

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**Order pronounced on: **30.05.2023**

Name of the Builder	Vatika Limited		
Project Name	Vatika One on One		
1.	CR/1292/2022	Saroj Gupta Vs Vatika One one One Pvt. Ltd.	Ms. Yogita Chhabra Mr. Pankaj Chandola
2.	CR/1316/2022	Chhavi Gupta Vs One one One Pvt. Ltd.	Ms. Yogita Chhabra Mr. Pankaj Chandola
3.	CR/1317/2022	Chhayi Gupta Vs One one One Pvt. Ltd.	Ms. Yogita Chhabra Mr. Pankaj Chandola
4.	C'R/1319/2022	Chhavi Gupta Vs One one One Pvt. Ltd.	Ms. Yogita Chhabra Mr. Pankaj Chandola
5.	CR/1320/2022	Saroj Gupta Vs Vatika One one One Pvt. Ltd.	Ms. Yogita Chhabra Mr. Pankaj Chandola
6.	CR/1322/2022	Saroj Gupta Vs Vatika One one One Pvt. Ltd.	Ms. Yogita Chhabra Mr. Pankaj Chandola

CORAM:	
Sh. Ashok Sangwan	Member
Sh. Sanjeev Kumar Arora	Member

ORDER

1. This order shall dispose of all the complaints titled as above filed before this authority in form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "the rules") for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all its obligations, responsibilities and functions to the allottees as per the agreement for sale executed inter se between parties.

2. The core issues emanating from them are similar in nature and the complainant(s) in the above referred matters are allottees of the project, namely, Vatika One on One (commercial complex) being developed by the same respondent/promoter i.e., Vatika Ltd. The terms and conditions of the application form fulcrum of the issue involved in all the cases pertains to failure on the part of the promoter to deliver timely possession of the units in question, seeking award of assured return and the execution of the conveyance deeds.
3. The details of the complaints, reply status, unit no., date of application, assured return clause, assured return rate, total sale consideration, amount paid up, and relief sought are given in the table below:

Project: Vatika One on One, Sector 16, Gurugram, HR-122012						
Clause 2 of Application form						
Assured return paid @120.28/- till completion of the building.						
1	2	3	4	5	6	7
Sr. no	Complaint no./title/reply status	Unit no. & area admeasuring	Allotment letter	BSP	Amount paid	Relief sought
1.	CR/1292/2022 Saroj Gupta Vs Vatika One on One Pvt. Ltd.	P-723, 500 sq.ft.	06.03.2018	Rs. 41,25,000/-	Rs.32,34,000/-	1. Possession 2. Conveyance deed 3. Assured return
2.	CR/1316/2022 Chhavi Gupta Vs One on One Pvt. Ltd.	P-686 500 sq.ft.	19.01.2018	Rs. 41,25,000/-	Rs.46,20,000/-	1. Possession 2. Conveyance deed 3. Assured return
3.	CR/1317/2022 Chhavi Gupta Vs One on One Pvt. Ltd.	P-687 500 sq.ft.	19.01.2018	Rs. 41,25,000/-	Rs.46,20,000/-	1. Possession 2. Conveyance deed 3. Assured return

4.	CR/1319/2022 Chhavi Gupta Vs One on One Pvt. Ltd.	P-688 500 sq.ft.	19.01.2018	Rs. 41,25,000/-	Rs.46,20,000/-	1. Possession 2. Conveyance deed 3. Assured return
5.	CR/1320/2022 Saroj Gupta Vs Vatika One on One Pvt.	P-725 500 sq.ft.	16.05.2018	Rs. 41,25,000/-	Rs.32,34,000/-	1. Possession 2. Conveyance deed 3. Assured return
7.	CR/1322/2022 Saroj Gupta Vs Vatika One on One Pvt.	03, GF, block 4, 1825 sq.ft	08.11.2017	Rs.1,82,50,000/-	Rs.2,04,63,658/-	1. Possession 2. Conveyance deed 3. Assured return

4. The aforesaid complaints were filed by the complainants against the promoter on account of violation of the application form executed between the parties *inter se* in respect of said unit for not handing over the possession by the due date, seeking award of delayed possession charges, assured return and the execution of buyer's agreement.
5. It has been decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter /respondent in terms of section 34(f) of the Act which mandates the authority to ensure compliance of the obligations cast upon the promoters, the allottee(s) and the real estate agents under the Act, the rules and the regulations made thereunder.
6. The facts of all the complaints filed by the complainant(s)/allottee(s) are also similar. Out of the above-mentioned case, the particulars of lead case **CR/1292/2022 Saroj Gupta Vs Vatika One on One Pvt. Ltd.** are being taken into consideration for determining the rights of the allottee(s) qua delay possession charges, assured return, execution of conveyance deeds.

A. Project and unit related details

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

CR/1292/2022 Saroj Gupta Vs Vatika One on One Pvt. Ltd.

S. No.	Heads	Information
1.	Name and location of the project	"One on One", Sector-16, Gurugram, Haryana.
2.	Nature of the project	Commercial complex
3.	Area of the project	12.13 acres
4.	DTCP License	05 of 2015 dated 06.08.2015
	valid upto	05.08.2020
	Licensee name	Keshav Dutt & others
5.	RERA registered/ not registered	237 of 2017 dated 20.09.2017 valid upto 19.09.2022
6.	Allotment letter	06.03.2018 (page 18 of complaint)
7.	Unit no.	P-723 admeasuring 500 sq.ft.
8.	Assured return clause	2. that the payment of your assured return of Rs. 130.15/- per sq.ft. per month on super area will commence only on receipt of 70% of Basic Sale consideration by us from you, in terms of the payment plan/schedule of payments as agreed/opted by you and will be paid till the completion of the construction of the said building. Post completion of construction of the said building, you will be paid committed return of Rs. 131/- per sq.ft. per month on super area for upto three years from the date of completion of construction of the said building or the said unit is put on lease, whichever is earlier.

9.	Basic sale price	Rs. 41,25,000/-
10.	Total amount paid by the complainant	Rs. 32,34,000/-
11.	Date of offer of possession to the complainants	Not offered
12.	Occupation certificate	Not obtained

B. Facts of the complaint

8. That the complainant trusting up on the respondent had booked a commercial space and allotted priority bearing unit no. P-723 indicating measuring area of 500 sq. Ft. vide allotment letter dated 06.03.2018 in the Vatika Limited project namely at "Vatika One on One" situated at: Sector-16 in Gurugram-122020, Haryana. As recorded in the said allotment letter.
9. That the complainant had made payment against aforesaid commercial space allotment letter dated 06.03.2018 under the assured return linked payment plan with total basic consideration of Rs. 41,25,000/- and Rs. 4,95,000/- towards GST with total consideration of Rs. 46,20,000/- but still the complainant hasn't received any buyer agreement or any other agreement for the said commercial property payment, as amounting Rs. 32,34,000/- has been paid and Rs. 13,86,000/- is still pending and would be payable at the time of possession by the complainant.
10. That as per allotment letter dated 06.03.2018 issued by the respondent against the aforesaid commercial property, it has to pay Rs. 130.15/- per sq. ft. per month on 500 sq. ft. area which comes to Rs. 65,075/- as an assured return to the intending the complainant from the date of receipt of pro data payment to till the date of completion of construction of said unit building or the said unit put on lease, whichever is earlier as per

allotment letter the assured return cheques by the respondent co. would be payable subject to deduction of TDS as per rates prescribed under the Income Tax Act, 1961.

11. That the respondent has paid assured return amount to the complainant only for the period w.e.f. 08.02.2018 to 30.09.2018. She attempted to contact the respondent on several occasions. However, the complainant officers deliberately ignored all calls. Aggrieved by the respondent failure to honour its commitments, The respondent to make payment of assured returns as per contract and to execute title documents of the unit in favour of the complainant and to handover peaceful possession of the same. At the time of booking the respondent has assured to the complainant would pay Rs.130.15/- per sq. ft. as an assured return on the 500 sq. ft. area on monthly basis, but the respondent fails to pay the assured return rental amount since October-2018. Since the respondent was deliberately avoiding the telephonic calls made and letters issued by the complainant requesting the respondent to honour its obligations as per the allotment letter, the complainant was constrained to issue a legal notice dated 02.02.2022 through their counsel on once again calling upon the make payment of the assured returns in terms of allotment letter and to also execute the title documents for the unit and peaceful possession of the same.
12. That the subject matter of claim falls within the jurisdiction of the Authority. The said project is registered with the Authority. The registration certificate is appended here to furthermore, the said project is situated, and cause of action has arisen within the ordinary territorial

jurisdiction of the Authority. Hence, the Authority has got the jurisdiction to try and decide the present complaint.

C. Relief sought by the complainants:

The complainant has sought following relief(s):

- i. Direct the respondent to handover of peaceful possession of unit no. p-723, indicating measuring area of 500 sq. ft.
 - ii. Direct the respondent to execute title documents in favour of the complainants pertaining to the unit no. P-723, indicating measuring area of 500 sq. ft.
 - iii. Direct the respondent to make payment of pending period assured returns of Rs. 130.15/- per sq.ft. which comes to Rs. 65,075/- per month along with appropriate interest for unit no. P-723 indicating measuring area of 500 sq.ft.
13. On the date of hearing, the authority explained to the respondents/ promoters 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 respondents

The respondents have contested the complaint on the following grounds.

- a. That in the year 2018, the complainant learned about the commercial project launched by the respondent titled as "One on One" situated at Sector 16, Gurugram and visited the office of the respondent to know the details of the said project. the complainants further inquired about the specifications and veracity of the commercial project and were satisfied with every proposal deemed necessary for the development.

- b. That after having dire interest in the commercial project constructed by the respondent the complainants booked a unit vide application form dated 08.02.108 on his own judgment and investigation. It is evident that the complainants were aware of each and every terms of the application form and agreed to sign upon the same without any protest or demur.
- c. That on 06.03.2018, an allotment letter was issued to the complainants for the unit bearing no. P-723admeasuring to 500 sq. yards for a total sale consideration of Rs. 41,25,000/- in the aforesaid project. The complainants were well aware of the fact, that the commercial unit in question was subject to be leased out post it completion and the same was evidently mentioned and agreed by the complainants in the allotment letter dated. The said commercial unit in question was deemed to be leased out upon completion. The complainants have mutually agreed and acknowledgment that upon completion for the said unit the same would be leased out.
- d. The said application form clearly stipulated provisions for "lease" and admittedly contained a "lease clause". In the light of the said facts and circumstances it can be concluded beyond and reasonable doubt that the complainants is not a consumer or allottee.
- e. That the complainants are trying to mislead the court by concealing facts which are detrimental to the complaint at hand. The complainants have approached the respondent as an investor looking for certain investment opportunities. Therefore, the said allotment of the said unit contained a "lease clause: which empowers the developers to put a unit

- of complainant along with the other commercial space unit on lease and do not have possession clause for physical possession.
- f. That the complainant has filed the present complainant before the wrong forum. That the complainant is praying for the relief of "Assured Returns" which is beyond the jurisdiction that this Ld. Authority has been dressed with. That from the bare perusal of the RERA Act, it is clear that the said Act provides for three kinds of remedies in case of any dispute between a builder and buyer with respect to the development of the project as per the agreement. That such remedies are provided under Section 18 of the RERA Act, 2016 for violation of any provision of the act. That the said remedies are of "Refund" in case the allottee wants to withdraw from the project and the other being "interest for delay of every month" in case the Allottee wants to continue in the project and the last one is for compensation for the loss occurred by the Allottee. That it is pertinent to note herein, that nowhere in the said provision the Ld. Authority has been dressed with jurisdiction to grant "Assured Returns".
- g. That the respondent cannot pay the "Assured Returns" to the complainant by any stretch of Imagination in the view of prevailing laws. That on 21.02.2019 the Central Government passed an ordinance "Banning of Unregulated Deposits, 2019", to stop the menace of unregulated deposits, the "Assured Returns Scheme" given to the complainant fell under the scope of this Ordinance and the payment of such returns became wholly illegal. That later, an act by the name "The Banning of Unregulated Deposits Schemes Act, 2019" (hereinafter

- referred to as “the BUDS Act”) notified on 31.07.2019 and came into force. That under the said Act all the unregulated deposit schemes such as “Assured Returns” have been banned and made punishable with strict penal provisions.
- h. It is also provided that in respect of respondent, “deposit” shall have the same meaning as assigned to it under the Companies Act, 2013. Sub section 31 of section 2 of the companies Act provides that “deposit” includes any receipt of money by way of deposit or loan or in any other form by a respondent but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India.
- i. One of the amounts as set out under sub rule (1)(c)(xii)(b) of Rule 2 of the Deposit Rules (i.e. which is not a deposit) is an advance, accounted for in any manner whatsoever, received in connection with consideration for an immovable property under an agreement or arrangement, provided that such advance is adjusted against such property in accordance with the terms of the agreement or the arrangement
- j. Therefore, the agreements or any other understanding of these kinds, may, after 2018, and if any assured return is paid thereon or continued therewith may be in complete contravention of the provisions of the BUDS Act. The BUDS Act provides two forms of deposit schemes, namely Regulated Deposit Schemes and Unregulated Deposit Schemes. Thus, for any deposit scheme, for not to fall foul of the provisions of the BUDS Act, must satisfy the requirement of being a ‘Regulated Deposit Scheme’ as opposed to Unregulated Deposit Scheme. Hence, the main

object of the BUDS Act is to provide for a comprehensive mechanism to ban Unregulated Deposit Scheme.

- k. Further, any orders or continuation of payment of any assured return or any directions thereof may be completely contrary to the subsequent act passed post the RERA Act, which, is not violating the obligations or provisions of the RERA Act. Therefore, enforcing an obligation on a promoter against a central Act which is specifically banned, may be contrary to the central legislation which has come up to stop the menace of unregulated deposit.
- l. It is pertinent to note that the schemes being harped upon by the complainant would have no foundation in the builder buyer agreement, therefore the concerns arising out of the same cannot be adjudicated by this authority. The "Assured Returns" scheme has become illegal. It is noteworthy in the present situation, that in order to provide a comprehensive mechanism to ban the unregulated deposit schemes, other than the deposits taken in the ordinary course of business, Parliament has passed an act titled as "The Banning of Unregulated Deposit Schemes Act, 2019" (hereinafter referred to as "BUDS Act").
- m. It is pertinent to note herein that the respondents have faced various challenges in the seamless execution of the present project. That the project had deferred due to various reasons beyond the control of the respondent which directly affected the execution of the project. Demonetization and GST resulted in a serious economic meltdown and sluggishness in the real estate sector. That the respondent, with no

cash circulation in the market the respondent could not make timely payments to the labourers and the contractors which stalled the construction. Further, the NGT vide its order dated 09.11.2017 a complete ban on construction activities in around Delhi-NCR which further caused serious damage to the project. Despite the various challenges the respondent is trying his level best to complete the said project well within the timeline as declared during the time of registration.

- n. That the current covid-19 pandemic resulted in serious challenges to the project with no available labourers, contractors etc for the construction of the Project. The Ministry of Home Affairs, GOI vide notification dated March 24,2020 bearing no. 40-3/2020-DM-I(A) recognised that India was threatened with the spread of Covid-19 pandemic and ordered a complete lockdown in the entire country for an initial period of 21 days which started on March 25,2020. By virtue of various subsequent notifications, the Ministry of Home Affairs, GOI further extended the lockdown from time to time and till date the same continues in some or the other form to curb the pandemic. Various State Governments, including the Government of Haryana have also enforced various strict measures to prevent the pandemic including imposing curfew, lockdown, stopping all commercial activities, stopping all construction activities. Pursuant to the issuance of advisory by the GOI vide office memorandum dated May 13, 2020 regarding extension of registrations of real estate projects under the provisions of the RERA Act, 2016 due to "Force Majeure", the Haryana Real Estate Regulatory Authority has also extended the

registration and completion date by 6 months for all real estate projects whose registration or completion date expired and or was supposed to expire on or after March 25, 2020.

- o. In past few years construction activities have also been hit by repeated bans by the Courts/Tribunals/Authorities to curb pollution in Delhi-NCR Region. In the recent past the Environmental Pollution (Prevention and Control) Authority, NCR (EPCA) vide its notification bearing no. EPCA-R/2019/L-49 dt 25.10.2019 banned construction activity in NCR during night hours (6 pm to 6 am) from 26.10.2019 to 30.10.2019 which was later on converted to complete ban from 1.11.2019 to 05.11.2019 by EPCA vide its notification bearing no. R/2019/L-53 dated 01.11.2019.
- p. The Hon'ble Supreme Court of India vide its order dated 04.11.2019 passed in writ petition bearing no. 13029/1985 titled as "MC Mehta vs Union of India" completely banned all construction activities in Delhi-NCR which restriction was partly modified vide order dated 09.12.2019 and was completely lifted by the Hon'ble Supreme Court vide its order dated 14.02.2020. These bans forced the migrant labourers to return to their native towns/states/villages creating an acute shortage of labourers in the NCR Region. Due to the said shortage the construction activity could not resume at full throttle even after the lifting of ban by the Hon'ble Apex Court. Even before the normalcy could resume the world was hit by the covid-19 pandemic. Therefore, it is safely concluded that the said delay in the seamless execution of the project was due to genuine force majeure

circumstances and the said period shall not be added while computing the delay.

- q. That right from the date of booking of the commercial unit the respondent herein had been paying the committed return of Rs. 65,075/- every month to the complainants without any delay. As on September 2018, the complainant has already received an amount of Rs.5,85,675/- as assured return as agreed by the respondent under the aforesaid agreement.
- r. That it is imperative to bring into the knowledge of the Authority that since starting the complainant has always been in advantage of getting assured return as agreed by the respondent. it is an admitted fact that the complainant has received an amount of Rs. 65,075/- every month as assured return right from the date of allotment upto September 2018. Since starting the respondent has always tried level best to comply with the terms of the agreement and has always intimated the exact status of the project. However, the delay is caused in the payment was bonafide and purely out of the control of the respondent and the same has been explained in detail herein below.
- s. That further, the complainant in the instant complaint has harped that the respondent has failed to offer timely possession of the respective unit. The said agreement was of the nature of an "investment agreement". The same does not stipulate about possession, in fact it clearly specified and as mutually agreed by the complainant.
- t. That the respondent no. 1 i.e., M/s Vatika Ltd. cannot be made a relevant in the present complaint since the allotment letter was issued

by respondent no. 2 M/s Vatika One on One Pvt. Ltd. which is a separate entity from M/s Vatika Ltd. Therefore, the respondent no.1 i.e., M/s Vatika Ltd. is not a necessary and proper party in the present matter.

- u. That the complainant, has suppressed the above stated facts and has raised this complaint under reply upon baseless, vague, wrong ground and has mislead the authority for the reason stated above.
13. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority

14. The respondent has raised preliminary objection regarding jurisdiction of authority to entertain the present complaint. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

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

E. II Subject-matter jurisdiction

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

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

Section 34-Functions of the Authority:

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

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

F. Findings on the relief sought by the complainant:

F.I Assured return

18. While filing the petition besides delayed possession charges of the allotted unit as per clause 2 of the allotment letter, the claimant has also sought assured returns on monthly basis as allotment letter 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 allotment letter. 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.

19. 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. (complaint no 141 of 2018), and Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP*** (supra), it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the issue of assured returns was involved to be

paid by the builder to an allottee but at that time, neither the full facts were brought before the authority nor it was argued on behalf of the allottees that on the basis of contractual obligations, the builder is obligated to pay that amount. However, there is no bar to take a different view from the earlier one if new facts and law have been brought before an adjudicating authority or the court. There is a doctrine of “prospective overruling” and which provides that the law declared by the court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. A reference in this regard can be made to the case of *Sarwan Kumar & Anr Vs. Madan Lal Aggarwal Appeal (civil) 1058 of 2003 decided on 06.02.2003* and wherein the hon’ble apex court observed as mentioned above. So, now the plea raised with regard to maintainability of the complaint in the face of earlier orders of the authority is 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 allottee 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 complainant besides initiating penal proceedings. So, the amount paid by the complainant to

- the builder is a regulated deposit accepted by the later from the former against the immovable property to be transferred to the allottee later on.
29. On consideration of documents available on record and submissions made by parties, the complainants have sought assured return on monthly basis as per one of the provisions of allotment letter at the agreed rates till the date of completion of building. It was also agreed that as per clause 2 of allotment letter, the developer would pay assured return to the buyer at different rates (mentioned in allotment letter) per sq. ft. super area of the said commercial unit. The said clause further provides that it would pay assured return to the buyer after the completion of building at different rates (mentioned in allotment letter) per month on super area for upto three years from the date of completion of construction of building or the unit is put on lease whichever is earlier. 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. 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.
30. Accordingly, the promoter is liable to pay assured return of the unpaid period as specified under the clause 2 of the allotment letter.

F.II Conveyance deed

36. Section 17 (1) of the Act deals with duty 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."

37. As OC of the unit has not been obtained, accordingly conveyance deed cannot be executed without unit come 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

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

- i. The respondent is directed to pay the arrears of amount of assured return at agreed rate to the complainant(s) from the date the payment of assured return has not been paid till the date of completion of construction of building. After completion of the construction of the building, 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 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.
45. Files be consigned to registry.


(Sanjeev Kumar Arora)
Member


(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

30.05.2023