BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**4777 of 2022**
Date of filing complaint:		**28.07.2022**
First date of hearing	**:**	**11.10.2022**
Date of decision	**:**	**19.04.2022**

Anju Malik
R/o: - 39, Deerwood Chase, Nirvana Country, Sector – 50, Gurgaon **Complainant**

Versus

M/s Vatika Limited
R/o: Unit no. A-002, Vatika India Next city Centre, Ground floor, block A, Sector 83, Vatika India Next Gurugram, Haryana-122012. **Respondent**

CORAM:
Sh. Ashok Sangwan **Member**
Sh. Sanjeev Kumar Arora **Member**
APPEARANCE:
Mr. Varun Kathuria Advocate for the complainant
Mr. Ankur Berry Advocate for the respondent

ORDER

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

A. Project and unit related details

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

S.N.	Particulars	Details
1.	Name of the project	"Vatika INXT City Centre", Ground floor, block-A, Sector 83, Vatika India Next, Gurugram, HR-122012.
2.	Project area	10.48 acres
3.	Nature of the project	Commercial complex
4.	DTCP license no.	258 of 2007
5.	Validity of license	13.06.2016
6.	Name of the licensee	Trishul Industries
7.	Rera registered/not registered	Not registered
8.	Allotment letter	18.08.2010 (annexure C1-page 12 of complaint)
9.	Date of builder buyer agreement	18.08.2010 (page 13 of complaint)
10.	Unit no.	1907, 19th floor, admeasuring 1000 sq.ft. (page 12 of complaint)
11.	Allotment of new unit	17.09.2013 (page 34 of complaint)
12.	New unit	204, 2nd floor, block F (page 34 of complaint)
13.	Possession clause	**2. Sale consideration**

		The Developer will complete the construction of the said complex within three (3) years from the date of execution of this agreement. *Further, the Allottee has paid full sale consideration on signing of this agreement, the Developer further undertakes to make payment of Rs As per annexure "A" ......(Rupees.......) per sq.ft. of super area per month by way of committed return for the period of construction, which the Allottee duly accepts. In the event of a time overrun in completion of the said complex the Developer shall continue to pay to the Allottee the within mentioned assured return until the unit is offered by the Developer for possession.* **(Emphasis supplied)**
14.	Assured return clause	**Addendum to the Agreement dated 18.08.2010** The unit has been allotted to you with an assured monthly return of Rs. 65/- per sq.ft. However, during the course of construction till such time the building in which your unit is situated is ready for possession you will be paid an additional return of Rs. 6.50/- per sq.ft. Therefore your return payable to you shall be as follows: This addendum forms an integral part of builder buyer Agreement dated 18.08.2010 A. Till Completion of the building: 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. 18.08.2010 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.
15.	Due date of possession	18.08.2013
16.	Total sale consideration	Rs. 40,00,000/-as per clause 1 of BBA (page 16 of complaint)
17.	Total amount paid by the complainants	Rs. 40,00,000/-as per clause 2 of BBA (page 16 of complaint)
18.	Offer of possession	Not offered
19.	Occupation certificate	Not obtained

20.	Assured return amount paid by the respondent till 30.09.2018	Rs. 65,06,500/- (page 36 of reply)

B. Facts of the complaint

3. The respondent made false representations and claims of being a big company and a reputed developer and thereby induced the complainant to book a 1000 sq. ft. unit in its project then known as "Vatika Trade Centre" by showcasing a fancy brochure which depicted that the project would be developed and constructed as state of the art being one of its kind with all modern amenities and facilities. A builder buyer agreement dated 18.08.2010 was executed between the parties and the complainant was allotted unit no. 1907, having 1000 sq. ft. super area on the nineteenth floor of the said project vide allotment letter dated 18.08.2010 for a total sale consideration of Rs. 40,00,000/- which was paid upfront at the time of execution of the agreement. As per the allotment letter the unit was to be completed by 30.09.2012. As per the addendum executed along with the BBA the respondent was liable to pay monthly returns at Rs. 71.5/- per sq. ft. per month till the completion of the project and @ Rs. 65/- per sq. ft. per month post the completion of the project. As per the agreement the respondent was liable to lease the unit of the complainant @ Rs. 65 per sq. ft. per month or pay the said amount for upto 3 years post completion or till leasing, whichever was earlier. It is pertinent to mention here that the builder buyer agreement was a pre-printed booklet drafted by it containing unilateral terms and conditions favouring

it and prejudicing the complainant and he was never given the option of changing the same.

4. An addendum dated 27/7/2011 was executed between the parties whereby which the complainant was unilaterally transferred to another project "Vatika Inxt City Centre" in Sector – 83, Gurgaon. The respondent unilaterally issued a letter dated 17.09.2013 to the complainant changing the unit of the complainant to unit no. F – 204 which was on a different floor from the unit originally booked by the complainant.

5. The respondent issued a letter dated 15.07.2014 deducting property tax of Rs. 1663/- from the returns payable to the complainant even though the project was neither complete. In March, 2017, the respondent falsely claimed completion of the tower where the unit of the complainant is located and reduced the payment of the monthly returns to Rs. 65/- per square foot per month. It is pertinent to mention here the despite of repeated requests the respondent did not share a copy of the occupation certificated with the complainant.

6. The respondent in furtherance of its malafide intentions and ulterior motives without assigning any reason stopped the payment of the monthly returns to the complainant from October 2018 onwards. Despite of repeated requests, the same have not been paid to the complainant.

7. The respondent sent an email to the complainant in January 2019, stating that it would be sending an amendment to the agreement to be executed by the complainant post which, he visited the office of the respondent on 17.01.2019, where she was given the option

to take a refund of the amount paid by her which would be paid to her in 3 instalments. The complainant agreed for the same and sent the necessary documents for the same to the respondent and even then it refused to refund the amount paid by the complainant.

8. It has come to the knowledge of the complainant that the respondent has not only duped him but several other buyers like them by refusing to pay the monthly returns on one pretext or the other even the project has not received the completion/ occupation certificate from the competent authority till date. buyers have been paid the monthly returns for different periods and have been denied the payment of the same on different grounds.

9. The respondent has not even offered the possession of the unit of the complainant to her and has further stopped responding to the communications of the complainant and has also restricted entry into its office for the complainant and other buyers and has failed to apprise the complainant regarding the true and correct status of the project where the unit of the complainant is located and has further refused to pay the monthly assured rent/minimum guaranteed rent to the complainant for reasons undisclosed.

10. The conduct of the respondent is illegal and arbitrary, and the respondent is guilty of deficiency of services and of unfair and monopolistic trade practices. The respondent is clearly in breach of its contractual obligations and of causing financial loss to the complainant and the conduct of the respondent has caused and is continuing to cause a great amount of financial loss stress, grief and harassment to the complainant.

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

11. The complainant has sought following relief(s):
    i. The respondent be directed to pay the amount of assured returns due and payable by it to the complainant for the last 36 months @ Rs. 71.5 per square ft per month as the project has not yet received the completion/occupation certificate from the competent authority till date.
    ii. The respondent be directed to continue paying the investment returns / monthly returns to the complainant as per the terms of the builder buyers agreement and the addendum thereof.
    iii. The respondent be directed to pay interest at the prescribed rate on the unpaid monthly returns/investment returns to the complainant, to be calculated from the date the monthly returns were due till the date of actual payment.
    iv. The respondent be directed to execute a conveyance deed for the unit of the complainant and to handover the physical/symbolic possession of the unit booked by the complainant to them, complete and ready in all respects.
    v. Direct the respondent to pay the delay possession charges.
12. 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

13. 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. The present complaint 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 builder buyers' agreement dated 18.08.2010, as would be evident from the submissions made in the following paras of the reply.

b. That at the very outset it is submitted that the complaint is not maintainable or tenable in the eyes of law. The complainant has misdirected himself in filing the above captioned complaint before the Ld. Authority as the reliefs being claimed by the him 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, (hereinafter referred as BUDS Act) the 'assured return' and/ or any "committed returns" on the deposit schemes have been banned. The respondent having not taken registration from SEBI board cannot run, operate, continue an assured return scheme. The implications of enactment of BUDS 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".

c. That as per Section 3 of the BUDS Act all Unregulated Deposit Scheme have been strictly banned and deposit takers such as builders, cannot, directly or indirectly promote, operate, issue any advertisements soliciting participation or enrolment in; or accept deposit. Thus, the section 3 of the BUDS Act, makes the assured return schemes, of the builders and promoter, illegal

and punishable under law. Further as per the Securities Exchange Board of India Act, 1992 (hereinafter referred as SEBI Act) Collective Investment Schemes as defined under section 11 AA can only be run and operated by a registered company. Hence, the assured return scheme of the respondent has become illegal by the operation of law and the respondent cannot be made to run a scheme which has become infructuous by law.

d. That it is pertinent to mention that the present complaint is not maintainable before the Authority as it is apparent from the prayers sought in the complaint. Further it is crystal clear from reading the complaint that the complainant is not an 'allottee', but purely is an 'investor', who is only seeking physical possession/delay possession charges from it, by way of present petition, which is not maintainable as the unit is not meant for personal use rather it is meant for earning rental income.

e. 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 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.

f. That in view of the judgment and order dated 16.10.2017 passed by the Maharashtra RERA Authority in the complaint titled ***Mahesh Pariani* vs. *Monarch Solitaire* order, Complaint No: CC006000000000078 of 2017** wherein it has been observed that in case where the complainant has invested money in the

project with sole intention of gaining profits out of the project, then the complainant is in the position of co-promoter and cannot be treated as 'allottee'. Thus, in view of the aforesaid decision, the complainant could not and ought not have filed the present complaint being a co-promoter.

g. That in the matter of ***Brhimjeet &Ors* vs. *M/s Landmark Apartments Pvt. Ltd.*** **(Complaint No. 141 of 2018)**, this Hon'ble Authority has taken the same view as observed by Maharashtra RERA in Mahesh Pariani (supra). Thus, the RERA Act, 2016 cannot deal with issues of assured return. Hence, the complaint deserves to be dismissed at the very outset.

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

i. That the complainant has come before the Authority with unclean 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 allottee 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 buyers' agreement dated

18.08.2010. It is pertinent to mention here that for the fair adjudication of grievance as alleged by the complainant, detailed deliberation by leading the evidence and cross-examination is required, thus only the civil court has jurisdiction to deal with the cases requiring detailed evidence for proper and fair adjudication.

j. It is submitted that the complainant entered into an agreement i.e., builder buyers' agreement dated 18.08.2010 with respondent owing to the name, good would and reputation of the respondent. It is a matter of record that the respondent duly paid the assured return to the complainant till September, 2018. Due to external circumstance which were not in control of the respondent, construction got deferred. Even though the respondent suffered from setback due to external circumstances, yet it managed to complete the construction.

k. The p complaint of the complainant 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 section 11 to section 18 of the Act, 2016 describes and prescribes the function and duties of the developer, section 19 provides the rights and duties of allottees. Hence, the Act, 2016 was never intended to be biased legislation preferring the allottees, 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 and omission of part of the other.

l. That in matter titled ***Anoop Kumar Rath Vs M/S ShethInfraworld Pvt. Ltd.*** in appeal no. AT006000000010822 vide order dated 30.08.2019 the Maharashtra Appellate Tribunal while adjudicating points be considered while granting relief and the spirit and object behind the enactment of the Act, 2016 in para 24 and para 25 discussed in detail the actual purpose of maintaining a fine balance between the rights and duties of the promoter as well as the allottee. The Ld. Appellate Tribunal vide the said judgment discussed the aim and object of the Act, 2016.

m. That 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 that the main purpose of the present complaint is to harass the respondent by engaging and igniting frivolous issues with ulterior motives to pressurize the respondent. Thus, the 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.

n. That it is brought to the knowledge of the Authority that the complainant is guilty of placing untrue facts and is attempting to hide the true colour of the intention of the complainant. Before buying the property, 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.

o. That, it is evident that the entire case of the complainant is nothing but a web of lies and the false and frivolous allegations made against the respondent are nothing but an afterthought, hence the complaint filed by the complainant deserves to be dismissed with heavy costs.

p. That the various contentions raised by the complainant is fictitious, baseless, vague, wrong and created to misrepresent and mislead the Authority, for the reasons stated above. It is further submitted that none of the relief as prayed for by the complainant is sustainable, in the eyes of law. Hence, the complaint is liable to be dismissed with imposition of exemplary cost for wasting the precious time and efforts of the Authority. The complaint is an utter abuse of the process of law, and hence deserves to be dismissed.

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 these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

15. 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

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

E. II Subject-matter jurisdiction

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

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

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

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

F. Findings on the relief sought by the complainants:

F.I Assured return

17. While filing the petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 18.08.2010, the complainants have also sought assured returns on monthly basis as per addendum to the agreement at the rate of Rs 71.50/- per sq. ft. of super area per month till the completion of construction of the said building. It was also agreed as per clause 32.2 that the developer will pay to the buyer Rs. 65/- per sq.ft. super area of the said commercial unit as committed return for upto three years from the date of completion of construction of the said building or till the said commercial unit is put on lease, whichever is earlier. 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.

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

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

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

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

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

19. While taking up the cases ***of Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd. (complaint no 141 of 2018)***, and ***Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP" (complaint no 175 of 2018)*** decided on 07.08.2018 and 27.11.2018 respectively, it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the issue of assured returns was involved to be paid by the builder to an allottee but at that time, neither the full facts were brought before the authority nor it was argued on behalf of the allottees that on the basis of contractual obligations, the builder is obligated to pay that amount. However, there is no bar to take a different

view from the earlier one if new facts and law have been brought before an adjudicating authority or the court. There is a doctrine of "prospective overruling" and which provides that the law declared by the court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. A reference in this regard can be made to the case of ***Sarwan Kumar & Anr Vs. Madan Lal Aggarwal Appeal*** (civil) 1058 of 2003 decided on 06.02.2003 and wherein the hon'ble apex court observed as mentioned above. So, now the plea raised with regard to maintainability of the complaint in the face of earlier orders of the authority in not tenable. The authority can take a different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. It is now well settled preposition of law that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum , memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement for sale defines the builder-buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allotee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arises out of the

agreement for sale only and between the same contracting parties to agreement for sale. In the case in hand, the issue of assured returns is on the basis of contractual obligations arising between the parties. Then in case of ***Pioneer Urban Land and Infrastructure Limited & Anr. v/s Union of India & Ors. (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019,*** it was observed by the Hon'ble Apex Court of the land that "...allottees who had entered into "assured return/committed returns' agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of agreement till the date of handing over of possession to the allottees". It was further held that 'amounts raised by developers under assured return schemes had the "commercial effect of a borrowing' which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code" including its treatment in books of accounts of the promoter and for the purposes of income tax. Then, in the latest pronouncement on this aspect in case ***Jaypee Kensington Boulevard Apartments Welfare Association and Ors. vs. NBCC (India) Ltd. and Ors.*** (24.03.2021-SC): MANU/ SC/0206 /2021, the same view was followed as taken earlier in the case of ***Pioneer Urban Land Infrastructure Ld & Anr.*** with regard to the allottees of assured returns to be financial creditors within

the meaning of section 5(7) of the Code. Then after coming into force the Act of 2016 w.e.f 01.05.2017, the builder is obligated to register the project with the authority being an ongoing project as per proviso to section 3(1) of the Act of 2017 read with rule 2(o) of the Rules, 2017. The Act of 2016 has no provision for re-writing of contractual obligations between the parties as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.,*** (supra) as quoted earlier. So, the respondents/builders can't take a plea that there was no contractual obligation to pay the amount of assured returns to the allottee after the Act of 2016 came into force or that a new agreement is being executed with regard to that fact. When there is an obligation of the promoter against an allottee to pay the amount of assured returns, then he can't wriggle out from that situation by taking a plea of the enforcement of Act of 2016, BUDS Act 2019 or any other law.

20. It is pleaded on behalf of respondents/builders 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 allottees is an ongoing project as per section 3(1) of the Act of 2016 and, the same would fall within the jurisdiction of the authority for giving the desired relief to the complainants besides initiating penal proceedings. So, the amount paid by the complainants to the builder is a regulated deposit accepted by the later from the former against the immovable property to be transferred to the allottee later on.

F. II Delay possession charges

29. In the present complaint, the complainants 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."*

30. A builder buyer agreement dated 18.08.2010 was executed between the parties. The possession clause is not mentioned in the file and has been taken from another file of the same project i.e., 3 years from the date of execution of this agreement. Therefore, the

possession was to be handed over by 18.08.2013. The relevant clause is reproduced below:

> *"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 ad 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.*

31. 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 complainants 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 allottees that even a single default by him in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position

and drafted such mischievous clause in the agreement and the allottees is left with no option but to sign on the dotted lines.

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

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

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., 19.04.2023 is 10.70%. 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 complainants and the respondent, the authority is satisfied that the respondent is in contravention of the provisions of the Act. The agreement executed between the parties on 18.08.2010, the possession of the subject unit was to be delivered within stipulated time i.e., 18.03.2013. However now, the proposition before it is as to whether the allottees who are 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 allottees on account of a provision in the addendum to the BBA. 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 rate at which assured return has been committed by the promoter is Rs. 71.50/-

per sq. ft. of the super area per month which is 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 i.e., assured return in this case is payable a Rs. 71,500/- per month whereas the delayed possession charges are payable approximately Rs. 35,666/- per month. By way of assured return, the promoter has assured the allottees that they would be entitled for this specific amount till completion of construction of the said building. Accordingly, the interest of the allottees 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 till from 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 @Rs. 71.50/- per sq.ft. per month and @ Rs. 65/- per sq. ft. 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.II Conveyance deed

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

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

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

> ***"17. Transfer of title.-***

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

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

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

G. Directions of the authority

41. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act:
    i. The respondent is directed to pay the arrears of amount of assured return at the rate i.e., Rs. 71.50/- per sq. ft. of the super area per month to the complainants from the date the payment of assured return has not been paid i.e., September 2018 till the date of completion of the building. After completion of the construction of the building, the respondent/builder would be liable to pay monthly assured returns @65/- per sq. ft. of the super area up to 3 years or till the unit is put on lease whichever is earlier.

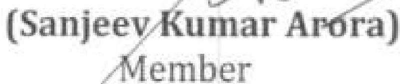
ii. The respondent is also directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of order after adjustment of outstanding dues, if any, from the complainants and failing which that amount would be payable with interest @8.70% p.a. till the date of actual realization.

iii. The respondent shall execute the conveyance deed 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 complainants which is not the part of the agreement of sale.

42. Complaint stands disposed of.

43. File be consigned to registry.



(Sanjeev Kumar Arora)
Member

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 19.04.2022