Corrected vide order dated 20-04-2023

HARERA
GURUGRAM

Complaint no. 3183 of 2021

BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**3183 of 2021**
Date of filing complaint:		**19.08.2021**
First date of hearing	**:**	**29.09.2021**
Date of decision	**:**	**05.04.2022**

Manik Sharma
R/o: ~~- 464, Sector 15A, Gautam Buddh Nagar, U.P.~~ A-707 Stellar building, LBS Marg, Mahavir Universe, Mumbai, 400078, Maharashtra. **Complainant**

Versus

M/s Vatika Limited
R/o: Vatika Triangle, 7th floor, Sushant Lok-I, Block A, MG Road, Gurugram-122002. **Respondent**

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

APPEARANCE: Ms. DAGGAR MALHOTRA for Complainant.
~~Mr. Abhimanyu Dhawan~~ Advocate for the complainant
Ms. Ankur Berry Advocate for the respondent

ORDER

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

A. Project and unit related details

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

S. No.	Heads	Information
1.	Name and location of the project	"Vatika INXT City Centre", Sector 82, Gurgaon, Haryana
2.	Nature of the project	Commercial complex
3.	Area of the project	10.718 acres
4.	DTCP License	122 of 2008 dated 14.06.2008
	valid upto	13.06.2016
5.	RERA registered/ not registered	**Not registered**
6.	Date of execution of builder buyer's agreement	09.06.2008 (page 13 of BBA)
7.	Unit no.	608A, 6th floor, tower-A (page 14 of complaint)
8.	Unit measuring	500 sq. ft.
9.	New unit no.	502, 5th floor, block D admeasuring 500 sq.ft. (as alleged by complainant at page 33 of complaint)
10.	Total consideration	Rs. 27,25,000/- As per clause 1 of BBA (page 15 of complaint being sale consideration)
11.	Total amount paid by the complainant	Rs. 27,25,000/- As per clause 2 of BBA (Page 15 of complaint being sale consideration)

developer undertook to make committed return/assured return of Rs. 30,000/- per month for the period of construction. Vide the same clause, developer undertook to continue to pay to the allottee the mentioned assured return until the unit was handed over by the developer for possession as the committed returns component. That vide addendum dated 27.07.2011, the parties agreed for relocation of the unit from Vatika Trade Centre to Vatika INXT city centre and on 17.09.2013 unit 502 of block D was allocated. All other terms of the BBA invariably remained the same.

4. The respondent unilaterally decided to not pay assured returns to the complainant with effect from 2018. Since 2019, the respondent with a malafide intention has been sending across to him completely lopsided addendums asking to give away the right to assured returns, promised lease rentals and completion date of the project all of which is completely illegal and in violation of the BBA. The respondent has been pressurizing the complainant into signing such a one-sided addendum. These addendums have not been signed by him. There is a delay of more than 10 years in completion of construction of the unit.

C. Relief sought by the complainant:

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

   i. Direct the respondent to pay interest for delay on the total amount paid by the complainant @prescribed rate of interest for every month of delay, till the date of actual handing over of the possession of the unit.

ii. Direct the respondent to honour its liability to pay committed returns to the complainant as per clause 2 of the BBA till completion of construction and offer of possession.

iii. Direct the respondent to pay the outstanding balance amount of committed returns from 2018 till date.

iv. Direct the respondent to not illegally charge maintenance from the complainant till the time the unit is complete and possession offered and leased out.

6. On the date of hearing, the authority explained to the respondent/ promoter about the contravention 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

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

a. The complainant has misdirected in filing the above captioned complaint before the authority as the reliefs being claimed 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 and thus cannot run, operate, continue an assured return scheme. As per Section 3 of the BUDS Act, all unregulated

12.	Due date of delivery of possession	01.10.2010 as per clause 2 (page 15 of complaint)
13.	Provision regarding assured return	Since the unit would be completed and handed over by 1st October 2010, and since the allottee has paid part/ full sale consideration on signing of this agreement, the developer hereby undertakes to make a payment by way of committed return during construction period, as under, which the allottees duly accepts: .... It is hereby specifically clarified that the committed return would be paid by the developer up to 30.09.2010 or in the event of any delay in completion of the project, up to the date of offer for handing over of completed unit to the allottee.
		Clause N(i) Return on completion of the project and letting out of space That on the completion of th project, the space would be let - out by the developer at his own cost to a bonafide lessee at a minimum rental of Rs. 60/- per sq.ft. per month less TDS at source. In the event of the developer being unable to finalize the leasing arrangements, it shall pay the minimum rent at Rs. 60/-

27

		per sq.ft. per month to the allottee as Minimum Guaranteed Rent for the first 36 months after the date of completion of the project or till the date the said unit/space is put on lease, whichever is earlier. If on account of any reason, the lease rent achieved is less than Rs. 60/- per sq.ft. per month of super area, then the Developer shall return to the Allottee, a compensation calculated at Rs. 130/- for everyone rupee drop in the lease rental below Rs. 64/- per sq.ft. per month. ....
14.	Date of offer of possession to the complainant	**Not offered**
15.	Occupation certificate	**Not obtained**
16.	Delay in handing over till date of decision i.e., 05.04.2022	11 years 6 month 4 days

B. Facts of the complaint

3. That on 09.06.2008, the complainant entered into BBA with the respondent and booked a unit no. 608A on 6th floor, tower no. A of the complex called "Vatika Trade Centre" admeasuring approx. 500 sq.ft. super area for a total sale consideration of Rs. 27,25,000/- and total sum of Rs. 27,25,000/- was paid by him vide two cheques duly encashed. As per clause 17(a) of the BBA, the respondent assured that the construction of the project would be completed in all respects on or before 30.09.2010. As per clause 2 of the BBA, the

deposit schemes have 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 promoter, illegal and punishable under law. Further as per the SEBI Act, 1992 collective investment schemes as defined under Section 11 AA an only be run and operated by a registered person. Hence, the assured return scheme of the respondent has become illegal by the operation of law and it cannot be made to run a scheme which has become infructuous by law. Thus, the present complaint deserves to be dismissed at the very outset, without wasting precious time of this hon'ble authority.

b. That the complainant had not come before the hon'ble authority with clean hands. The complaint has been filed just to harass the respondents and to gain the unjust enrichment. It is pertinent to mention here that for the fair adjudication of grievance as alleged requires 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 present complaint is not maintainable before the hon'ble authority as it is apparent from the prayer sought in the complaint. That further, it is crystal clear from reading the complaint that the complainant is not

25

'allottees', but purely an 'investor', who is only seeking assured return from the respondent, by way of present petition, which is not maintainable under the provisions of the Act, 2016.

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*** order, 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 they are in the position of co-promoter and cannot be treated as '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 complainant herein 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),** 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.

f. That further in the matter of ***Bharam Singh & Ors* vs. *Venetian LDF Projects LLP* (Complaint No. 175 of 2018)**, the hon'ble authority, Gurugram upheld its earlier decision of not entertaining any matter related to assured returns. That the Hon'ble Authority in the said order stated

"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. That in view of the catena of judgments passed by this hon'ble authority and the intent and purpose of enactment RERA Act, 2016, the hon'ble authority is not the right forum for the relief sought by the complainant. Further there is no question of interest to be paid of the alleged assured returns plan in view of the catena of judgements passed by the authority. That the

24

complainant is attempting to seek an advantage of the slowdown in the real estate sector and it is apparent from the facts of the present case that 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.

h. That the present complaint is an arm-twisting method employed by the complainant to fulfil the illegitimate, illegal and baseless claims so as to get benefit from the respondent. Thus, the present complaint is without any basis and no cause of action has arisen, till date, in favour of them and against the respondent and hence the complaint deserves to be dismissed.

i. It is most respectfully submitted that the complainant had wilfully agreed to the terms and conditions of the builder buyer agreement and the addendum and now at a belated stage are attempting to wriggle out of the obligation imposed by the said mutually agreed agreement terms by the filing the instant complaint before this hon'ble authority.

j. That it is brought to the knowledge of the hon'ble authority that the complainant is guilty of placing untrue facts and is attempting to hide the true colour of his intention. That before signing the agreement, he was well aware of the terms and conditions as imposed upon the parties under the agreement & the addendum and only after thorough reading, the said agreement & addendum got signed and executed. He is misrepresenting the true contents of the agreement &

addendum to extract more money from the respondent. The respondent has fulfilled all the obligations so far, as per the said agreement.

k. It is further submitted that the complainant is making false statement before the hon'ble authority, and all the averments made by him is to be put to strict proof thereof. Thus, it is evident that the entire case of is nothing but a web of lies and the false and frivolous allegations made against the respondent is nothing but an afterthought hence the present complaint filed by the complainant deserves to be dismissed with heavy costs. It is pertinent to mention here that complainant's act is also violative of the provisions of Banning of Unregulated Deposit Act,2019 as the complaint falls within the definition of "deposit takers", as per the Section 2(6) of 'Banning of Unregulated Deposit Schemes Act, 2019 and the said ordinance bans such deposits, thereby also bars such assured returns.

l. The BBA dated 09.06.2008 & addendum dated 27.07.2011, never intended to give possession to the complainant and the said fact is ample clear due to absence of clause of possession in the BBA. The BBA dated 09.06.2008 & addendum dated 27.07.2011 do not contain a single clause as to the due date of delivery of possession and rather, the only clause is of leasing arrangements. Thus, the prayer of the complainant seeking possession, is illegal and the present complaint ought to be dismissed. Further, the prayer of compensation as demanded in

23

the complaint, does not fall within the jurisdiction of the hon'ble authority and that too deserves to be dismissed.

8. 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

9. 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

10. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has completed territorial jurisdiction to deal with the present complaint.

E. II Subject-matter jurisdiction

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

> ***Section 11(4)(a)***
>
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
>
> *The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.*
>
> ***Section 34-Functions of the Authority:***
>
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

So, in view of the provisions of the Act of 2016 quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the relief sought by the complainant:

F.I Maintenance charges

11. The complainant has sought a direction to the respondent to not illegally charge the maintenance charges from him till the time the unit is complete and possession offered or leased out.

12. The Real Estate (Regulation and Development) Act, 2016 (RERA) mandates under section 11(4)(d), that the developer will be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees. Since 19(6) of the RERA also states that every allottee, who has entered into an agreement for sale, to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale/BBA and shall pay within stipulated time and appointed place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent and other charges, if any.

13. The next question arises herein as to from which date the maintenance charges can be charged or made applicable. In this regard the authority places reference to the State Consumer Disputes Redressal Forum decision in ***Shri Anil Kumar Chowdhury vs DLF Ltd.*** on 16th August 2018, wherein it has been held as under:

> *"Maintenance Charge and Holding Charge:-*
> *According to Clause 10 or Clause 14.3 of the Agreement, the apartment allottee shall be liable to pay the maintenance charge on and from the date on which actual physical possession is taken or on the expiry of thirty (30) days from the date of issuance of the Notice of Possession, whichever is earlier.*
> *As per terms of the Agreement, the OP/developer has no authority to demand maintenance for any period prior to actual physical possession being handed over. Equally the OP/developer shall have no authority to*

demand any holding charge as the delay in giving possession is on their own part and they are wrongfully withholding possession till date. However, the complainant will be liable to make payment on account of government charges only upon receiving physical possession of the flat and car parking space from the OP.

So far as claim of the complainant for common facilities or benefit like - swimming pool, tennis court etc. are concerned, the same cannot be entertained because prior to lodging complaint, no permission was sought for in accordance with Section 12(1)(c) of the Act to file the complaint in a representative capacity. Therefore, there is hardly any reason to discuss about the common areas and facilities of the complex, as alleged by the complainant.....

In view of the discussion above, the complaint is allowed on contest with the following directions:-

The Opposite Party is directed to deliver possession and to execute the Sale Deed in favour of the complainant on payment of stamp duty and registration charges within 90 days from date after obtaining Completion Certificate from the competent authority;

.....

The Opposite Party is directed not to claim any amount under the head of

(a) cost of increased in area;

(b) pro-rate charges for arranging supply of electrical energy and

(c) Other costs including government charges from final statement of accounts,

(d) maintenance for any period till handing over possession and

(e)any holding charge whatsoever for withholding possession;.....".

14. In yet another judgement titled as **Dr. Mudit Kumar vs Emaar MGF Land Limited on 28th January, 2020** passed by the State Commission, Punjab wherein it has been held that the promoter is not entitled to charge maintenance charges till the handing over of the possession of the plot to the allottee post receipt of the OC only.

However, the amount accredited towards maintenance charges should be maintained in a corpus and the builder cannot transfer the proceeds or maintenance charges received from allottees to his company's account, because such money received for maintenance is not his income in any way. The logic behind it, is that a builder is only a facilitator for a limited amount of time and the onus of taking up the responsibility of maintenance of the flat and its premises is on the residents' welfare association (RWA).

15. In the light of the above-mentioned reasoning, the allottee shall be liable to pay the maintenance charge on and from the date on which actual physical possession is taken or on the expiry of thirty (30) days from the date of issuance of the notice of possession, whichever is earlier.

F.II Assured Return

16. While filing the petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 09.06.2008, the claimant has also sought assured returns on monthly basis as per clause 2 of the agreement of Rs 30,000/- per sq. ft. of super area per month till the date of offer for handing over or completed unit to him. 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.

17. The Act of 2016 defines "agreement for sale" means an agreement entered into between the promoter and the allottee [Section 2(c)]. An agreement for sale is defined as an arrangement entered between the promoter and allottee with freewill and consent of both the parties. An agreement defines the rights and liabilities of both the parties i.e., promoter and the allottee and marks the start of new contractual relationship between them. This contractual relationship gives rise to future agreements and transactions between them. The different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral part of this agreement is the transaction of assured return inter-se parties. The "agreement for sale" after coming into force of this Act (i.e., Act of 2016) shall be in the prescribed form as per rules but this Act of 2016 does not rewrite the "agreement" entered between promoter and allottee prior to coming into force of the Act as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.,*** (Writ Petition No. 2737 of 2017) decided on 06.12.2017. Since the agreement defines the buyer-promoter relationship

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

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

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

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

18. While taking up the cases of ***Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd. (complaint no 141 of 2018)***, and ***Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP"*** (complaint no 175 of 2018) decided on 07.08.2018 and 27.11.2018 respectively, it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the

issue of assured returns was involved to be paid by the builder to an allottee but at that time, neither the full facts were brought before the authority nor it was argued on behalf of the allottees that on the basis of contractual obligations, the builder is obligated to pay that amount. However, there is no bar to take a different view from the earlier one if new facts and law have been brought before an adjudicating authority or the court. There is a doctrine of ***"prospective overruling"*** and which provides that the law declared by the court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. A reference in this regard can be made to the case of ***Sarwan Kumar & Anr Vs. Madan Lal Aggarwal*** Appeal (civil) 1058 of 2003 decided on 06.02.2003 and wherein the hon'ble apex court observed as mentioned above. So, now the plea raised with regard to maintainability of the complaint in the face of earlier orders of the authority in not tenable. The authority can take a different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. It is now well settled preposition of law that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum, memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an

19

agreement for sale defines the builder-buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allotee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arises out of the agreement for sale only and between the same contracting parties to agreement for sale. In the case in hand, the issue of assured returns is on the basis of contractual obligations arising between the parties. Then in case of ***Pioneer Urban Land and Infrastructure Limited & Anr. v/s Union of India & Ors.*** (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019, it was observed by the Hon'ble Apex Court of the land that "*...allottees who had entered into "assured return/committed returns' agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of agreement till the date of handing over of possession to the allottees".* It was further held that 'amounts raised by developers under assured return schemes had the "commercial effect of a borrowing' which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code" including its treatment in books of accounts of the promoter

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

19. 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

18

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 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;

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 unreguiated 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 and do not fall within the term of deposit, which have been banned by the Act of 2019.

17

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 complainant 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

16

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 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.

F. II Delay possession charges

28. In the present complaint, the complainant intend to continue with the project and is 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."*

29. A builder buyer agreement dated 09.06.2008 was executed between the parties. As per clause 2 of the builder buyer agreement, the possession was to be handed over by October 01.10.2010. The clause 2 of the builder buyer agreement is reproduced below:

> *Since the unit would be completed and handed over by 1st October 2010, and since the Allottee has paid part/full sale consideration on signing of this agreement, the Developer hereby undertakes to make a payment by way of committed return during construction period, as under; which the allottee duly accepts:.*

30. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and

15

documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions is not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottees that even a single default by him in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottees is left with no option but to sign on the dotted lines.

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

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

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

33. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 05.04.2022 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

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

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.
Explanation. —For the purpose of this clause—
(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;

(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

35. On consideration of documents available on record and submissions made by the complainant and the respondent, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 2 of the agreement executed between the parties on 09.06.2008, the possession of the subject unit was to be delivered within stipulated time i.e., 01.10.2010. However now, the proposition before it is as to whether an allottees 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?

36. To answer the above proposition, it is worthwhile to consider that the assured return is payable to the allottee on account of a provision in the BBA or in a MoU having reference of the BBA or an addendum to the BBA or in a MoU 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 amount of assured return has been committed by the promoter at Rs. 60/- per sq.ft. of the super area (i.e., 500 sq.ft.). The amount of Rs. 30,000/- of assured return has been committed by the promoter which is more than reasonable in the present circumstance. 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 i.e., assured return in this case is payable a Rs. 30,000/- per month (after deduction of TDS) whereas the delayed possession charges are payable approximately Rs. 21,118.75/- per month. By way of assured return, the promoter has assured the allottee that he would be entitled for this specific amount till offer of possession. Accordingly, the interest of the allottee is protected even after the due date of possession is over as the assured returns are payable from the first 36 months 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 his money is continued to be used by the promoter even after the promised due date and in return, he is to be paid either the assured return or delayed possession charges whichever is higher.

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 till from 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.

The authority directs the respondent/promoter to pay assured return from the date the payment of assured return has not been

13

paid till offer of possession @Rs. 60/- per sq.ft. per month of super area (i.e., Rs. 30,000/- per month) from the completion of the project and declines to order payment of any amount on account of delayed possession charges as his interest has been protected by granting assured return till construction of the said commercial building is complete.

G. Directions of the authority

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

i. Since assured returns being on higher side are allowed than delay possession charges so respondent is directed to pay the arrears of assured return at the rate of Rs. 30,000/- per month (i.e., 60/- per sq.ft. of the super area) to the complainant from the date the payment of assured return has not been paid i.e., September 2018 as per the terms and condition of buyer's agreement dated 09.06.2008 upto the date of completion of the construction of the building. After completion of the construction of the building, the respondent/builder would be liable to pay monthly assured returns @65/- per sq. ft. of the super area up to 36 months 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 and failing which that amount would be payable with interest @7.30% p.a. till the date of actual realization.

iii. The respondent shall not charge anything from the complainant which is not the part of the agreement of sale.

38. Complaint stands disposed of.

39. File be consigned to registry.

(Vijay Kumar Goyal)
Member

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

Dated: 05.04.2022