BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Order pronounced on: 02.12.2022

Name of the Builder		**Vatika Limited**	
Project Name		**Vatika City INX City Centre**	
1.	CR/4929/2021	Geetanjali Anand & Umesh Anand V/s Vatika Limited	Mr. Aditya Bharech Mr. Venket Rao
2.	CR/4922/2021	Sonia Mehta V/s Vatika Limited	Mr. Aditya Bharech Mr. Venket Rao

CORAM:	
Shri. Vijay Kumar Goyal	Member
Shri. Sanjeev Kumar Arora	Member

ORDER

1. This order shall dispose of both the complaints titled as above filed before this authority under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "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 its obligations, responsibilities and functions to the allottees as per the agreement for sale executed inter se between parties.
2. The core issues emanating from them are similar in nature and the complainant(s) in the above referred matters are allottees of the project, namely, High Street at INXT (commercial complex) being developed by the same respondent/promoter i.e., Vatika Ltd. The terms and conditions of the builder buyer's agreements, fulcrum of the issues involved in both the cases pertains to failure on the part of the promoter to deliver timely possession of the units in question, seeking award of delayed possession

charges, assured return, the execution of buyers' agreement as per the terms and conditions of allotment letter, the execution of the conveyance deeds and litigation charges.

3. The details of the complaints, reply status, unit no., date of agreement, assured return clause, assured return rate, possession clause, due date of possession, total sale consideration, amount paid up, and relief sought are given in the table below:

Assured return clause in complaint bearing nos. 4929-2022
4. The developer shall remit an assured monthly return of RS. 107.47 per sq.ft. till completion of the building. It is stated that the project is in advance stages of construction and the developer based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said building/said commercial unit soon. *5. The Allottee authorizes the developer to lease out the said unit, which is part of the commercial complex (mention name of the project) and agrees that the obligation of the developer shall be to lease the said unit along with the other commercial spaces in the commercial complex. The developer shall lease the unit along with the premises @RS. 100/- per sq.ft. However, in the eventuality the achieved lease return being higher or lower than Rs. 100/- per sq.ft. the following would be applicable.* *a. If the achieved rental is less than Rs. 100/- per sq.ft. then you shall be refunded @Rs. 133.33/- per sq.ft. for every Rs. 1/- by which achieved rental is less then Rs. 100/- per sq.ft.* *b. If the achieved rental is more then 100/- per sq.ft. shall be liable to pay additional sales consideration @Rs. 66.67/- per sq.ft. for every rupee of additional rental achieved.*
Assured return clause in complaint bearing nos. 4922-2022
4. The developer shall remit an assured monthly return of Rs. 92.16 per sq.ft. till completion of the building. It is stated that the project is in advance stages of construction and the developer based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said building/said commercial unit soon. *5. The Allottee authorizes the developer to lease out the said unit, which is part of the commercial complex (mention name of the project) and agrees that the obligation of the developer shall be to lease the said unit along with the other commercial spaces in the commercial complex. The developer shall lease the unit along with the premises @RS. 100/- per sq.ft. However, in the eventuality the achieved lease return being higher or lower than Rs. 100/- per sq.ft. the following would be applicable.* *a. If the achieved rental is less than Rs. 100/- per sq.ft. then you shall be refunded @Rs. 133.33/- per sq. ft. for every Rs. 1/- by which achieved rental is less then Rs. 100/- per sq.ft.*

b. If the achieved rental is more then 100/- per sq.ft. shall be liable to pay additional sales consideration @Rs. 66.67/- per sq.ft. for every rupee of additional rental achieved.

Unit related details

1	2	3	4	5	6	7	8
Sr. no	**Complaint no./title/reply status**	**Unit no. & area**	**Allotment letter**	**Date of agreement**	**Due date Of possession**	**Total sale consideration Amount paid**	**Assured return paid till date**
1	4929/2021 Geetanjali Anand & Anr. Vs Vatika Ltd.	133, 1st Floor 1125 sq. ft.	19.06.2017	Not executed	Cannot be ascertained	Rs. 78,75,000/- Rs. 69,28,375/- +2,36,00 19.09.2018, page 53)	October 2018
2	4922/2021 Sonia Mehta Vs Vatika Ltd.	134, 1st Floor 1125 sq. ft.	19.06.2017	Not executed	Cannot be ascertained	Rs. 48,90,375/- Rs. 48,90,375/-	October 2018

4. The aforesaid complaints were filed by the complainants against the promoter on account of violation of the builder buyer's agreement executed between the parties *inter se* in respect of said units for not handing over the possession by the due date and other reliefs detailed earlier.

5. It has been decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter/ respondent in terms of section 34(f) of the Act which mandates the authority to ensure compliance of the obligations cast upon the promoter, the allottee(s) and the real estate agents under the Act, the rules and the regulations made thereunder.

6. The facts of both the complaints filed by the complainant(s)/allottee(s)are also similar. Out of the above-mentioned cases, the particulars of lead case ***CR 4929/2021 titled as Geetanjali Anand & Anr. Vs. M/s Vatika Limited*** are being taken into consideration for determining the rights of the allottee(s) qua the reliefs detailed earlier.

A. Project and unit related detail

7. The particulars of the project, the details of sale consideration, the amount paid by the complainant(s), date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form: CR/4929/2021 titled as Geetanjali Anand & Anr. Vs. Vatika Limited

S. No.	Heads	Information
1.	Name and location of the project	High Street, Inxt City Center, Gurugram, Haryana.
2.	Nature of the project	Commercial complex
3.	Area of the project	10.72 acres
4.	Allotment letter	19.06.2017 (page 49 of complaint)
5.	Date of execution of builder buyer's agreement	Not executed
6.	Unit no.	133, first floor admeasuring 1125 sq.ft. (page 45 of complaint)
7.	Basic sale consideration	Rs. 78,75,000 (page 49 of complaint)
8.	Total amount paid by the complainants	Rs. 69,28,031+23600 (paid on 19.09.2018, page 53)
9.	Due date of delivery of possession	Cannot be ascertained
10.	Date of offer of possession to the complainants	**Not offered**
11.	Occupation certificate	**Not obtained**

8. That the complainants booked a unit no. 133 situated on the first floor in tower A, admeasuring 1125 sq.ft. in the commercial project "Hight Steet at INXT, Sector 83, Gurugram, (Haryana) developed and promoted by the respondent. The complainants are "allottees" under the Act, 2016. For marketing and promotional purposes, the respondent advertised the project through print media as well as through its channel partners. In 2017, the complainants came across such advertisements and were approached by the channel partners of it seeking investment in the project under the assured return plan. Further, the complainants were assured that the project would be completed in time.
9. That upon the promise of the monthly assured return plan, the complainants were thus induced and allured into investing in the project and accordingly made payment of Rs.69,28,031/- as booking amount towards purchase of a unit in the project on 16.06.2017 along with the application for allotment of unit under the assured returns plan. The abovementioned payment was received by the office of the respondent. Accordingly, the respondent issued a "letter of allotment" dated 19.06.2017 to the complainants of a unit in tower A, "High Street at INXT", sector 83, Gurugram. The letter of allotment duly acknowledged receipt of the booking amount of Rs. 69,28,031/- realized on 16.06.2017. The letter of allotment forms the agreement between the complainants and the respondent which provided for payment of monthly assured returns to the allottees.
10. That the letter of allotment, under clause 4 in particular, clearly sets out the understanding between the parties with respect to the purchase/allotment of the unit. It is to be noted that the letter of allotment issued by the respondent was accompanied with a cheque towards commitment charges for the month of June-Aug 2017.

Thereafter, the complainants made further payment of INR 23,600/- on account of Installment/interest/other charges/taxes which were duly received. No buyers' agreement w.r.t to the allotted unit was executed between the parties. This was as the respondent had informed the complainants that the buyers' agreement was being modified to comply with the requirements of the Act.

11. Thereafter, the complainants received the monthly assured returns/ commitment charges from the respondent till 12.10.2018 post which the monthly assured returns were abruptly stopped by it. Subsequently, the complainants received a cryptic and vague email on 09.11.2018 regarding suspension of return-based sales in view of change/developments in law in relation to return based sales. That email highlighted that the respondent was in the process of receiving legal advice from its legal consultants and would revert in due course regarding the way forward. However, no follow up of that email was received thereafter in relation to the way forward.
12. That in the meanwhile, the complainants raised concern over the abrupt stoppage of assured monthly returns with the executives of the respondent telephonically on multiple occasions. However, the issue was neither resolved nor they were provided any justification for such stoppage.
13. Subsequently, the complainants also received an email from the respondent on 19.09.2020 with respect to redesigning the project in view of COVID-19. However, there was no mention of resumption regarding the assured monthly returns. Aggrieved by the above, the complainants sent a communication on 01.09.2021 vide email as well as physical hard copies calling upon the respondent to immediately make payment of the monthly assured returns under the letter of allotment w.e.f. 13.10.2018

along with interest at 18% till date of payment. However, they have, till date, neither received any response nor acknowledgement of the abovementioned communication.

14. That as the respondent failed to respond to the issue regarding payment of monthly returns i.e., commitment charges from the respondent to the complainants, they were constrained to seek legal advice in this regard leading to issuance of a legal notice dated 18.10.2021 *inter alia* seeking payment of the pending monthly assured returns/commitment charges under the letter of allotment w.e.f. 13.10.2018 along with interest and updated status report of the project along with timelines regarding its completion. No response was received to the abovementioned legal notice. The respondent has continued to ignore the communications and the legal notice issued on behalf of the complainants whilst enjoying the fruits of their hard-earned monies which it is not entitled to in any manner. Such conduct of the respondent wreaks of *malafide* and is impermissible in law and equity. The respondent has arbitrarily discontinued payment of monthly assured returns to the complainants without assigning any reason and in complete contravention of the contractual terms mutually agreed upon between the parties.

15. It is settled law that a developer is bound by the doctrine of promissory estoppel which clearly postulates that if any person has made a promise and the promise has acted on such promise and his altered his position, then the promiser is bound to comply with its promise of providing assured monthly returns to the complainants and cannot evade such liability whatsoever. Therefore, it is evident the respondent has not only violated the terms of the letter of allotment but is also in violation of the law of the land.

16. That it is to be noted that the funds for the project have been raised by investments made by allottees such as the complainants. Even after a lapse of more than 4 years since issuance of the letter of allotment, admittedly the work at the project is nowhere near completion despite the assurances provided to this effect including those recorded in the letter of allotment. Such cavalier conduct of the respondent is unprofessional, negligent and punishable in law.

17. That in view of the above, it is crystal clear that the respondent is acting in an arbitrary and whimsical manner in as such as it is refusing to pay the assured monthly return to the complainants in fundamental breach of the agreement entered into between them. Admittedly, even after a lapse of more than 4 years, construction of the project is nowhere near completion. In any event, as per the terms of the letter of allotment, the respondent is required to provide the complainant with assured monthly returns till completion of the building, post which the unit is to be leased out as per clause 5 o the letter of allotment. However, the respondent has neither completed the construction of the building nor is making payment of the monthly assured returns to the complainants. Thus, they have no alternative but to seek redressal before this authority for the fraud and illegal acts committed upon them by the respondent.

C. Relief sought by the complainants:

18. The complainants have sought the following relief(s):

i. Direct the respondent to make payment of the pending monthly assured returns under the letter of allotment since 13.10.2018 along with prescribed rate of interest as per the 2016 Act and Rules till the completion of the project.

ii. Direct the respondent to pay the monthly lease rentals as committed returns for up to 3 years from the date of completion of construction

of the project or till the unit in the project is leased whichever is earlier.

iii. Direct the respondent to execute the builder buyer agreement with the complainants in accordance with the terms of the letter of allotment dated 19.06.2017.

iv. Award Rs.1,00,000/- to the complainants towards cost of litigation.

19. 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

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

a. That the complainants filed the complaint with oblique motive of harassing the respondent and to extort illegitimate money while making absolutely false and baseless allegations against it. It is submitted that the complainants have not approached this authority with clean hands and have suppressed the relevant material facts. It is submitted that the complaint under reply is devoid of merits and the same should be dismissed with cost.

b. It is pertinent to bring into the knowledge of the authority that the complainants booked unit in the project of the respondent for steady monthly returns. It is evident fact that since starting, the complainants booked the unit in question considering the same as an investment opportunity. It is an admitted fact that by no stretch of imagination, it can be concluded that the complainants are not "consumers". It is a matter of fact, that they are simply investors who approached the respondent for investment opportunities and for a steady rental income.

c. That in the year 2017, the complainants learnt about the commercial project launched by the respondent titled as "Hight Street at Inxt City situated at sector 83, Gurugram and visited its office to know the details of the said project. They further inquired about the specifications and veracity of the commercial project and were satisfied with every proposal deemed necessary for the development. After showing keen interest in the commercial project being developed by it, the complainants booked a unit vide application form dated 16.06.2017, on their own judgement and investigation. It is evident that the complainants were well aware of each and every term of the application form and agreed to sign upon the same without any protest or demur. The respondent vide allotment letter dated 16.06.2017, allotted a unit bearing no. 133, first floor, tower A admeasuring to 1125 sq.ft. super area for a total sale consideration of Rs. 78,75,000/- in their name in the aforesaid project.

d. It is submitted that the complainants were aware of the fact, that the commercial unit in question was to be leased out post completion and the same was evidently mentioned and agreed by them in the allotment letter dated 19.06.2017. It is imperative to note, that the complainants had mutually agreed and acknowledged that upon completion for the said unit, the same would be leased out at a rate as per the lease clause and mutually decided by the parties.

e. The complainants are trying to mislead the authority by concealing facts which are detrimental to this complaint. They approached the respondent as an investor looking for certain investment opportunities. Therefore, the allotment of the said unit contained a 'lease clause' which empowers the developer to put a unit of

complainants along with the other commercial space unit on lease and does not have "possession clause" for a physical possession.

f. That the respondent was committed to complete the project as the money received from the allottees was being used for construction activities. But the same was delayed due to the reasons beyond the control of respondent such as various bans issued from time to time by the statutory authorities such as the hon'ble Supreme Court environmental pollution authority, non-payment of dues by the various allottees covid-19 etc.

g. That the matter w.r.t grant of assured returns is pending before the appellate tribunal in appeal no. 647 of 2021 and as such no further proceedings can be carried out in this case.

h. That the jurisdiction of the authority is barred to entertain and deal with the complaint in view of its earlier orders and particularly with the passage of the Banning of Unregulated Deposits Schemes Act, 2019.

i. All other averments made in the complaint were denied in toto.

21. 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

22. 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

23. 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 complete territorial jurisdiction to deal with the present complaint.

E. II Subject-matter jurisdiction

24. 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.*

25. 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:

26. The common issues with regard to delayed possession charges, assured return, execution of buyers' agreement as per the terms and condition of allotment letter, execution of conveyance deeds and litigation charges are involved in **both these cases and are being taken up accordingly.**

F.I Assured return

27. While filing the complaint, the claimants sought assured returns on monthly basis as per clause 4 and 5 of allotment letter dated 19.06.2017 at the rates mentioned therein till the completion of the building. It is pleaded that the respondent has not complied with the terms and conditions of the allotment letter of the unit. Though for some time, the amount of assured returns was paid to the complainants 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.

28. 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/ terms and conditions of letter of allotment only and between the same parties as per the provisions of section 11(4)(a) of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the agreement for sale till the execution of conveyance deed of the unit in favour of the allottee. Though, in the case in hand there is only letter of allotment dated 19.06.2017 setting out the terms and conditions of allotment, the sale consideration dimensions of the unit, its area including provision for monthly assured returns but whether in the absence of buyer's agreement, the same can be considered for determining the rights of the allottee qua the later relief. This issue came for consideration before the authority in case bearing no. ***2522 of 2021***

titled as Gurdeep Guglani Vs. Vatika Limited decided on 05.04.2022 and wherein, it was observed that the assured return is payable to the allottees on account of a provision in the BBA or in the MoU having reference of the BBA or an addendum to the BBA or in a MoU or **allotment letter.** There are specific provisions w.r.t. assured returns in the case in hand while issuing letter of allotment dated 19.06.2017 and for a reference the same are being reproduced as under:

> *4. The developer shall remit an assured monthly return of RS. 107.47 per sq.ft. till completion of the building. It is stated that the project is in advance stages of construction and the developer based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said building/said commercial unit soon.*
> *5. The Allottee authorizes the developer to lease out the said unit, which is part of the commercial complex (mention name of the project) and agrees that the obligation of the developer shall be to lease the said unit along with the other commercial spaces in the commercial complex. The developer shall lease the unit along with the premises @RS. 100/- per sq.ft. However, in the eventuality the achieved lease return being higher or lower than Rs. 100/- per sq.ft. the following would be applicable.*
> *a. If the achieved rental is less than Rs. 100/- per sq.ft. then you shall be refunded @Rs. 133.33/- per sq.ft. for every Rs. 1/- by which achieved rental is less then Rs. 100/- per sq.ft.*
> *b. If the achieved rental is more then 100/- per sq.ft. shall be liable to pay additional sales consideration @Rs. 66.67/- per sq.ft. for every rupee of additional rental achieved.*

Thus, in view of the observation of the authority in the above noted case and in the absence of execution of buyer's agreement between the parties w.r.t. the allotted unit, the terms and conditions in the letter of allotment dated 19.06.2018 w.r.t. the assured returns can be taken into consideration for deciding the rights of the allottee in this regard. Now, three issues arise for consideration as to:

i. Whether the authority is within its 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 allottee 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 allottee in pre-RERA cases

29. While taking up the cases of B***rhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd.*** (complaint no 141 of 2018), and ***Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP"*** (supra), 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 an allotee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arises out of the agreement for sale only and between the same contracting parties to agreement for sale. In the case in hand, the issue of assured returns is on the basis of contractual obligations arising between the parties. Then in case of ***Pioneer Urban Land and Infrastructure Limited & Anr. v/s Union of India & Ors.*** (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019, it was observed by the Hon'ble Apex Court of the land that "...allottees who had entered into

"assured return/committed returns' agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of agreement till the date of handing over of possession to the allottees". It was further held that 'amounts raised by developers under assured return schemes had the "commercial effect of a borrowing' which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the

head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code" including its treatment in books of accounts of the promoter and for the purposes of income tax. Then, in the latest pronouncement on this aspect in case ***Jaypee Kensington Boulevard Apartments Welfare Association and Ors. vs. NBCC (India) Ltd. and Ors.*** (24.03.2021-SC): MANU/ SC/0206 /2021, the same view was followed as taken earlier in the case of Pioneer Urban Land Infrastructure Ld & Anr. with regard to the allottees of assured returns to be financial creditors within the meaning of section 5(7) of the Code. 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. 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.*

30. 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;*

31. 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.

32. 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.

33. 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.

34. 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.

35. 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.*

36. 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.

37. 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 allottee 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 complainant besides

initiating penal proceedings. 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.

38. On consideration of documents available on record and submissions made by parties, the complainants have sought assured return on monthly basis as per one of the provision of allotment letter at the agreed rates till the date of completion of building. It was also agreed that as per clause 5 of that document, the developer would pay to the buyer Rs. 133.33/- per sq. ft. super area of the said commercial unit for every Rs. 1/- by which achieved rental is less than Rs. 100/- per sq. ft. The said clause further provides that if the achieved rental is more than Rs. 100/- per sq. ft., it would pay additional sale consideration @Rs. 66.67/- per sq.ft. for every rupee of additional rental received. The respondent has not complied with the terms and conditions of the allotment letter. 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. 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.

39. Accordingly, the promoter is liable to pay assured return of the unpaid period as specified under the clause 4 and 5 of the allotment letter dated 19.06.2017.

F.III Execution of BBA

40. The authority is of considered view that the complainant-allottees have already paid an amount of Rs. 69,51,975/- towards consideration of allotted unit i.e., Rs. 78,75,000/- constituting 87.34% of total consideration. As per section 13(1) of Act of 2016, the respondent was

under an obligation to get the buyer's agreement executed between the parties before demanding or accepting further demand beyond 10% of sale consideration. There In view of aforesaid circumstances it is observed that there is gross negligence on part of the respondent-builder and thus, As per section 13(1) of Act of 2016, the respondent was under obligation to get the buyer's agreement executed between the parties before demanding or accepting any further demand beyond 10% of sale consideration. The respondent has violated the provisions of section 13(1) of Act of 2016. The respondent is directed to get the buyer's agreement executed in favour of the complainants within 30 days of date of this order. The complainants are further directed to execute the buyers' agreement of the allotted unit as per the terms and conditions of allotment letter specifically, but not limited to clause w.r.t. assured return.

F.III Conveyance deed

41. With respect to the conveyance deed, the provision has been made under clause 8 of the buyer's agreement and the same is reproduced for ready reference:

> ***8. Conveyance***
> *Subject to the approval/no objection of the appropriate the Developer shall sell the Said Unit to the Allottee by executing and registering the Conveyance Deed and also do such other acts/deeds as may be ne necessary for confirming upon the Allottee a marketable title to the Said Unit free from all encumbrances. The Conveyance Deed shall be in the form and content as approved by the Developer's legal advisor and shall be in favour of the Allottee. Provided that the Conveyance Deed shall be executed only upon receipt of full consideration amount of the said Unit. Stamp Duty and Registration Charges and receipt of other dues as per these presents.*

42. Section 17 (1) of the Act deals with duty of promoter to get the conveyance deed executed and the same is reproduced below:

"17. Transfer of title.-

(1). The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws:

Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate."

43. As OC of the unit has not been obtained, accordingly conveyance deed cannot be executed without unit come into existence for which conclusive proof of having obtained OC from the competent authority and filing of deed of declaration by the promoter before registering authority.

F. IV Litigation cost

44. The complainants are also seeking relief w.r.t. litigation expenses & compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as ***M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors., 2021-2022(1) RCR (C) 357*** has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, the complainant is advised to

approach the adjudicating officer for seeking the relief of litigation expenses.

G. Directions of the authority

45. 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 promoter as per the function entrusted to the authority under section 34(f):

a. The respondent is directed to pay assured return of the unpaid period i.e., November 2018 till the completion of the building and as specified under the clause 4 and 5 of the letter of allotment dated 19.06.2017.

b. 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 @8.35% p.a. till the date of actual realization.

c. The respondent is directed to execute the buyers' agreement of the allotted unit in favour of the complainants as per the terms and conditions of allotment letter specifically, but not limited to clause w.r.t assured return.

d. The respondent shall also execute the conveyance deed of the allotted unit in favour of the complainants within the 3 months from receipt of occupation certificate of the building of the allotted unit on deposit of requisite stamp duty & other statutory charges by them.

46. This decision shall mutatis mutandis apply to case no. 4929 of 2021 mentioned in para 3 of this order.
47. A copy of this order be placed on the connected case file.
48. The matters stand disposed of.
49. Files be consigned to the registry.

Sanjeev Kumar Arora
Member

Vijay Kumar Goyal
Member
02.12.2022