BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**1457 of 2021**
Date of filing complaint:		**19.03.2021**
First date of hearing	:	**27.05.2021**
Date of decision	:	**05.07.2022**

Mr. Abhay Khemka & Sons HUF
R/o:- B-3/16, Ground Floor, DLF Phase-I, Gurugram, Haryana-122002 **Complainants**

Versus

M/s Vatika Limited
Office: Unit no. A-002, Vatika India Next city Centre, Ground floor, block A, Sector 83, Vatika India Next Gurugram, Haryana-122012. **Respondent**

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

APPEARANCE:
Mr. Abhijeet Gupta Advocate for the complainants
Mr. Dhruv Dutt Sharma Advocate for the respondent

ORDER

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

A. Project and unit related details

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

S. No.	Heads	Information
1.	Name and location of the project	"Vatika INXT City Centre", Sector 83, Gurgaon, Haryana
2.	Nature of the project	Commercial complex
3.	Area of the project	10.718 acres
4.	DTCP License	258 of 2007 dated 19.11.2007 valid upto 19.11.2019
5.	RERA registered/ not registered	**Not registered**
6.	Allotment letter	02.06.2010 (annexure A, page 26 of complaint)
7.	Date of builder buyer agreement	02.06.2010 (page 28 of complaint)
8.	Unit no.	1724, 17th floor, tower no. A admeasuring 150 sq. ft. (page 31 of complaint)
9.	New unit no.	506, 17th floor, tower no. E (annexure 4, page 52 of reply)
10.	Possession clause	***The Developer will complete the construction of the said complex within three (3) years from the date of execution of this agreement.*** *Further, the Allottee has paid full sale consideration on signing of this agreement, the Developer further undertakes to make payment of Rs As per annexure "A" ..... (Rupees.....) per sq.ft. of super area per month by way of committed return for the period of construction, which the Allottee duly accepts. In the event of a time overrun in completion of the said complex the Developer shall continue to pay to the Allottee the within mentioned assured return until the unit is offered by the*

		Developer for possession. **(Emphasis supplied)**
11.	Due date of possession	02.06.2013
12.	Total sale consideration	Rs. 30,00,000/- as per clause 1 of the agreement (page 31 of complaint)
13.	Paid up amount	Rs. 30,00,000/- as alleged by the complainants (page 31 of the complaint)
14.	Assured return clause	**Annexure A** **Addendum to the agreement dated 02.06.2010** The unit has been allotted to you with an assured monthly return of Rs. 65/- per sq.ft. However, during the course of construction till such time the building in which your unit is situated is ready for possession you will be paid an additional return of Rs. 6.50/- per sq.ft. Therefore, your return payable to you shall be as follows: This addendum forms an integral part of builder buyer Agreement dated 02.06.2010 A. Till Completion of the building: Rs. 78/- per sq.ft. B. After Completion of the building: Rs. 65/- per sq.ft. You would be paid an assured return w.e.f. 02.06.2010 on a monthly basis before the 15th of each calendar month. The obligation of the developer shall be to lease the premises of which your flat is part @Rs. 65/- per sq.ft. In the eventuality

		the achieved return being higher or lower than Rs. 65/- per sq.ft. 1. If the rental is less than Rs. 65/- per sq.ft. than you shall be returned @Rs. 116/- per sq.ft. for every Rs. 1/- by which achieved rental is less than Rs. 65/- per sq.ft. 2. If the achieved rental is higher than R. 65/- per sq.ft. than 50% of the increased rental shall accrue to you free of any additional sale consideration. However, you will be requested to pay additional sale consideration @Rs. 116/- per sq.ft. every rupee of additional rental achieved in the case of balance 50% of increased rentals.
15.	Offer of possession	Not offered
16.	Occupation certificate	Not obtained
17.	Assured return amount paid by the respondent till 31.09.2018	Rs.58,98,750/- (annexure R3, page 51 of complaint)

B. Facts of the complaint

3. That, in pursuant to the elaborate advertisements, assurances, representations and promises made by respondent in the brochure circulated by them about the timely completion of a premium commercial project with impeccable facilities and believing the same to be correct and true, the complainants booked unit 1724, 17th floor at tower-A of Vatika Trade Center Gurugram vide agreement dated 02.06.2010. It was represented and assured by the respondent that the project including the commercial unit of the complainant would be completed by end of 2013.

4. That, relying upon the representations and being assured that the respondent would abide by the commitments, the complainants in good faith purchased a commercial unit bearing unit no. 1724, 17th floor, tower a of Vatika trade centre from the respondent.

5. That pursuant to the booking of the unit by the complainants, a builder-buyer agreement dated 02.06.2010 was executed between the parties which included all the details of the project such as amenities promised, site plan, payment schedule, date of completion etc. under the said builder buyer agreement. The respondent promised, assured, represented and committed to the complainant that the residential project would be completed and would be handed over to the buyer within the above-mentioned stipulated period of time. Further, as per clause 2 of the builder-buyer agreement, the respondent assured that the time is of the essence.

6. That pursuant to the original builder buyers' agreement, an addendum dated 27.07.2011, marked as annexure A to the BBA, was duly signed and executed between the parties and undertook to pay a monthly rent of Rs. 78/- per sq. ft. per month till completion of the said project and thereafter Rs. 65/- per sq. ft. per month upon completion of the said project upto 3 years from the date of completion to the complainants, which is equivalent to Rs. 58,500/- per month till completion of the project and thereafter Rs. 48,750/- per month upon completion of the project upto three years from the date of completion. It is stated that the complainants were getting paid the promised monthly rentals till September 2018 however the respondent stopped paying the monthly rentals to the complainants after September 2018.

7. Furthermore, the complainants were shocked and appalled when respondent changed the unit re-allotted from unit no. 1724, 17th floor, tower-A, Vatika Trade Center to unit no. E-506 on 5th floor in tower E, Vatika Inxt City Center stating the original plan of 14 storey building has been cancelled and now they have a basement plus 4 storey commercial building in plan to which the complainants had agreed upon initially. It is pertinent to mention that this act of respondent is arbitrary and in contravention to provisions of the BBA and other agreements as agreed and executed between the parties.

8. Thereafter, several efforts from the complainants were made to seek timely updates about the status of the construction work at the site. But due to the negligence of the respondent, there was no satisfactory response from their end. The agreement entered between the complainants and the respondent provided for construction linked payment plan and the complainants assumed the money collected by the respondent from the complainants would be utilized for construction purpose. Unfortunately, the respondent did not properly utilize the complainant's hard-earned money and even after the lapse of the 11 Yyears of the date of booking the project is yet to be completed.

9. After getting zero response from the respondent, the complainants visited the construction site but were shocked and appalled to see that construction that had not been completed. Despite respondent promising the complainants to provide him with world class project with impeccable facilities, they were complainant is shocked to see incomplete construction being done at the

construction site and the purpose of booking the unit completely not fulfilled.

10. That the respondent at various instances violated the terms and condition of the builder buyer's agreement by:
    i. Not handing over the peaceful and vacant possession of the abovesaid allotted unit.
    ii. Not paying the promised monthly rentals to the complainants at initially promised rates.
    iii. By not executing the sale deed of the abovesaid Unit.
    iv. By re-allotting the unit without any prior consent of the complainant.
11. That, even at the time of the filing of the present complaint before this authority, Gurugram, the respondent has not got the project registered with the authority and for the same reason, the respondent has violated the provisions of section 3 and section 4 of the Act, 2016 and therefore, liable to be punished under Section 59 & 60 of the abovesaid Act.
12. That at the time of execution of the builder-buyer agreement, the respondent had represented to the complainants that they are in possession of the necessary approvals from the DTCP, Haryana to commence with the construction work of the commercial project. However, till date only incomplete construction whatsoever has taken place at the site. It is abundantly clear that the respondent has no intention of completing the above said project and has not abided to the terms and conditions mentioned in the clauses of the builder buyer agreement.
13. That, it is unambiguously lucid that no force majeure was involved, and the project has been at a standstill since several years,

precisely in the end of 2012 and it has been 10 years till the present date, therefore the respondent cannot take a plea that the construction was halted due to the Covid-19 pandemic. It is submitted that the reassigned complainants have already made the full payment to the respondent towards the commercial unit booked by them. That, despite paying such a huge sum towards the unit, the respondent has failed to stand by the terms and condition of the agreement and the promises, assurances, representations etc., which it made to the complainants at the time of the booking the abovesaid unit and hence this complaint.

C. Relief sought by the complainants:

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

    i. Direct the respondent to handover the actual, physical, vacant possession of the unit no. E-506 in Tower E of the abovesaid project.

    ii. Direct the respondent to execute the sale deed of the abovesaid unit in favour of the complainants.

    iii. Direct the respondent to pay the delay penalty charges with interest as per RERA Act.

    iv. Direct the respondent to pay assured return charges to the complainant as per the addendum to agreement.

15. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the act to plead guilty or not to plead guilty.

D. Reply by the respondent

16. The respondent has contested the complaint on the following grounds.

a. That the complaint filed by the complainants before the authority, besides being misconceived and erroneous, is untenable in the eyes of law. The complainant have misdirected himself in filing the above captioned before this authority as the relief being claimed by them, besides being illegal, misconceived and erroneous, cannot be said to even fall within the realm of jurisdiction of this authority.

b. That the complainants by way of present complaint are also seeking the relief of recovery of alleged pending assured return amount. However, it is submitted that the authority does not have jurisdiction to decide upon the amount of assured return which it has already held in its various judgments. It is clear that complainants are not "allottees, but are investors" who are only seeking assured return from the respondent, by way of present complaint, which is not maintainable under RERA. The complainant after their own independent judgment have booked the said unit. The complainants have agreed for leasing arrangement wherein they have booked the said commercial unit for earning profit and is meant for leasing only and not for personal occupation.

c. That due to the evolving policies, regulations and legal framework governing real estate investments, the company also informed the clients of commercial units that as per the guidelines newly promulgated ordinance i.e. "Banning of Unregulated Deposit Scheme Ordinance 2018" and further "Banning of Unregulated Deposit Scheme Act 2019" the government banned such assured/committed returns and schemes of such returns completely. It is submitted that the

respondent duly paid the assured return till September, 2018 amounting to Rs. 58,98,750/- and it was only due to the above-mentioned ordinance and Act, the responded suspended all return based sales and stopped making payments towards the assured returns. Thus, in view of the above-mentioned ordinance and Act, the assured return is not payable.

d. That the complainants are a real estate investor who has made the booking with the respondent only with an intention to earn assured return and lease rentals from the respondent. As per clause 32.1 of the builder buyer agreement r.w. addendum to the agreement, the complainants have agreed for leasing arrangement wherein they have booked the said commercial unit for earning profit and is meant for leasing only and not for personal physical occupation or use and as such the relief of possession and interest sought by them cannot be granted by this authority. Therefore, the present complaint does not fall within the purview of the authority.

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

E. Jurisdiction of the authority

18. 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

19. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana, 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 completed 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 of 2016 quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving

aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the relief sought by the complainants:

F.I Assured return

20. While filing the petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 02.06.2010, the complainants have also sought assured returns on monthly basis as per addendum to the agreement at the rate of Rs 78/- per sq. ft. of super area per month till the completion of construction of the said building. It was also agreed as per clause 32.2(a) that the developer will pay to the buyer Rs. 65/- per sq.ft. super area of the said commercial unit as committed return for upto 36 months from the date of completion of construction of the said building or till the said commercial unit is put on lease, whichever is earlier. It is pleaded that the respondent has not complied with the terms and conditions of the agreement. Though for some time, the amount of assured returns was paid but later on, the respondent refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019 (herein after referred to as the Act of 2019). But that Act does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act. However, the plea of respondent is otherwise and who took a stand that though it paid the amount of assured returns upto the year 2018 but did not pay the same amount after coming into force of the Act of 2019 as it was declared illegal.

21. 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 returns between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate regulatory authority has complete jurisdiction to deal with assured return cases as the contractual relationship arise out of agreement for sale only and between the same parties as per the provisions of section 11(4)(a) of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the agreement for sale till the execution of conveyance deed of the

unit in favour of the allottees. Now, three issues arise for consideration as to:

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

22. While taking up the cases ***of Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd. (complaint no 141 of 2018),*** and ***Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP" (complaint no 175 of 2018)*** decided on 07.08.2018 and 27.11.2018 respectively, it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the issue of assured returns was involved to be paid by the builder to an allottee but at that time, neither the full facts were brought before the authority nor it was argued on behalf of the 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 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 allottee 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. 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 respondents/builders can't take a plea that there was no contractual obligation to pay the amount of assured returns to the allottee after the Act of 2016 came into force or that a new agreement is being executed with regard to that fact. When there is an obligation of the promoter against an allottee to pay the amount of assured returns, then he can't wriggle out from that situation by taking a plea of the enforcement of Act of 2016, BUDS Act 2019 or any other law.

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

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

24. A perusal of the above-mentioned definition of the term 'deposit' shows that it has been given the same meaning as assigned to it under the Companies Act, 2013 and the same provides under

section 2(31) includes any receipt by way of deposit or loan or in any other form by a company but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India. Similarly rule 2(c) of the Companies (Acceptance of Deposits) Rules, 2014 defines the meaning of deposit which includes any receipt of money by way of deposit or loan or in any other form by a company but does not include.

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

25. 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.
26. 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.
27. It is evident from the perusal of section 2(4)(l)(ii) of the above-mentioned Act that the advances received in connection with consideration of an immovable property under an agreement or

arrangement subject to the condition that such advances are adjusted against such immovable property as specified in terms of the agreement or arrangement do not fall within the term of deposit, which have been banned by the Act of 2019.

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

29. 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.*

30. 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.

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

F. II Delay possession charges

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

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

33. A builder buyer agreement dated 02.06.2010 was executed between the parties. The due date is calculated as per clause 2 of BBA i.e., 3 years from the date of execution of this agreement. Therefore, the possession was to be handed over by 02.06.2013. The relevant clause is reproduced below:

> *"The developer will complete the construction of the said complex within three (3) years from the date of execution of this agreement. Further, the Allottee has ad full sale consideration on signing of this agreement, the Developer further undertakes to make payment of Rs. As per Annexure 'A' (Rupees.....) per sq.ft. of super area per month by way of committed return for the period of construction, which the Allottee duly accepts. In the event of a time overrun in completion of the said complex the Developer shall continue to pay to the Allottee the within mentioned assured return until the unit is offered by the developer for possession.*

34. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions is not only vague and

uncertain but so heavily loaded in favour of the promoter and against the allottees that even a single default by him in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottees is left with no option but to sign on the dotted lines.

35. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges. However, proviso to section 18 provides that where an allottees does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

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

36. The legislature in its wisdom in the subordinate legislation under the rule 15 of the rules has determined the prescribed rate of interest.

37. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 05.07.2022 is 7.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.70%.

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

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

39. On consideration of documents available on record and submissions made by the complainants and the respondent, the respondent is liable to pay assured return as per annexure A to the BBA, wherein it was to pay a monthly rent of Rs. 78/- per sq.ft. per month till completion of the said project and thereafter Rs. 65/- per sq.ft. per month upon completion of the said project upto 3 years from the date of completion to the complainants. It is stated by the

complainants that the respondent paid promised monthly rentals till September 2018. However, the respondent stopped paying the monthly rentals to the complainants after September 2018. In its reply, respondent stated that the said commercial unit is not meant for physical possession and the same has been booked by the complainants to earn profit by specifically agreeing to leasing arrangement. It is further submitted that as per addendum agreement dated 05.10.2019, the complainants agreed for certain new terms and conditions wherein the timeline for completing the construction within 3 years was deleted and total assured returns were payable was till 30.06.2019 only.

40. The authority observes that there was an addendum executed between the parties on 02.06.2010. As per addendum to the agreement dated 02.06.2010, the respondent is liable to pay assured return amount till completion of the building at rate 78/- per sq.ft. per month and thereafter as per clause 32.2 of the builder buyer agreement the respondent was liable to pay assured return amount for the first 36 months after the date of completion of the project or till the date the said unit is put on lease, whichever is earlier. Subsequently there was an addendum agreement was executed on 05.10.2019 and as per clause 2 it was agreed by both the parties, the payment of assured return was to be paid upto 30th June 2019. Further, it was also mentioned in clause 3 of the addendum agreement that the clause 2 of the builder buyer agreement stood deleted. The relevant clause is reproduced below:

> *"Clause 2 Notwithstanding anything to the contrary contained in the said Agreement and upon reconciliation of the accounts of the Allottee, any amount due and payable to the Allottee/Allottees by the Developer, including amounts payable under Annexure A (to*

the Letter dated 15th May 2010) through which the payments payable under Clause 2 (Sale Consideration) were amended and Clause 32 (Leasing Arrangement) upto 30th June 2019, shall be settled and payable at the time of leasing of the unit or within ninety days from the date of execution of the present Addendum Agreement whichever is earlier.

Clause 3 W.e.f. 1st July 2019, Clause 2 (Sale Consideration of the said Agreement stands amended as below:

The last paragraph of Clause 2 (Sale Consideration) "The Developer will complete..... until the Unit is offered by the Developer for possession" and the Annexure 'A' to the Letter dated 15th May 2010 amending the Clause 2 (Sale consideration of the builder buyer Agreement stand deleted"

41. Keeping in view of above-mentioned submissions, the authority directs the respondent to pay the assured return amount from September 2018 till 30.06.2019 as per addendum agreement executed on 05.10.2019. Thereafter, the complainants are entitled to delay possession charges as per clause 2 of the builder buyer agreement. The due date of possession is 02.06.2013. Though, the due date of possession as agreed upon between the parties was fixed as 02.06.2013 as per clause 2 of the builder buyer agreement dated 02.06.2010 but that clause also provided a provision for assured returns, and which was deleted vided addendum dated 05.10.2019. Admittedly, the complainants have been paid the assured returns against the allotted unit upto September 2018 and have been directed to pay the same at agreed rates upto 30.06.2019. Thus, to protect the interest of the allottees and since the project is not complete and offer of possession has not been made of the subject unit after receipt of occupation certificate, the respondent is directed to pay delay possession charges at the

prescribed rate from 01.07.2019 till offer of possession + 2 months on the basis of valid occupation certificate.

H. Directions of the authority

42. Hence, the Authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

i. The respondent is directed to pay the assured return amount from September 2018 till 30.06.2019 as per addendum agreement executed on 26.09.2019. Thereafter, the respondent is also directed to pay delay possession charges at the prescribed rate from 01.07.2019 till offer of possession + 2 months on the basis of valid occupation certificate.

ii. The respondent is also directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of order after adjustment of outstanding dues, if any, from the complainants and failing which that amount would be payable with interest @7.70% p.a. till the date of actual realization.

iii. The respondent shall execute the conveyance deed within the 3 months from the final offer of possession alongwith OC upon payment of requisite stamp duty as per norms of the state government.

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

43. Complaint stands disposed of.

44. File be consigned to registry.

(Vijay Kumar Goyal)
Member

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

Dated: 05.07.2022