HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

COMPLAINT NO. 1394 OF 2021

Akansha Sharma ....COMPLAINANT

VERSUS

Vatika Limited ....RESPONDENT

CORAM: **Rajan Gupta** **Chairman**
Dilbag singh Sihag **Member**

Date of Hearing: 17.08.2022

Hearing: 4th

Present: Mr. R. K. Sahni, ld. counsel of complainant through VC.
None for the respondent.

ORDER (DILBAG SINGH SIHAG - MEMBER)

1. While initiating his pleading, ld. Counsel for the complainant submitted that following are the major facts of the case: -

i. Complainant booked a commercial unit No. 424 measuring 500 sq. ft. on 4th floor of tower C of the project promoted by the

respondents on an agreed consideration of ₹27,50,000/-. Complainant made entire payment of ₹27,50,000/- for the unit through cheques bearing No. 600422 and 000001 dated 11.11.2016 in favour of the respondent.

ii. Respondent issued allotment letter dated 05.12.2016. According to clause 2 of the said allotment letter, respondent undertook to pay assured return at the rate of ₹77 per sq. ft. per month i.e., ₹38,500/- to the complainant until construction of the allotted unit is complete. Builder-buyer agreement was executed on 12.01.2017 (Annexure A-4). Clause 15 of Agreement also provides for payment of assured returns @ ₹77/- per sq. ft. until completion of construction. Further, clause 16 provides that respondent to pay monthly committed returns @ ₹66/- per sq. ft. for upto 3 years from the date of completion of construction. Complainant further alleges that as per representation of the respondent, initially, date of completion of unit was fixed for 30.06.2019.

iii. Complainant further stated that respondent started paying assured returns @ ₹77 per sq. ft. from 05.12.2016 but the same was stopped after September 2017. Despite repeated requests and reminders and even after passing of several years, respondent

neither clarified the date of possession nor paying the assured returns to the complainants.

iv. Complainants further stated that in June 2019 the complainant received an ADDENDUM Agreement from the respondent, she was asked to send a signed copy of the same. Said Addendum Agreement contained amendments of the original BBA. Clause 15 and 16 of the original BBA was unilaterally deleted w.e.f. 01.07.2019. Furthermore, vide Addendum Agreement it was also stated that maintenance charges applicable to the Allottee's unit shall become payable from the date of first lease or 01.07.2021 whichever is earlier.

v. Complainant alleges that said amendment is in gross violation of RERA Act as date of possession was now fixed for 30.06.2021 and further it is settled norm that builder cannot charge maintenance without first handing over the possession of the unit.

vi. Considering above facts, Complainant has filed present complainant being aggrieved from the non-payment of assured returns by the respondent. Further unilateral amendment of the Original BBA vide Addendum Agreement of June 2019 has caused grievance to the complainant. Under such circumstances,

complainant prays that respondent be directed to handover possession of the unit. Further he should also be directed to pay outstanding monthly assured returns from October, 2017 along with permissible delay interest.

3. On the other hand, as per office records notice has been successfully delivered on 17.01.2022. But respondents failed to submit their reply despite availing three opportunities. Therefore, vide order dated 29.06.2022, Authority struck off their defense and decided to proceed ex-parte against the respondent.

4. Authority upon perusing case file observes that issues and controversies involved in this complaint had already been discussed in detail and adjudicated in complaint no. 343 of 2021 titled "Tanya Mahajan Vs. Vatika Ltd.". All the facts and circumstances have already been addressed by the Authority as is evident from the order dated 03.02.2022 and relevant part of the same is reproduced below for ready reference:

> 1. All captioned complaints have been taken up together for disposal because their facts are similar and they relate to same project of the respondent company. Complaint No. 343 of 2021 titled 'Tanya Mahajan Vs. Vatika Ltd.' has been taken as lead case and the facts of this case has been taken into consideration for disposal of this bunch of complaints.
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> 2. The case of complainants is as follows: -
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> i. The complaint has been filed against three respondents. Respondent No.1 and 2 have been stated to be sister concerns and respondent No.3 is director of both the respondent No.1 and

2 companies. Accordingly, all three respondents are jointly and severely liable towards complainants.

ii. On the basis of brochure, representation and assurances of respondent no.1, complainant booked a commercial apartment/unit No. 407 and measuring 500 sq. ft. on 4th floor of the building of the project promoted by respondents at agreed consideration of ₹22,50,000/-. Complainant opted for down payment scheme, and accordingly paid ₹1.00 lac on 18.04.2014 and remaining little more than entire consideration i.e. ₹22,33,430/- on 27.04.2014.

iii. Builder-buyer agreement was executed on 23.05.2014. Clause 15 of Agreement provides that assured return committed at the rate of ₹71.50 per sq. ft. per month i.e. ₹35,750/- per month will be paid to complainant till construction of the allotted unit is complete.

iv. Complainant alleges that respondent paid assured return @ ₹71.50 per sq. ft. till February, 2018, but suddenly stopped the payment thereafter. The complainant alleges that when complainant visited office of respondents in the year 2019 with regard to payment of assured returns, respondent informed that they have received occupation certificate of the building, therefore, from now onwards they will not give assured returns. Complainant, however, alleges that even till now, the possession of the unit has not been offered and the project is not ready of occupation.

v. Complainant further alleges that from 09.03.2018, respondents started making payment of assured returns @ ₹65 per sq. ft., whereas, as per agreement, payment should have been made @ ₹71.50 per sq. ft. Complainant states that respondents stopped making payment even @ ₹65/- per sq. ft. from December, 2018.

vi. Complainant argues that the agreement was silent in regard to date of delivery of possession, but claims that three years should be taken as reasonable period to complete the construction from the date of execution of agreement, making substantial payments.

3. The respondents have submitted in their reply stating as follows:

i. That there is no relationship of builder and buyer between the respondents and the complainant. Complainant was simply an

investor who had approached respondents for investment opportunities and for steady rental income. Respondents have quoted provisions of cause 16.12 of agreement in support of their arguments.

ii. To press the point that the complainants herein are not allottees but mere investors and that the agreement relating to assured returns do not fall within the jurisdiction of the Authority, respondents have referred to certain judgments of the learned RERA Gurugram. Specific judgments referred to are 'Brhimjeet and Anr. Vs. M/s Landmark Apartments Pvt. Ltd.' Complaint No. RERA-GRG-141-2018; and 'Bharam Singh and Anr. Vs. Venetian LDF projects LLP' Complaint No. 175 of 2018. Respondents have also cited Hon'ble National Consumer Disputes Redressal Commission's order in 'Priti Arora Vs. ARN Infrastructure Pvt. Ltd.' CC No. 246 of 2013.

iii. Respondents alleges that agreement between parties was in the form of an investment agreement and complainant had approached the respondents as an investor looking for certain investment opportunities. Complainant being an investor purchased six units in the project and, the agreement for commercial space/unit contained a lease clause which empowers the developer to put unit of the complainant along with other commercial space on lease. It does not have a clause for offering possession. Since complainant was looking for speculative gains, these complaints are liable to be dismissed. Respondents challenges that present complaint has been filed before a wrong forum. The complainants are praying for assured returns which is beyond jurisdiction of this Authority.

iv. Respondents cannot pay assured returns to complainant due to prevailing laws. Respondents argue that on 21.02.2019, Central Government issued an ordinance "Banning of Unregulated Deposit 2019" ordinance. By virtue of which payment of assured returns became wholly illegal. Said ordinance was converted into an Act named "Banning of Unregulated Deposit Scheme Act, 2019" (BUDS Act in brief) on 31.07.2019. Respondents argue that on account of enactment of BUDS Act, they are prohibited from granting assured returns to complainants.

4. Both parties have put forward their oral arguments and also have submitted their arguments in writing.

5. Complainant argues that he is clearly an allottee in terms of Section 2 (d) of RERA Act, 2016. Respondents No.1 is a developer and owner of respondent No.2. Respondent No.2 is owner of the land on which project namely "Vatika Mindscapes" is being developed in which complainant had booked six commercial units measuring 500 sq. ft. each at agreed consideration of ₹22,50,000/- each. Complainant had opted for down payment scheme. Respondents had undertaken to pay assured returns to the complainant till the time peaceful physical possession is handed over to complainant. Construction of the project is nowhere near completion. As per agreement, respondents paid assured returns @ ₹71.50 per sq. ft. till February, 2018 and thereafter stopped it suddenly. The reason for stopping assured returns was that they have received occupation certificate of the building. The complainant states that offer of possession has still not been made nor has payment of assured returns been resumed. The respondents, however, started making payments @ ₹65/- per sq. ft. w.e.f. 09.03.2018. They stopped making payment of even ₹65/- per sq. ft. from December, 2018. Complainant has prayed for delivery of possession of units as well as payments of overdue amounts of assured returns.

6. Sh. Venkat Rao, learned counsel for respondents orally as well as in writing submits that complainant is an investor. As per clause 15 of the agreement, a leasing arrangement was agreed between the parties. The agreement is in the form of investment/lease agreement. The conditions precedent for exercising jurisdiction of this Authority of this subject are not fulfilled, therefore, Authority is precluded from proceedings ahead with the matter. The question of assured returns is squarely covered by the BUDS Act. On account of provisions of the said Act, the jurisdiction will be of any other appropriate forum but not of this Authority.

7. Authority has gone through all facts and circumstances of these matters. It has gone through written statement as well as oral arguments put-forth by both sides. It observes and orders as follows:

i. Claim of the complainant is that they are allottees of the project as is clearly establish from nature of the project and the nature of the builder-buyer agreement executed between complainant

and respondent company. Respondent company has failed to keep its promises of paying assured returns and also have not completed the project and offered possession after obtaining Occupation certificate.

ii. The case of the respondents is that the complainants are not allottees, they are mere depositors. Assured returns had been paid to the complainants up to December, 2018, but after promulgation of BUDS ordinance on 21.02.2019 and coming into force of the BUDS Act on 31.07.2019, the respondents are prohibited from paying assured returns to complainants. Further, the agreement executed between parties is only a lease agreement. Respondents have been paying due returns to the complainants, but had stopped payments after coming into force the BUDS Act as law has prohibited them from making payments of assured returns to the complainants.

iii. Authority would first of all refer to nature of the agreement executed between both the parties. Clause-A, B & C of opening recitals of the agreement provides that respondents-company is owner in possession of 8.793 acres land in revenue estate of Sarai Khawaja, Tehsil and District Faridabad, Sector-27, Faridabad. M/s Vatika I.T. Parks Pvt. Ltd. i.e. respondent no.2 had obtained licence No. 1133 of 2006 from Director, Town & Country Planning Department, Haryana, for constructing upon the said land an IT park. Clause-C of the opening recital states that Director, Town & Country Planning Department, has already approved demarcation/ zoning plans and building plans of the said IT park vide their memo No. 16150 and 1315 dated 20.06.2007 and dated 08.04.2008. It further states that said IT park has been named as "Vatika Mindscapes".

iv. Clause D, E, F & G repeatedly refers to complainants as buyers and to respondents as developers. Clause E clearly stipulates that complainant/buyer have approached the developer for purchase of units of approximately 500 sq. ft. super area on 4th floor of the building block-C of the project.

v. A cursory reading of the opening recital A to H leaves no doubts that respondents are builder-promoters of the project 'Vatika Mindscapes'. They have properly obtained licence from State Government. They have got their building plans etc. duly approved. They have properly negotiated for sale of specified and identified units to the complainants.

This by itself leaves no doubt that the respondents are developers and complainants are buyers and a proper builder-buyer relationship exists between both the parties and any dispute relating to the agreement between them is referable to this Authority only. Jurisdiction of the Authority, therefore, for dealing with this dispute is undisputable and objections raised by respondents to the jurisdiction of the Authority are without any basis.

vi. In Clause-1 (a) of the agreement, unit allotted to the complainant is properly identified. In Clause-2 (a) of the agreement, basic sale consideration as well as principles regulating the payments of the basic sale consideration also, have been clearly and unmistakably stipulated. It appears, there were multiple payment options available, however, complainants herein chose the option of down payments. An option of deferred payment was also available but complainant did not opt for the same.

vii. Clause-4, particularly clause 4.4, specifies the area deliverable to complainants, including covered area of the unit as well as pro-rata share of common areas of the entire building. Definition of the common area has also been specified in the agreement.

viii. Reading of the remaining clauses of the agreement there is no doubt that this was a proper builder-buyer agreement as per prevailing market practice.

ix. Clause-15, however, provides for payment of assured monthly returns. From a reading of this clause 15, it is absolutely clear that ordinarily the payments in a real estate project are made in instalments or in accordance with construction linked plan but if entire consideration is paid upfront, some interest becomes payable to the buyer by way of incentive for monthly upfront payment. In this case, complainants chose to make down payments and in return claim monthly assured returns. As per law, interest on the entire payments made is payable after due date of offering possession. It is but natural that if payment is made up-front, complainant allottees would be entitled to return on their up-front payments made which in this case has been named assured monthly returns.

8. Authority, therefore, has no hesitation in coming into a conclusion that a proper builder-buyer relationship exists between respondents and complainants because complainants had booked the unit for its physical delivery to them. Before completion of the project assured payment @ ₹71.50 per sq. ft. per month was agreed and after completion it was to be @ ₹65 per sq. ft. per month. Complainants are very much entitled to possession of the booked unit and its leasing as per their wish after taking over of possession. The respondents have not fulfilled their promise of offering possession to complainant. Complainants therefore are entitled to relief sought i.e. possession of the unit along with payment of overdue assured returns as per provisions of the agreement.

9. Respondents have taken a technical argument that BUDS Act has come into force w.e.f. July, 2019 and an ordinance preceding that was passed by Parliament of India in February, 2019. Further, under BUDS Act, unregulated deposits are prohibited, therefore, respondents' argument is that since the complainants are not allottees, they are depositors, therefore, they fall within the prohibitions provided in the BUDS Act.

10. Respondents have cited provisions of Sub Section 4 of Section 2 of the BUDS Act in which definition of deposits has been given. Opening line of the definition of the deposit reads …
"…. 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 of a specified period or otherwise either in cash or any kind or any specified service……"
Authority observes that none of the conditions listed in the aforesaid definition of "deposits" are fulfilled in the captioned complaints. The money paid by the complainants cannot be called advance or loan. It was very much a consideration for purchase of specified and identified apartments/ units in the duly licenced real estate project of the respondents. Further, definition deposit stipulates an essential condition that the deposit has taken with 'a promise to return after a specific period'. This condition is also not fulfilled in the present case. Provisions of the agreement do not at all provide for return of the money paid by the complainants. It only provides for delivery of a pre-identified constructed unit in the lawfully licenced project of the respondents. The arguments of the respondents, therefore, are summarily rejected because

consideration amount paid by complainant by no stretch of imagination can be categorised as deposits of finance for return in the form of investment bonus, profit or in any other form.

11. Respondents are desperately trying to deny legitimate rights of the complainants as are admissible to them in terms of the builder-buyer agreement executed and in terms of Real Estate (Regulation and Development) Act, 2016.

12. The Authority observes that respondents have still not obtained occupation certificate. Real estate project can be said to be complete only upon receipt of occupation certificate or part completion certificate. Having not received the Occupation certificate, project is still on going. The respondents have got this project registered with the Authority vide Registration No. 196 of 2017 dated 15.09.2017. The complainants are therefore, entitled to lawful possession of the unit after obtaining occupation certificate thereof by the respondents. Till such time as a lawful offer of possession is made, complainants are entitled to get agreed monthly assured returns @ ₹71.50 per sq. ft. Authority reiterates that agreed monthly assured returns in fact is a substitute of prescribed interest as provided for in Section 18 of the Act. Had the quantum of monthly assured returns not provided for in the agreement, Authority would have ordered payments of interest for the entire period of delay at the rate provided for in Rule 15 of the Rules i.e. MCLR+2%. But since a specific agreement exists between parties for payment of monthly assured returns @ ₹71.50 per sq. ft. per month, Authority will abide by provisions of agreement in this case. Admittedly, monthly assured returns @ ₹71.50 per sq. ft. which amounts to ₹35,750/- per month is payable. This amount had been paid up to December, 2018. Accordingly, monthly returns @ ₹35,750/- will be paid for the entire period from January 2019 till February 2022 i.e. the month of passing of this order. This amount works out to ₹15,63,803/-. It is also ordered that non-calculated monthly interest will be paid regularly by the respondents till lawful offer of possession is made to the complainants.

13. **Disposed of** in above terms. Order be uploaded on the website and files be consigned to record room after compliance.

5. In furtherance of the above order, Authority would dispose of this complaint ordering that possession of the booked unit shall be delivered by the respondent-company to the complainants after obtaining occupation certificate from authorities concerned. Till the time, a lawful offer of possession is to be made by the respondent, complainants are entitled to get agreed monthly assured returns as decided in Builder-Buyers Agreement for the unit. Monthly assured returns had been decided @ ₹77 per sq. ft. It is pertinent to mention that complainant mentioned one addendum agreement of June 2019 being sent by respondent to her. However, said addendum agreement has not been executed by respondent as it does not bear signature of respondent. Hence, it is an unexecuted addendum agreement and does not affect the right of complainant. Therefore, it is not being taken into consideration while deciding the complaint.

Accordingly, monthly returns @ ₹38,500/- (500 sq. ft. @ ₹77/-) for unit will be paid for the entire period from October 2017 till August 2022 i.e., the month of passing of this order along with interest as per Rule 15 of HRERA Rules, 2017. This amount works out to Rs. 28,39,375/-. It is also ordered that further monthly interest will be paid regularly by the respondents till lawful offer of possession is made to the complainants.

7. **Disposed of** in above terms. Order be uploaded on the website and files be consigned to record room after compliance.

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RAJAN GUPTA
[CHAIRMAN]

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DILBAG SINGH SIHAG
[MEMBER]