BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Order pronounced on: 30.05.2023

Name of the Builder		Vatika Limited	
Project Name		Vatika City INX City Centre	
1.	CR/4220/2022	Dr. Suman Yadav & Harish Yadav V/s Vatika Limited	Mr. Amit Chahal Ms. Ankur Berry
2.	CR/4583/2022	Seema Goyal & Nirmal Goyal V/s Vatika Limited	Mr. Amit Chahal Ms. Ankur Berry
3.	CR/4588/2022	Sunanda Roy Choudhary & Ajay Roy Choudhary V/s Vatika Limited	Mr. Amit Chahal Ms. Ankur Berry

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

ORDER

1. This order seeks to dispose of all the three complaints titled as above filed before the 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 the 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 litigation charges.

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

Project: Vatika INXT City Centre, Sector 83, Vatika India Next, Gurugram, HR-122012
Assured return clause in complaint bearing no. 4220 of 2022, 4583 of 2022 & 4588 of 2022. **ANNEXURE A** **Addendum to the agreement** 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 offered 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 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 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. the following would be applicable. 1. If the rental is less than Rs. 65/- per sq.ft. than you shall be refunded @Rs. 117/- per sq.ft. (Rupees one hundred seventeen only) for every Rs.1/- by which achieved rental is less than Rs. 65/- per sq.ft. 2. If the achieved rental is higher than Rs. 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. 117/- per sq.ft. (Rupees one hundred seventeen only) for every rupee of additional rental achieved in the case of balance 50% of increased rentals.

Unit related details							
1	2	3	4	5	6	7	8
Sr.no	Complaint no./title/reply status	Unit no. & area admeasuring	Allotment 7. let	Date of agreement	Due date of possession 11.	Total sale consideration/ Amount paid	Assured return paid till date
1.	CR/4220/2022 Dr. Suman Yadav & Anr. VS Vatika Limited	315, 3rd floor, tower A admeasuring 1000 sq.ft. Finally allotted unit: 335, admeasuring 1000 sq.ft.	N/A	25.10.2010	25.10.2013	Rs. 50,00,000/- **Rs. 50,00,000/-**	July 2018
2.	CR/4583/2022 Mrs.Seema Goyal & Anr. VS Vatika Limited	316, 3rd floor, tower A admeasuring 500 sq.ft. Finally allotted unit: 337, admeasuring 500 sq.ft.	N/A	23.10.2010	23.10.2013	Rs. 25,00,000/- **Rs. 25,00,000/-**	July 2018
3.	CR/4588/2022 Mrs.Sunanda Roy Choudhary & Anr. VS Vatika Limited	317, 3rd floor, tower A admeasuring 500 sq.ft. Finally allotted unit: 338, admeasuring 500 sq.ft.	N/A	24.11.2010	24.11.2013	Rs. 25,00,000/- **Rs. 25,00,000/-**	July 2018

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

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 in nature. Out of the above-mentioned case, the particulars of lead case ***CR 4220/2022 titled as Dr. Suman Yadav & Harish Yadav 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 ligation charges.

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 4220/2022 titled as Dr. Suman Yadav & Harish Yadav Vs. M/s Vatika Limited

S. No.	Heads	Information
1.	Name and location of the project	"Vatika INXT City Centre" at sector 82, Gurgaon, Haryana
2.	Nature of the project	Commercial complex
3.	Project area	10.718 acres
4.	DTCP license no.	122 of 2008 dated 14.06.2008 valid upto 13.06.2016
5.	RERA Registered/ not registered	Not registered
6.	Unit no.	315, 3rd floor, tower A admeasuring 1000 sq.ft. (page 20 of complaint)
7.	New unit no.	335, block C
8.	Date of builder buyer agreement	25.10.2010 (annexure C1, page 17 of complaint)
9.	Due date of possession	25.10.2013
10.	Total sale consideration	Rs. 50,00,000/- [as per clause 1 of BBA, page 20 of complaint]

11.	Amount paid by the complainants	**Rs. 50,00,000/-** [as per clause 2 of BBA, page 20 of complaint] *Complainants alleged that they paid additional amount of Rs. 28,00,000/- in cash, but there is no evidentiary proof placed on file.
12.	Occupation certificate	Not obtained
13.	Offer of possession	Not offered
14.	Assured return amount paid by the respondent to the complainant	Rs. 61,90,849/- (annexure R2, page 31 of reply)

B. Facts of the complaint

8. That in the year 2010, the complainants received a call, from the marketing department of the respondent for investment in the project namely "Vatika INXT City Centre, situated in Sector 82, Gurgaon (Haryana). It was stated by the respondent's representative that it is an extremely successful builder/developer which has conceptualized, implemented and developed various projects in India. It was further represented that the aforesaid commercial complex would comprise of retail, hotels, serviced apartments, corporate offices etc. It was assured to the complainants that the complex would include modern amenities like 24x7 power backup, CCTV security, recreational facilities etc. and would be instrumental in contributing to their life. It further invited them to visit its office for a detailed presentation and overview of the project.

9. That the complainants believing the representations to be true in good faith, visited the office of the respondent and met its sales representative/agent. The respondent, acting through its sales representative, assured the complainants that all the sanctions pertaining to the said project had been obtained by it. They were further assured that the possession of the unit would be delivered within 3 years by the

respondent and it would provide a pre-determined sum of money per month to them for the entire period utilized in completion of the project. Thus, an impression was generated by the respondent that it is striving to deliver possession of the unit in a short period of time. The respondent further represented that the units in the project were selling out rapidly and it would be in the interest of the complainants to secure allotment of a unit by paying a certain sum of money to it.

10. That lured and induced by the representations and assurances proffered by the respondent, the complainants applied for allotment of a unit in the said project. In pursuance thereof, they were allotted a unit bearing no. 315 admeasuring 1000 sq. ft. super area situated on 3rd Floor of tower bearing no. A in the said project for a total sale consideration initially quantified at Rs. 50,00,000/- and the same was duly paid by them. However, the respondent, thereafter, unilaterally revised the rate from Rs. 5,000/- per sq. ft. to Rs. 7,800/- per sq. ft. and demanded an additional amount of Rs. 28,00,000/- from the complainants. The respondent insisted that the additional amount of Rs. 28,00,000/- be paid in cash by the complainants. It was claimed by it that collecting a part of the sale consideration in cash is a prevalent practice in the real estate industry and the same would allow it to utilize the cash amount for mobilizing labor and construction material on daily basis. The complainants proceeded to pay Rs. 28,00,000/- in cash to the respondent in good faith. The respondent insisted that the said transaction be kept informal and refrained from executing any receipts with regard to that amount. They did not have any reason to suspect the bonafide of the respondent and believed its representations to be true in good faith. The respondent vide its letter dated 31st of July 2013 replaced the unit, referred to above, with unit

bearing no. 335 admeasuring 1000 sq. ft. super area situated on 3rd floor of tower bearing no. C.

11. That thereafter, the respondent provided a pre-printed, arbitrary, biased and unilateral builder buyer agreement to the complainants. They, after perusing the said agreement, raised certain objections against the clauses incorporated in the said agreement but it did not budge. As a result, they had no choice but to go ahead and execute the said agreement containing biased and prejudicial terms and conditions unilaterally incorporated by it.

12. That the complainants specifically objected to the aforesaid clauses of the buyer's agreement and requested the respondent to incorporate parity between the parties. However, the concerned representative of the respondent stated that the buyer's agreement in question was a standard document and the same is executed invariably by all the allottees. They, at the relevant time, did not have any choice but to proceed with the transaction and executed the builder buyer agreement on 25.10.2010.

13. That, without prejudice to the foregoing, it is submitted that as per clause 2 of the buyer's agreement, the respondent had undertaken to complete the construction of the project within three years from the date of execution of the buyer's agreement. Furthermore, the respondent had expressly agreed to pay Rs. 71.50/- per sq. ft. of super area per month as committed return for the period of construction of the project. It has been further stipulated in clause 32.2 that the respondent, on completion of the project, would pay a minimum guaranteed rent at Rs. 65/- per sq. ft. to the complainants per month for the first 36 months after the date of completion of the project or till the date the unit in question has been leased out and whichever was earlier.

14. That the due date for delivery of possession of the unit in question was 25th of October 2013. However, the respondent consciously failed to offer possession of the unit in question to the complainants within the stipulated time period.

15. That a letter dated 15th of March 2018 was dispatched to the complainants by the respondent whereby it was pleaded by it that it had completed the construction of block C in the project. It was further conveyed to the complainants that the respondent was supposedly in active discussions with a number of prospective tenants and was expecting to lease out the area in due course. Furthermore, it unilaterally revised the commitment charges due and payable to them from Rs. 71.50/- per sq. ft. super area per month to Rs. 65/- per sq. ft. super area per month. The respondent assured that it would pay the aforesaid amount to the complainants from 01.03.2018 till the unit is leased out to a tenant.

16. That the unilateral and dishonest act of the respondent in decreasing the commitment charges due and payable to the complainants from Rs. 71.50/- per sq. ft. super area per month to Rs. 65/- per sq. ft. super area per month is illegal, unwarranted, whimsical and illogical especially in light of the fact that the respondent had not obtained occupation certificate in respect of the tower in which the said unit is located. It is undeniable that the respondent could not have delivered possession to a prospective lessee in the absence of the occupation certificate. In fact, making the building operative without the grant of occupation certificate therefore is in itself a culpable act. The respondent, thus, cannot be legally permitted to decrease the commitment charges as alleged in the letter, referred to above. The building has not been completed in accordance with law and on that count, the unilateral decrease in the commitment charges due and payable to them is premature, overhasty, illegal and unjustified.

17. That after receipt of the aforesaid letter, the complainants visited the office of the respondent and further tried to communicate telephonically with the respondent on various occasions and had requested the officials of the respondent multiple times to disclose the exact status of the completion of the construction of the said project but to no avail. In fact, the officials did not disclose to the complainants till date as to whether the unit in question has been leased out or not. The officials of the respondent have kept on evading the queries raised by the complainants on one pretext or the other. They are completely unaware of the status of the unit in question and therefore reserve their right to amend the instant complaint upon revealing of the aforesaid facts pertaining to the unit in question by the respondent.

18. That it is evident that the respondent has miserably failed to complete the project within the stipulated time period. Moreover, the respondent has wantonly stopped remitting the commitment charges to the complainants from July 2018 in complete contravention of its express promise in the letter dated 15.03.2018. Without admitting the correctness and validity of the letter dated 15.03.2018, it is submitted that it has evidently failed to offer possession of the unit, referred to above, to the complainants within the stipulated time period and is consequently liable to pay delay possession in accordance with the provisions of the Real Estate (Regulation and Development) Act, 2016. Furthermore, the respondent is contractually and legally obligated to pay a minimum amount of Rs. 65/- per sq. ft. super area per month to the complainants from the actual date of completion of the project for a period of 36 months as has been stipulated in the buyer's agreement. The complainants have requested the respondent multiple times to discharge its aforesaid financial liabilities but to no avail.

19. That the entire sale consideration of Rs. 78,00,000/- had been remitted to the respondent in the year 2010. However, it has failed to provide any document to the complainants which indicates that the construction of the project has been completed nor the respondent has offered to execute a conveyance deed in favor of the complainants. The respondent has further failed to disclose to the complainants regarding any lease, if executed, in respect of the unit in question. Additionally, it has maliciously and deliberately withheld the commitment charges/ minimum guaranteed rent due and payable to the complainants. The aforesaid acts of the respondent are completely illogical and irrational in the facts and circumstances of the case.

20. That it is submitted that there is inordinate delay in completion of the said project. The respondent has failed to deliver possession of the unit in question or execute a conveyance deed in respect thereof till date. The faith of the complainants in the respondent has been eroded irreversibly. Thus, the complainants are entitled to delay possession charges and compensation and compensation in the facts and circumstances of the case. No lapse or default of any nature can be imputed to the complainants in the entire sequence of events. They have fulfilled their contractual obligations arising out of buyer's agreement dated 25.10.2010 and have always been ready and willing to abide by the covenants incorporated in buyer's agreement. They have been penalized, harassed and victimized without there being any fault whatsoever on their part. The complainants deserve to be compensated for loss of interest by the respondent and as well as for the harassment and mental agony undergone by them on account of deceitful and unfair trade practices adopted by it.

21. That it needs to be highlighted that the complainants at the time of purchase, had made a legitimate assessment regarding the future course

of their life based on the representation of the respondent that the unit in question would be delivered by October 2013. The complainants had considered that the unit in question would start giving returns, as promised in the buyer's agreement, by October, 2013 and accordingly had planned their finances. However, on account of unwarranted and excessive delay on the part of the respondent in fulfilment of its contractual obligations, the complainants have been left in lurch and have suffered enormously without there being any fault on their part.

22. That the complainants have been needlessly compelled by the respondent to institute the present complaint. They requested the respondent multiple times to remit the amount due and payable to them by it. However, it has ignored and evaded the requests of the complainants on one pretext or the other. It is pertinent to mention that there have been deliberate misrepresentations on its part.

C. Relief sought by the complainants:

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

i. Direct the respondent to handover the possession along with delayed possession charges.

ii. Direct the respondent to pay the commitment charges from July 2018 till the date of possession.

iii. Direct to pay the balance amount calculated @Rs. 6.50/- per sq.ft. from for the month of March 2018 to July 2018 along with interest at the rate of 12% per annum calculated from the date on which the amount became due and payable to the complainant.

iv. Direct to pay an amount of Rs. 1,00,000/- as litigation expenses incurred by the complainants.

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 contested the complaint on the following grounds.

a. That the complainants have got no locus standi or cause of action to file the 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, as shall be evident from the submissions made in following paras. At the very outset, it is submitted that the complainants have misdirected themselves in filing the above captioned complaint before the authority as the reliefs being claimed by them cannot be said to fall within the realm of jurisdiction of the authority. 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.

b. That the complainants also enjoyed the monthly returns till September 2018. The complaint has been filed by them just to harass the respondent and to gain the unjust enrichment. It is pertinent to mention here that for the fair adjudication of grievances as alleged by the complainants 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. That the complaint is not maintainable before the authority as it is apparent from the prayer sought in the complaint. Further, it is crystal clear from reading the complaint that the complainants are not 'allottees', but purely 'investors', who are only seeking refund from the respondent due to the depreciating real estate values.

d. That it is also relevant to mention here that the commercial unit of the complainants was not meant for physical possession as the same was only meant for leasing the said commercial space for earning rental income. Furthermore, as per clause 32 of the agreement, the said commercial space was deemed to be legally possessed by the complainants.

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: ***CC00600000000078 of 2017,*** 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 a co-promoter and cannot be treated as 'allottees'.

f. In the matters of ***Brhimjeet & Anr. Vs. M/s landmark Apartment Pvt. Ltd. (complaint no. 141 of 2018),*** & ***Bharam Singh & Ors vs. Venetian LDF Projects LLP*** **(Complaint No. 175 of 2018)**, decided on 07.08.2018 & 27.11.2018 respectively, the hon'ble Haryana real Estate Regulatory authority has taken the same view as observed by Maharasthtra RERA in Mahesh Pariani stated earlier. 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.

g. That the complaint has been filed by the complainants just to harass the respondent and to gain unjust enrichment. The actual reason for filing of the complaint stems from the changed financial valuation of the real estate sector, in the past few years and the allottees malicious intention to earn some easy buck. The covid pandemic has given people to think beyond the basic legal way and to attempt to gain financially at the cost of others. The complainants have instituted the present false and vexatious complaint against the respondent who has already fulfilled its obligation as defined under the BBA dated 25.10.2010. Further, the construction of unit was completed and the same was duly informed to the complaints.

g. That 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.

h. The complainants are attempting to seek an advantage of the slowdown in the real estate sector, and it is apparent from the facts of the present case. The main purpose of the present complaint is to harass the respondent by engaging and igniting frivolous issues with ulterior motives to pressurize it. It is pertinent to submit that the complainants were 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 their favour and against it and hence, the complaint deserves to be dismissed.

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

14. 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 those 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 allottees 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 complainants at a later stage.

F. Findings on the relief sought by the complainants:

18. Earlier the complainants filed complaints seeking refund of the paid-up amount along with arrears of assured returns and litigation charges etc. But during the pendency of the complaints, they did not opt for refund of the paid-up amount from the respondent and sought relief of delay possession charges, assured returns and litigation charges and their plea was allowed by way of amendment of complaints.

19. The common issues involved in all the three cases are with regard to delayed possession charges, assured return & litigation charges and the same are being discussed as under:

F.I Assured return

20. Before taking up the issue of delay possession charges against the allotted units, the issue of assured return is being discussed as findings on the same would effect that issue.

21. While filing the petition besides delayed possession charges of the allotted unit as per builder buyer agreement, the claimants have also sought assured returns on monthly basis as per addendum to 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 September 2018 but did not pay the same after coming into force of the Act of 2019 as its payment was declared illegal.

22. 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 ***Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd.*** and ***Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP"*** (supra), it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the issue of assured returns was involved to be paid by the builder to an allottee but at that time, neither the full facts were brought before the authority nor it was argued on behalf of the allottees that on the basis of contractual obligations, the builder is obligated to pay that amount. However, there is no bar to take a different view from the earlier one if new facts and law have been brought before an adjudicating authority or the court. There is a doctrine of "prospective overruling" and which

provides that the law declared by the court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. A reference in this regard can be made to the case of ***Sarwan Kumar & Anr Vs. Madan Lal Aggarwal Appeal*** (civil) 1058 of 2003 decided on 06.02.2003 and wherein the hon'ble apex court observed as mentioned above. So, now the plea raised with regard to maintainability of the complaints 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. But again, the plea taken in this regard is devoid of merit. Section 2(4) of the above mentioned Act defines the word ' deposit' as *an amount of money received by way of an advance or loan or in any other form, by any deposit taker with a promise to return whether after a specified period* or otherwise, either in cash or in kind or in the form of a specified service, *with or without any benefit in the form of interest, bonus, profit or in any other form, but does not include*

    i. *an amount received in the course of, or for the purpose of, business and bearing a genuine connection to such business including—*
    ii. *advance received in connection with consideration of an immovable property under an agreement or arrangement subject to the condition that such advance is adjusted against such immovable property as specified in terms of the agreement or arrangement.*

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 complainants besides initiating penal proceedings. So, the amount paid by the complainants to the builder is a regulated deposit accepted by the later from the former against the immovable property to be transferred to the allottees later on.

F. II Delay possession charges

29. In the present complaint, the complainant(s) intend to continue with the project and are seeking possession of the subject unit and delay possession charges as provided under the provisions of section 18(1) of the Act which reads as under.

> *"Section 18: - Return of amount and compensation*
>
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
>
> .....
>
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

31. The buyer agreement was executed between the parties. As per clause 2 of that agreement, the possession was to be handed over within 3 years from the date of execution of that document. 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) are seeking delay possession charges. However, proviso to section 18 provides that where an allottee(s) does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at

such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
> *(1)For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

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

34. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 30.05.2023 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 allottees, 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 buyer's agreement having reference of the 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 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 allottees 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 allottees 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 the agreed rates per month and at agreed rate per month of super area as minimum guaranteed rent up to 3 years from the date of completion of the said building or the said unit is put on lease whichever is earlier and declines to order payment of any amount on account of delayed possession charges as their interest has been protected by granting assured returns till the completion of the construction of the building and thereafter also upto 3 years at different rate from the date of construction of the said building or the said unit is put on lease whichever is earlier.

F. IV Litigation cost

39. The complainants are also seeking relief w.r.t. litigation expenses & compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as ***M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors., 2021-2022(1) RCR (C) 357*** has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation

& litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of litigation expenses

G. Directions of the authority

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

i. The respondent is directed to pay the arrears of amount of assured return at agreed rates to the complainant(s) in each case from the dates 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 3years 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 copies of this order be placed on the case file of each matter.

45. Files be consigned to the registry.

Sanjeev Kumar Arora
Member

Ashok Sangwan
Member

Vijay Kumar Goyal
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 30.05.2023