDS Act 2019 or any other law.

58. Section 2(4) of the BUDS Act, 2019 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.*

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

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

60. So, keeping in view the above-mentioned provisions of the BUDS 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.

61. 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.

62. It is evident from the perusal of section 2(4)(l)(ii) of the BUDS Act of 2019 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.

63. 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.

64. 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.**

65. The money was taken by the builder as deposit in advance against allotment of immovable property and its possession was to be offered within a certain period. However, in view of taking sale consideration by way of advance, the builder promised certain amount by way of assured returns for a certain period. So, on his failure to fulfil that commitment, the allottee has a right to approach the authority for redressal of his grievances by way of filing a complaint.

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

Though it is the case of complainant, he has received assured return up to August 2012, but the version of respondent is otherwise who took a plea that the amount of assured return was paid up to June 2013. Though no authenticated document in this regard has been placed on the file by both the parties but there are details of amount paid to the complainant as depicted in

Annexure C at page number 30 of paper book, showing payment of Rs. 24,89,454/- up to 11.06.2013.

G. Directions of the authority.

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

i. The respondents are directed to pay the amount of assured return as agreed upon with the complainant from July 2013 till the date of offer of possession.

ii. The complainant is directed to pay outstanding dues, if any, after adjustment of amount of assured returns.

iii. The respondent is directed to handover the possession of the unit within one month although he should have done it within two months of obtaining OC as per law.

iv. The respondent is also directed to pay the arrears of assured returns as agreed upon up to the date of offer of possession 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.

v. The respondent is also directed to provide copies of license and sanctioned plan of the above said unit.

vi. The above directions be complied with by the respondent within 90 days.

67. Complaint stands disposed of.

68. File be consigned to registry.

(Vijay Kumar Goyal)
Member

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

Dated: 27.01.2022