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/4879/2021	Nirmala Devi Prayagraj Agarwal V/s Vatika Limited	Mr. Abhijeet Gupta Ms. Ankur Berry
2.	CR/4880/2021	Nirmala Devi Prayagraj Agarwal V/s Vatika Limited	Mr. Abhijeet Gupta Ms. Ankur Berry

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, Vatika Trade Center (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 and the striking down the impugn clauses.

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:

Project: Vatika Trade Center, Sector 82A, Gurugram, **Assured return clause in complaint bearing nos. 4879-4880 of 2021** **Addendum to agreement dated 19.03.2011**
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 19.03.2011 A. Till offer of possession: Rs. 71.50/- per sq.ft. B. After Completion of the building: Rs. 65/- per sq.ft. You would be paid an assured return w.e.f. 19.03.2011 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. 120/- 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. 120/- per sq.ft. for every rupee of additional rental achieved in the case of balance 50% of increased rentals.

Unit related details							
	Complaint no./ Title	**Unit no. & area admeasuring**	**Allotment letter**	**Date of agreement**	**Due date of possession**	**Total sale consideration/ Amount paid**	**Assured return paid till date**
1.	CR/4879/2021 Nirmala Devi Prayagraj Agarwal V/s Vatika Limited.	618, 6th floor, Block - F (Changed from 284, 2nd floor, 1000sq. ft.)	19.03.2011 And new Allotment on 25.04.2013	19.03.2011	19.03.2014 (As per Agreement)	Rs.45,00,000/ Rs.45,00,000/-	September 2018
2.	CR/4880/2021 Nirmala Devi Prayagraj Agarwal V/s Vatika Limited.	619, 6th floor, Block - F (Changed from 285, 2nd floor, 1000sq. ft.)	19.03.2011 And new Allotment on 25.04.2013	19.03.2011	19.03.2014 (As per Agreement)	Rs.45,00,000/ Rs.45,00,000/-	September 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 unit for not handing over the possession by the due date, seeking award of delayed possession charges, assured return and the striking down of the impugn clauses.

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 promoters, the allottee(s) and the real estate agents under the Act, the rules and the regulations made thereunder.

6. The facts of all the complaints filed by the complainant(s)/allottee(s)are also similar. Out of the above-mentioned case, the particulars of lead case ***CR 4879/2021 titled as Nirmala Devi Prayagraj Agarwal Vs. M/s Vatika***

Limited are being taken into consideration for determining the rights of the allottee(s) qua delay possession charges, assured return.

A. Project and unit related details

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/4879/2021 titled as Nirmala Devi Prayagraj Agarwal & Anr. Vs. Vatika Limited

S.N.	Particulars	Details
1.	Name of the project	Vatika Trade Centre, Gurgaon
2.	Allotment date	19.03.2011 (annexure A, page 22 of complaint)
3.	Date of builder buyer agreement	19.03.2011 (annexure B, page 23 of complaint)
4.	Unit no.	284, 2nd floor admeasuring 1000 sq.ft. (Annexure A, page 22 of complaint)
5.	Allotment for new unit	25.04.2013 (page 43 of complaint)
6.	New unit	618, 6th floor, block F (annexure B, page 43 of complaint)
7.	Possession clause	**2. Sale consideration** ***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)**
8.	Due date of possession	19.03.2014
9.	Total sale consideration	Rs. 45,00,000/- (Page no. 26 of complaint)
10.	Paid up amount	Rs. 45,00,000/- (Page no. 26 of complaint)
11.	Assured return clause	**Addendum to the Agreement dated 19.03.2011** 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 19.03.2011 A. Till offer of possession: Rs. 71.50/- per sq.ft. B. After Completion of the building: Rs. 65/- per sq.ft. You would be paid an assured return w.e.f. 19.03.2011 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. 120/- 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. 120/- per sq.ft. for every rupee of additional rental achieved in the case of balance 50% of increased rentals.
12.	Offer of possession	Not offered
13.	Completion certificate	27.03.2018 (page 33 of reply) *Note: Invalid completion certificate.
14.	Occupation certificate	Not obtained
13.	Assured return amount paid by the respondent till 30.09.2018	Rs.58,80,986/-

B. Facts of the complaint

8. The complainant is entitled to the constitutional right to property as envisaged in the Constitution of India. The complainant vide allotment letter dated 19.03.2011 enclosing with respective terms and conditions. project was confirmed to the complainant vide builder buyer agreement dated 19.03.2011, wherein the respondent explicitly assigned all the rights and benefits to the present complainants.

9. The complainant made the payment to the respondent vide two cheques dated 10.03.2011 of amount 1, 15,875/- and 45, 00,000/- towards the booking of the said unit.

10. That in the builder-buyer agreement along with the addendum dated 19.03.2011, as executed between the parties, **Clause 32** of the builder-buyer agreement and **Clause 1 and 2** of the addendum for a provision which is utterly unfair, unjust and arbitrary in nature.

11. Furthermore, it is pertinent to mention that as per the addendum to the agreement dated 19.03.2011, the respondent had promised an assured return w.e.f. 19.03.2011 on a monthly basis before the 15th of each calendar month, wherein till the possession an amount calculated at rate of Rs. 71.5/- per sq. ft. and after completion of the building at rate of Rs. 65/- per sq. ft. was to paid to the complainant by the respondent.

12. That the complainant was shocked and appalled when respondent vide its letter dated 25.04.2013 informed the complainant that the final unit being allotted to the complainant is unit admeasuring 1000 sq. ft. on 6th floor of Block F bearing no. 619in India Next City Centre, NH-8, Sector83, Gurgaon, while the agreed upon unit was a commercial Unit bearing no. 285 admeasuring 1000 sq. fts. Super area in Tower A at Vatika Trade Center, Sector 82A, NH-8, Gurugram. That it is not out the place to mention that this act of respondent No. 1 is arbitrary and in contravention to various provisions of the BBA and other agreements agreed between the parties.

13. Thereafter, several efforts from the complainant were made to seek updates on the booked unit and 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 complainant and the respondent provided for construction linked payment plan, the complainant had assumed the money collected by the respondent from the complainant 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 10 years of the date of booking the actual booked unit.

14. After getting zero response from the respondent, the complainant visited the construction site but were shocked and appalled to see that construction that had not been completed. However, till date only incomplete construction whatsoever has taken place at the site.

15. That, it is unambiguously lucid that no force Majeure was involved, and the project has been at a standstill since several years, and it has been 10(Ten) 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 complainant has already made the full payment to the respondent towards the commercial unit booked by them. That, despite paying such a huge sum towards the commercial unit, the respondent has failed to stand by the terms and condition of the builder-buyer agreement and the promises, assurances, representations etc., which they made to the complainants at the time of the booking the abovesaid unit. Hence, this complaint.

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

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

    a. To handover the actual, physical, vacant possession of the

booked commercial unit bearing no. 285 admeasuring 1000 sq. fts. super area in Tower A at Vatika Trade Center, Sector 82A, NH-8, Gurugram

b. To direct the respondent to execute the sale deed of the abovesaid booked unit in favour of the complainant.

c. To direct the respondent to pay the delay penalty charges with interest as per RERA Act.

d. To direct the respondent to make payment on account of the assured return in terms of the addendum.

e. To direct the respondent to strike down the impugn clauses under BBA and Addendum.

17. 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

The respondent has contested the complaint on the following grounds.

a. The complainants have misdirected themselves in filing the above captioned complaint before the authority as the relief being claimed by them cannot be said to fall within the realm of jurisdiction of this forum. It is humbly submitted that upon the enactment of the Banning of Unregulated Deposit Schemes Act, 2019, the 'assured return' and any "committed returns" on the deposit schemes have been banned. The respondent having not taken registration from SEBI thus cannot run, operate, continue an assured return scheme. The implications of

enactment of BUDA Act read with the Companies Act, 2013 and companies (Acceptance of Deposits) Rules, 2014, resulted in making the assured return/committed return and similar schemes as unregulated schemes as being within the definition of "deposit". As per section 3 of the BUDS Act, all unregulated deposit scheme has been strictly banned and deposit takers such as builders, cannot, directly or indirectly promote, operate, issue any advertisement soliciting participation or enrolment in or accept deposit. Thus, section 3 of the BUDS Act, makes the assured return schemes, of the builders and promoters, illegal and punishable under law. Further as per the SEBI Act, 1992, collective investment schemes as defined under section 11 AA can only be run and operated by a registered person. Hence, the assured return schemes have become illegal by the operation of law and the respondent cannot be made to run a scheme which has become infructuous by law. It is also important to rely upon clause 35 of the BBA dated 21.07.2011 which specifically caters to the situation where certain provisions of the agreement become inoperable due to application of law. Thus, the complaint deserves to be dismissed at the very outset, without wasting precious time of this authority.

b. The complainants have not come before the authority with clean hands. The complaint has been filed by them just to harass the respondent and to gain the unjust enrichment. It is pertinent to mention here that for the fair adjudication of grievance as alleged by them require detailed deliberation by leading the evidence and cross-examination. Thus, only

the civil court has jurisdiction to deal with the cases required detailed evidence for proper and fair adjudication.

c. It is pertinent to mention that the complaint is not maintainable before the authority as it is apparent from the prayer sought in the complaint. Further, it is crystal clear from reading the complaint that the complainants are not 'allottees', but purely 'investors', who are only seeking assured return from the respondent, by way of present petition, which is not maintainable as the unit is not meant for personal use and rather, it is meant for earning rental income.

d. That in view of the judgment and order dated 16.10.2017 passed by the Maharashtra RERA Authority in the complaint titled ***Mahesh Pariani*** **vs.** ***Monarch Solitaire*** in, complaint no: ***CC006000000000078 of 2017,*** wherein it has been observed that in case where the complainants have invested money in the project with sole intention of gaining profits out of the project, then the complainants are in the position of co-promoter and cannot be treated as an 'allottee'. The authority therein opined as under:

> *"It means that the Complainants have the status of 'Co- promoter' of the project, it is evident that the dispute between the Complainants and the Respondent is of a civil nature between the promoter and co-promoter and does not pertain to any contravention of the Real state (Regulation and Development) Act, 2016. The complaint is, therefore, dismissed."*

Thus, in view of the aforesaid decision, the complainants could not and ought not have filed the present complaint being a co-promoter.

e. In a matter of ***Brhimjeet & Anr. Vs. M/s landmark Apartment Pvt. Ltd. (complaint no. 141 of 2018),*** decided on 07.08.2018 the hon'ble

Haryana real Estate Regulatory authority has taken the same view as observed by Maharasthtra RERA in Mahesh Pariani stated that,

> *"The Complainants have made a complaint dated 15.5.2018 with regard to the refund of the assured return of Rs.55,000/- per month. As per Clause 4 of the Memorandum of Understanding dated 14.8.2010, the Complainants are insisting that the RERA Authority may get the assured return of Rs.55,000/- per month released to him. A perusal of the Real Estate (Regulation & Development) Act, 2016 reveals that as per the Memorandum of Understanding, the assured return is not a formal clause with regard to giving or taking of possession of unit for which the buyer has paid an amount of Rs.55 Lakhs to the builder which is not within the purview of RERA Act. Rather, it is a civil matter. Since RERA Act deals with the builder buyer relationship to the extent of timely delivery of possession to the buyer or deals with withdrawal from the project, as per the provisions of Section 18 (1) of the Act. As such, the buyer is directed to pursue the matter with regard to getting assured return as per the Memorandum of Understanding by filing a case before an appropriate forum/Adjudicating Officer."*

Thus, the RERA Act, 2016 cannot deal with issues of assured return and hence the present complaint deserves to be dismissed at the very outset. Further in the matter of ***Bharam Singh & Ors* vs. *Venetian LDF Projects LLP* (Complaint No. 175 of 2018)**, decided on 27.11.2018, the hon'ble authority, Gurugram upheld its earlier decision of not entertaining any matter related to assured returns in the said order stated as under:

> *"that as already decided in complaint no. 141 of 2018 no case is made out by the Complainant". "That since the authority has taken a view of much earlier as stated above, the authority cannot go beyond the view taken already. In such types of assured return schemes, the authority has no jurisdiction, as such the Complainants are at liberty to approach the appropriate forum to seek remedy".*

g. The complainants have come before this authority with un-clean hands. The complaint has been filed by them just to harass the respondent and

to gain unjust enrichment. The actual reason for filing of the complaint stems from the changed financial valuation of the real estate sector, in the past few years and the allottees malicious intention to earn some easy buck. The covid pandemic has given people to think beyond the basic legal way and to attempt to gain financially at the cost of others. The complainants have instituted the present false and vexatious complaint against the respondent who has already fulfilled its obligation as defined under the BBA dated 10.09.2010. It is pertinent to mention here that for fair adjudication of grievance as alleged by the complainants, detailed deliberation by leading the evidence and cross-examination is required. Thus, only the civil court has jurisdiction to deal with the cases requiring detailed evidence for proper and fair adjudication.

h. It is submitted that the complainant entered into an agreement i.e., builder buyer agreement dated 10.09.2010 owing to the name, goodwill and reputation of the respondent. According to the terms of the BBA dated 10.09.2010, the construction of unit was completed and the same was duly informed to the complainants vide letter dated 27.03.2018. Due to external circumstances which were not in control of the respondent, minor timeline alterations occurred in completion of the project. Even though the respondent suffered from setback due to external circumstances, yet it managed to complete the construction.

i. The present complaint has been filed on the basis of incorrect understanding of the object and reasons of enactment of the RERA, Act 2016. The legislature in its great wisdom, understanding the catalytic

role played by the real estate sector in fulfilling the needs and demands for housing and infrastructure in the country, and the absence of a regulatory body to provide professionalism and standardization to the said sector and to address all the concerns of both buyers and promoters in the real estate sector, drafted and notified the RERA Act, 2016 aiming to gain a healthy and orderly growth of the industry. The Act has been enacted to balance the interests of consumer and promoter by imposing certain responsibilities on both. Thus, while sections 11 to section 18 of the RERA Act, 2016 describes and prescribes the function and duties of the promoter/developer, section 19 provides the rights and duties of allottee. Hence, the RERA Act, 2016 was never intended to be biased legislation preferring the allottee, rather the intent was to ensure that both the allottee and the developer be kept at par and either of the party should not be made to suffer due to act or omission of part of the other.

j. The complainants are attempting to seek an advantage of the slowdown in the real estate sector, and it is apparent from the facts of the present case. The main purpose of the present complaint is to harass the respondent by engaging and igniting frivolous issues with ulterior motives to pressurize the respondent. It is pertinent to submit that the complainant was sent the letter dated 27.03.2018 informing of the completion of construction. Thus, the present complaint is without any basis and no cause of action has arisen till date in their favour and against the respondent. Hence, the complaint deserves to be dismissed.

k. It is brought to the knowledge of this authority that the complainants are guilty of placing untrue facts and are attempting to hide their true

colour of the intention. Before buying the property from the erstwhile allottee, the complainants were aware of the status of the project and the fact that the commercial unit was only intended for lease and never for physical possession.

13. 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

14. 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

15. 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

16. 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.

17. 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 complainant at a later stage.

F. Findings on the relief sought by the complainants:

18. The common issues with regard to delayed possession charges and assured return involved in **both the cases.**

F.I Assured return

19. While filing the complaints besides delayed possession charges of the allotted unit as per builder buyer agreement, the claimants have also sought assured returns on monthly basis as per addendum to agreement 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 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.

20. 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 parts of this agreement is the transaction of assured return inter-se parties. The "agreement for sale" after coming into force of this Act (i.e., Act of 2016) shall be in the prescribed form as per rules but this Act of 2016 does not rewrite the "agreement" entered between promoter and allottee prior to coming into force of the Act as held by the Hon'ble Bombay

High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors., (Writ Petition No. 2737 of 2017) decided on 06.12.2017.*** Since the agreement defines the buyer-promoter relationship therefore, it can be said that the agreement for assured returns between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate 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 allottee. 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

19. While taking up the cases of ***Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd.*** 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.

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

i. as an advance, accounted for in any manner whatsoever, received in connection with consideration for an immovable property

ii. as an advance received and as allowed by any sectoral regulator or in accordance with directions of Central or State Government;

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.*

26. 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.

27. 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 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

28. In the present complaint, the complainant(s) 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."*

31. The builder buyer agreement was executed between the parties. As per clause 2 of the builder buyer agreement, the possession was to be handed over on 19.03.2014.

32. **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 allottee(s) 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.*

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

34. 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., 02.12.2022 is 8.35%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.35%.

35. 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

(iii) 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;"

36. On consideration of documents available on record and submissions made by the complainant(s) and the respondent, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause iv of the allotment letter, the possession of the subject unit was to be delivered by 19.03.2014. However now, the proposition before the authority is as to whether an allottee(s) who is getting/entitled for assured return even after expiry of due date of possession, can claim both the assured return as well as delayed possession charges?

37. To answer the above proposition, it is worthwhile to consider that the assured return is payable to the allottee(s) on account of a provision in the buyer's agreement having reference of that document or allotment letter. The assured return in this case is payable from the date of making 100% of the total sale consideration till completion of the building. The rates at which assured return has been committed by the promoter are more than reasonable in the present circumstances. If we compare this assured return with delayed possession charges payable under proviso to section 18(1) of the Act, 2016, the assured return is much better than delayed possession charges. By way of assured return, the promoter has assured

the allottee(s) that they would be entitled for this specific amount till completion of construction of the said building. Accordingly, the interest of the allottee(s) is protected even after the due date of possession is over as the assured returns are payable from the first 3 years after the date of completion of the project or till the date of said unit/space is put on lease whichever is earlier. The purpose of delayed possession charges after due date of possession is served on payment of assured return after due date of possession as the same is to safeguard the interest of the allottee as their money is continued to be used by the promoter even after the promised due date and in return, they are to be paid either the assured return or delayed possession charges whichever is higher.

38. Accordingly, the authority decides that in cases where assured return is reasonable and comparable with the delayed possession charges under section 18 and assured return is payable even after due date of possession is over till the date of completion of the project, then the allottee shall be entitled to assured return or delayed possession charges, whichever is higher without prejudice to any other remedy including compensation. Hence, the authority directs the respondent/promoter to pay assured return from the date the payment of assured return has not been paid till completion of construction of building at agreed rate per month super area as minimum guaranteed rent up to 3 years from the date of completion of the said building or the said unit is put on lease whichever is earlier and declines to order payment of any amount on account of delayed possession charges as their interest has been protected by granting assured returns till the completion of the construction of the building and thereafter also

upto 3years @ of Rs 65/- per sq.ft. per month from the date of construction of the said building or the said unit is put on lease whichever is earlier.

F.III Conveyance deed

39. 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.*

40. Section 17 (1) of the Act deals with duties 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."

41. As occupation certificate of the unit has not been obtained, accordingly conveyance deed cannot be executed without the unit coming 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

42. 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 complainants are advised to approach the adjudicating officer for seeking the relief of litigation expenses

G. Directions of the authority

42. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of

obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

i. The respondent is directed to pay the arrears of amount of assured return to the complainant(s) from the date the payment of assured return has not been paid till the date of completion of construction of building. After completion of the construction of the building at the rate agreed as per buyer's agreement. Further, the respondent/builder would also be liable to pay monthly assured returns at agreed rate of the super area up to 3 years or till the unit is put on lease whichever is earlier.

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 complainant(s) and failing which that amount would be payable with interest @8.35% p.a. till the date of actual realization.

iii. The respondent shall execute the conveyance deed of the allotted unit within 3 months from the final offer of possession after obtaining of occupation certificate and upon payment of requisite stamp duty aby the complainant(s) as per norms of the state government.

iv. The respondent shall not charge anything from the complainant(s) which is not the part of the agreement of sale.

43. This decision shall *mutatis mutandis* apply to cases mentioned in para 3 of this order.

44. Complaints stand disposed of. True certified copy of this order shall be placed in the case file of each matter. There shall be separate decree in individual cases.

45. Files be consigned to registry File be consigned to the registry.

Sanjeev Kumar Arora
Member

Vijay Kumar Goyal
Member

Haryana Real Estate Regulatory Authority, Gurugram
02.12.2022