BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Order pronounced on: 24.05.2023

Name of the Builder		Vatika Limited	
Project Name		Vatika City INX City Centre	
1.	CR/2690/2022	Kundan Lal Kalra V/s Vatika Limited	Mr. Divjyot Singh Ms. Ankur Berry
2.	CR/2536/2022	Abhishek Kalra V/s Vatika Limited	Mr. Divjyot Singh Ms. Ankur Berry
3.	CR/2379/2022	Simran Singh Iqram Govind Singh & Shubhlakshmi Singh V/s Vatika Limited	Mr. Varun Kathuria Ms. Ankur Berry
4.	CR/2520/2022	Chandrakant Chugh & Raman Chugh V/s Vatika Limited	Mr. Varun Kathuria Ms. Ankur Berry
5.	CR/2519/2022	Anuradha Dheer V/s Vatika Limited	Mr. Varun Kathuria Ms. Ankur Berry
6.	CR/2376/2022	Shobha Thapar & Subhlakshami Singh V/s Vatika Limited	Mr. Varun Kathuria Ms. Ankur Berry

CORAM:	
Shri. Ashok Sangwan	Member

ORDER

1. This order shall dispose of all the six 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, India Next City Centre (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 these 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 execution of the conveyance deeds.

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

Project: Vatika INXT City Centre, Sector 83, Vatika India Next, Gurugram, HR-122012
Assured return clause in complaint bearing no: 2690-2022, 2536-2022 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. 13/- per sq.ft. Therefore, your return payable to you shall be as follows: This addendum forms an integral part of builder buyer Agreement A. Till completion of the building: Rs. 78/- per sq. ft. B. After Completion of the building: Rs. 65/- per sq. ft. You would be paid an assured return w.e.f. ..... 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
Assured return clause in complaint bearing no: 2379-2022, 2376-2022 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 A. Till offer of the 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. ..... 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

Assured return clause in complaint bearing no. 2520-2022,2519-2022

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:

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.....

It is hereby specifically clarified that the committed return would be paid by the developer up to ..... 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. 62/- 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. 62/- 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. 62/- per sq.ft. per month of super area, then the Developer shall return to the Allottee, a compensation calculated at Rs. 128/-**(in Cr 2519-2022)** 127.60/- **(in CR 2520-2022)** for everyone rupee drop in the lease rental below Rs. 62/- per sq.ft. per month.

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1	2	3	4	5	6	7
Sr. no	Complaint no./title/reply status	Unit no. & area admeasuring	Allotment letter	Date of agreement	Due date of possession	Total sale consideration/ Amount paid

1.	CR/2690/2022 Kundan Lal Kalra V/s Vatika Limited	1431, 14 floor, tower A 500 sq.ft. Finally allotted unit: 514, 5th floor, block E	NA	29.03.2010	29.03.2013	Rs. 20,00,000/- Rs. 20,00,000/-
2.	CR/2536/2022 Abhishek Kalra & Anr. V/s Vatika Limited	1432, 14 floor, tower A 500 sq.ft. Finally allotted unit: 515, 5th floor, block E	NA	29.03.2010	29.03.2013 vgbxcd	Rs. 20,00,000/- Rs. 20,00,000/-
3.	CR/2379/2022 Simran Singh Iqram Govind Singh & Shubhlakshmi Singh V/s Vatika Limited	232,2nd floor, 500 sq.ft. Finally allotted Unit: 119 B	28.12.2010	28.12.2010	28.12.2013	Rs. 25,00,000/- Rs. 25,00,000/-
4.	CR/2520/2022 Chandrakant Chugh & Raman Chugh V/s Vatika Limited	717, 7th floor, tower A	02.07.2008	23.07.2008	Cannot be ascertain	Rs. 20,00,000/- Rs. 20,00,000/-
5.	CR/2519/2022 Anuradha Dheer V/s Vatika Limited	804A, 8th floor, tower A, 500 sq.ft.	01.08.2008	14.08.2008	Cannot be ascertain	Rs. 20,00,000/- Rs. 20,00,000/-
6.	CR/2376/2022 Shobha Thapar & Subhlakshami Singh V/s Vatika Limited	439 B, 4th floor, tower A	NA	29.10.2010	29.10.2013	Rs. 25,00,000/- Rs. 25,00,000/-

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

possession charges, assured return, and the execution of the conveyance deeds.

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 2690/2022 titled as Kundan Lal Kalra Vs. M/s Vatika Limited*** are being taken into consideration for determining the rights of the allottee(s) qua delay possession charges, assured return and execution of conveyance deeds.

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 2690/2022 titled as Kundan Lal Kalra Vs. M/s Vatika Limited

S. No.	Heads	Information
1.	Name and location of the project	"Vatika Inxt City Center" at Sector 83, Gurugram, Haryana
2.	Nature of the project	Commercial complex
3.	Area of the project	10.72 acres
4.	DTCP License	122 of 2008 dated 14.06.2008
	valid upto	13.06.2018
	Licensee name	M/s Trishul Industries
5.	RERA registered/ not registered	**Not registered**
6.	Allotment letter	NA

7.	Date of execution of builder buyer's agreement	29.03.2010 (page 27 of complaint)
8.	Unit no.	1431,14th floor, tower A (page 30 of complaint)
	New unit	514, 5th floor, block E (page 53 of complaint)
9.	Total consideration	Rs. 20,00,000/- (page 30 of complaint)
10.	Total amount paid by the complainants	Rs. 20,00,000/- (page 30 of complaint)
11.	Due date of delivery of possession	29.03.2013
12.	Date of offer of possession to the complainants	**Not offered**
13.	Occupation certificate	**Not obtained**
14.	Assured return amount paid by the respondent till 30.09.2018	Rs.39,59,408/- (annexure R2, page 35 of reply)

B. Facts of the complaint

8. The complainant booked a **commercial unit bearing no. 1431 admeasuring 500 sq. ft. (super area) on first floor, tower D in "Vatika Trade Centre", NH-8, Sector-83, Gurugram**. Subsequently, a builder buyer agreement dated 29.03.2010, was executed between the parties. The complainant has paid the entire sale consideration.

9. That in terms of clause 2 of the agreement the respondent was to deliver the possession of the commercial unit within 36 months from the date of signing of the agreement. The respondent therefore was obligated to deliver the possession of the unit by 23.02.2013. Till date the respondent has not offer the possession of the unit to the complainant. Therefore, as on date of filing of the present complaint there is a total delay of 9 years 2 months in handing over the possession of the allotted unit.

10. That the respondent thereafter vide letter dated 27.07.2011, informed the complainant that the project site is being relocated to a new location which is strategically better located as it is in the proximity to National Highway-

8 and the Dwarka Expressway. It was represented by the respondent that the project land is owned by one Trishul Industries and the respondent is the principle and controlling partner of Trishul Industries. The respondent also represented that Trishul Industries has also obtained a license bearing no. 122 of 2008 from the Director of Town and Country Planning Department, Chandigarh for developing the said land. Subsequently, the respondent sent another letter dated 17.09.2013, informing that the complainant now has been allotted unit bearing no. 514 measuring 500 sq. ft. on the 5th floor of block E at the new location.

11. Further, as per clause 2 of the agreement in lieu of the investment made by the complainant in the project, the respondent agreed to pay to the complainant a fixed assured return at the rate of Rs. 78 per sq. ft. i.e., Rs. 39,000/- every month. As per clause 2 of the agreement the assured returns of Rs. 39,000/- was to be paid by it every month w.e.f. 29.03.2010, till the completion of the project.

12. That in terms of the agreement, the respondent started making payments of the assured returns w.e.f. April 2010. It used to deposit the assured returns directly into the bank account of the complainant. In terms of the agreement the respondent has agreed/committed to pay the assured returns at the rate of Rs. 78 per sq. ft. till the completion of the project. However, it has paid the assured returns at the rate of Rs. 78 per sq. ft. only till August 2018 and thereafter the said rate was unilaterally reduced by the respondent to Rs. 65 per sq. ft. without giving any prior intimation to complainant. The respondent thereafter for the month of September 2018 made the payment at the rate of Rs. 65 per sq. ft. However, after September 2018 it has abruptly stopped making the payment of the assured returns without any plausible explanation.

13. The respondent thereafter vide e-mail dated October 31, 2018, suspended the payment of the assured returns on frivolous grounds. It subsequently on November 30, 2018, sent another mail and informed that the further payment of assured returns shall remain suspended till June 2019. On June 14, 2019, the respondent sent another e-mail providing an update about the project. In the said e-mail it mentioned about the shifting of the various companies in the areas around the project. However, no update about the project in question was given by it. In the said e-mail it was nowhere mentioned that as to when the possession of the commercial unit would be delivered to the complainant. The respondent in its e-mail further mentioned that they shall be reconciling the accounts of the complainants till June 2019 and would send a reconciliation statement along with the addendum agreement containing the revised clauses of the buyer agreement. It was further mentioned in the e-mail that only after the addendum agreement is executed by the complainant, the payment in respect to the outstanding assured returns shall be disbursed to him and the said payment would be disbursed in three instalments. The changes or new clauses which the respondent intended to incorporate in the addendum agreement were never shown or discussed with the complainant and decision to amend the original agreement was unilaterally taken by it without his consent. However, it did not share the said addendum agreement that they were claiming that the complainant would have to sign.

14. Since then, the complainant has been regularly and repeatedly following up with the respondent and enquiring about the payment of the assured returns and the status of the project. However, the respondent has neither made the payments of the assured returns after September 2018 without any justifiable reasons nor delivered the possession of the office space. The

respondent failed to provide any update about the project the complainant therefore visited the project site and was surprised to find that the work on the project site was still not completed. It was found that it has been misrepresenting to the investor that the work of the building was over and the same were ready to be offered for possession. The survey of the project site revealed that there was a lot of work that was needed to be done.

15. That the complainant thereafter again followed up with the respondent for the remaining outstanding dues. Despite continuous follow ups, it has failed to make the payment of its outstanding assured returns.
16. That the complainant along with other allottees has also filed an Insolvency Petition No. CP (IB) No. 491/Chd/Hry/2019 against the respondent under section 7 and 60(5) of the Insolvency and Bankruptcy Code, 2016 before the National Company Law Tribunal, Chandigarh Bench. The said insolvency petition is still pending for adjudication before the NCLT, Chandigarh.
17. The cause of action to file the complaint arose in September 2018 when the respondent abruptly stopped paying the committed assured returns. The cause of further arose on October 31, 2018, when it sent an e-mail suspending the payment of the assured returns on frivolous grounds. It further arose on November 30, 2018, when it sent another mail and informed that the further payment of assured returns would remain suspended till June 2019. The cause of action also arose in June 2019 when it again failed to pay the assured returns. The cause of action is still subsisting and continuing as the respondent has failed to deliver the possession of the commercial unit till date.

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

The complainant has sought following relief(s):

i. To handover the actual, physical, vacant possession of the commercial unit.

ii. Delay possession charges.

iii. To direct the respondent to make payment on account of the assured return in terms of the builder buyer agreement.

13. 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. That the complainant has got no locus standi or cause of action to file the present complaint. It is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyers agreement dated 29.03.2010, as would be evident from the submissions made in the following paras of the present reply.

b. The complainant has misdirected himself in filing the above captioned complaint before the authority as the relief being claimed by him 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 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 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. Also, it is important to rely upon clause 35 of the BBA dated 21.07.2011 which specifically caters to a situation where certain provisions of the BBA 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.

c. The complainant also enjoyed the monthly returns till September 2018. The complaint has been filed by the complainant just to harass the respondent and to gain the unjust enrichment. It is pertinent to mention here that for the fair adjudication of grievances as alleged by the complainant 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.

d. That it is also relevant to mention here that the commercial unit of the complainant is not meant for physical possession as the said unit is only meant for leasing the said commercial space for earning rental income. Furthermore, as per clause N(d) of the agreement, the said commercial space would be deemed to be legally possessed by the complainant.

Hence, the commercial space booked by the complainant is not meant for physical possession.

e. 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 they 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 complainant herein could not and ought not have filed the present complaint being a co-promoter.

f. 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. That 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. 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. The complainant has come before this authority with un-clean hands. The complaint has been filed by the complainant 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 complainant has instituted the present false and vexatious complaint against the respondent who has already fulfilled its obligation as defined under the BBA dated 29.03.2010.

h. It is submitted that the complainant entered into an agreement i.e., builder buyer agreement dated 29.03.2010 owing to the name, goodwill and reputation of the respondent. According to the terms of the BBA dated 29.03.2010, the construction of unit was completed and the same was duly informed to the complainant vide letter dated 26.03.2018. 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 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. 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 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 favour of the complainant and against the respondent and hence, the complaint deserves to be dismissed.

k. It is brought to the knowledge of this authority that the complainant is guilty of placing untrue facts and is attempting to hide the true colour of his intention. Before buying the property from the erstwhile allottee, the complainant was 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 submissions 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 complainant:

18. The common issues with regard to delayed possession charges, assured return and execution of conveyance deeds are involved in all these cases.

F.I Assured return

19. While filing the petition besides delayed possession charges of the allotted unit as per builder buyer agreement, the claimant has also sought assured returns on monthly basis as per clause of BBA, addendum to the 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 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 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 B*rhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd.* (complaint no 141 of 2018), and ***Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP"*** (supra), it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the issue of assured returns was involved to be paid by the builder to an allottee but at that time, neither the full facts were brought before the authority nor it was argued on behalf of the allottees that on the basis of contractual obligations, the builder is obligated to pay that amount. However, there is no bar to take a different view from the earlier one if new facts and law have been brought before an adjudicating

authority or the court. There is a doctrine of "prospective overruling" and which provides that the law declared by the court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. A reference in this regard can be made to the case of ***Sarwan Kumar & Anr Vs. Madan Lal Aggarwal Appeal*** (civil) 1058 of 2003 decided on 06.02.2003 and wherein the hon'ble apex court observed as mentioned above. So, now the plea raised with regard to maintainability of the complaint in the face of earlier orders of the authority in not tenable. The authority can take a different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. It is now well settled preposition of law that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum , memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement for sale defines the builder-buyer relationship. So, it can be said that the agreement for assured returns between the promoter and an allotee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arises out of the agreement for sale only and between the same contracting parties to agreement for sale. In the case in hand, the issue of assured returns is on the basis of contractual obligations arising between the parties. Then in case of ***Pioneer Urban Land and Infrastructure Limited & Anr. v/s Union of India & Ors.*** (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019, it was observed by

the Hon'ble Apex Court of the land that "...allottees who had entered into "assured return/committed returns' agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of agreement till the date of handing over of possession to the allottees". It was further held that 'amounts raised by developers under assured return schemes had the "commercial effect of a borrowing' which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code" including its treatment in books of accounts of the promoter and for the purposes of income tax. Then, in the latest pronouncement on this aspect in case ***Jaypee Kensington Boulevard Apartments Welfare Association and Ors. vs. NBCC (India) Ltd. and Ors.*** (24.03.2021-SC): MANU/ SC/0206 /2021, the same view was followed as taken earlier in the case of Pioneer Urban Land Infrastructure Ld & Anr. with regard to the allottees of assured returns to be financial creditors within the meaning of section 5(7) of the Code. Then after coming into force the Act of 2016 w.e.f. 01.05.2017, the builder is obligated to register the project with the authority being an ongoing project as per proviso to section 3(1) of the Act of 2017 read with rule 2(o) of the Rules, 2017. The Act of 2016 has no provision for re-writing of contractual obligations between the parties as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.,*** (supra) as quoted earlier. So, the respondent/builder can't take a plea that there was no contractual obligation to pay the amount of assured returns to the allottee

after the Act of 2016 came into force or that a new agreement is being executed with regard to that fact. When there is an obligation of the promoter against an allottee to pay the amount of assured returns, then he can't wriggle out from that situation by taking a plea of the enforcement of Act of 2016, BUDS Act 2019 or any other law.

20. 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. A reference in this regard has been made to the observations made by the civil court, Gurugram in case ***Naresh Prasad versus M/s Vatika Limited and Anr, CNR No. HRGR02-000461-2021- CIS No. CS 338 of 2022, dated 19.04.2022,*** *wherein it was held that M/s Vatika Limited has justification in with holding the assured returns to the applicants i.e., the plaintiffs.* But it was also observed in that case by the court that *"there may be some other mechanism under any other law like Real Estate (Regulation & Development)Act, 2016 and the Insolvency & Bankruptcy Code, 2016 under which the depositors, or buyers/allottees, may have a right to bring a claim against the Company for having stopped the payment of assured returns, subject to the ruling of maintainability of such complaints/applications by the relevant tribunals and authorities which depends on facts and circumstances of each such case".* The observations made by the court rather supports the case of complainant(s) as they are pursuing the remedy for assured return before ethe authority set up under the Act of 2016. Similarly, the respondent also referred to the observations of hon'ble High Courts of Jammu & Kashmir & Ladakh and Punjab & Haryana High Court in cases of Director, ***Splendor Land Base Ltd. & Ors., Haridev Vikram & Others. Versus A.M. Mir India Handicrafts Pvt. Ltd. CRM(M) No. 283 of 2019 & CRM(M) No. 284 of 2019, Vatika Limited versus Union of India and Anr., CWP No. 26740-***

2022 dated 25.05.2022 & 22.11.2022 and wherein it was held that when transactions between the allottees and the respondent/builder are purely of civil nature, then criminal proceedings cannot proceed and coercive steps seeking recovery against the deposits against the builders respectively cannot be taken. The observations of the hon'ble High Courts in the above-mentioned cases are only w.r.t. initiation of criminal proceedings and use of coercive methods for recovery of assured returns but not a bar for continuation of civil proceedings for recovery of that amount. Moreover, 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.*

21. 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;

22. 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.

23. 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.

24. 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.

25. 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.

26. 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.*

27. 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.

28. 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

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

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 within 3 years from the date of execution of builder buyer agreement. The clause 2 of the builder buyer agreement is reproduced below:

> ***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)

32. 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(s) not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions is not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee(s) 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 allottee(s) 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 allottee(s) 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 allottee(s) is left with no option but to sign on the dotted lines.

33. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant(s) is 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., 24.05.023 is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.

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 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 2 of the agreement executed between the parties, the possession

of the subject unit was to be delivered within three years from the date of execution of buyers' agreement. However now, the proposition before it 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 BBA having reference of the BBA or an addendum to the 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/36 months (different terminology use) 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 and at agreed rate per month f super area as minimum guaranteed rent up to 3 years/36 months (different terminology use) 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 at different rate from the date of construction of the said building or the said unit is put on lease whichever is earlier.

G. Directions of the authority

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

i. Since assured return being on higher side are allowed than delay possession charges, so the respondent is directed to pay the arrears of amount of assured return at agreed rate to the complainant(s) in each case 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, the respondent/ builder would be liable to pay monthly assured returns at agreed rate of the super area up to 3 years/36 months (different terminology use) 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 @8.70% p.a. till the date of actual realization.

iii. The respondent shall execute the conveyance deed of the allotted unit within the 3 months from the final offer of possession along with OC upon payment of requisite stamp duty 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.

(Ashok Sangwan)
Member
Haryana Real Estate Regulatory Authority, Gurugram
24.05.2023