BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**3192-2022**
First date of hearing:		**03.09.2022**
Date of decision	**:**	**01.08.2023**

Sh. Harish Chandra Kapoor
Mrs. Rashmi Mahajan
Both RR/o: - C-1850, Sushant Lok-I, Gurugram-122002, Haryana. **Complainants**

Versus

M/s Vatika Limited
Regd. office: A-002, INXT City Centre, GF, block-A, Sector-83, Vatika India Next, Gurugram-122012, Haryana. **Respondent**

CORAM:
Shri. Ashok Sangwan **Member**
Shri. Sanjeev Kumar Arora **Member**

APPEARANCE:
Mr. K.K. Kohli Advocate for the complainants
Mr. Venket Rao & Pankaj Chandola Advocates 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 allottee as per the agreement for sale executed inter-se them.

A. Project and unit related details

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

S. No.	Heads	Information
1.	Name and location of the project	"Vatika Tower", Sector-54, Gurugram
2.	Nature of the project	Commercial complex
3.	RERA registered/ not registered	**Not registered**
4.	Application form	11.05.2015
5.	Date of builder buyer agreement	Not executed
6.	Unit no.	P-237
7.	Total sale consideration	Rs. 34,22,364/-
8.	Total amount paid by the complainants	Rs. 27,50,880/-
9.	Offer of possession	Not offered
10.	Occupation certificate	Not obtained

B. Facts of the complaint

3. That on 10.05.2015, the complainants applied for allotment of commercial space in the project of the respondent called "Vatika Tower C" located at Golf Course Road Gurgaon and thereby made an initial payment of Rs. 10,00,000/- for a commercial space admeasuring 500 sq. ft. In the said application dated 10.05.2015, the complainants opted for assured returns payment plan wherein the

company was required to pay Rs. 120/- per sq. ft super area per month to the complainants till completion.

4. That the respondent received the booking amount payment of Rs. 10,00,000/- as follows: Rs. 5,00,000/- vide cheque no. 000039 drawn on HDFC Bank Gurgaon, another payment of Rs. 5,00,000/- vide cheque no. 000006 drawn on HDFC Bank Gurgaon. This was acknowledged vide receipt voucher no. 919554133 dated 12.05.2015 as well as email dated 18.05.2015 issued by the respondent. Though the application for allotment stated that the builder buyer agreement would be executed shortly, no such agreement was signed between the parties. There was also no brochure at the time when the complainants booked the shop as the project had been pre-launched. But recently the company launched the same project again on its website.
5. That the respondent confirmed the booking of the shop no. P-237 in the aforesaid project to the complainants and thereafter, on 01.07.2015, the respondents received payment of Rs. 8,75,440/- and another payment of Rs. 8,75,440/-. Hence, the respondent without having signed the buyer agreement had received a total of Rs. 27,50,880/- till July 2015, being 80% of the total sale consideration of Rs. 34,22,364/. This is a blatant violation of in violation of Section 13(1) of the RERA Act.
6. That the respondent paid assured returns as per the terms till October 2018. However, the payments were stopped suddenly without giving any valid justification. In November 2018, vide emails dated 09.11.2018 and 30.11.2018, th respondent quoted vague reasons such as the change in the legal regulations governing legal regulations such as GST and SEBI amendments.

Further, the email dated 30.11.2018 stated that "project will commence construction in April 2019. The project is likely to take 30-36 months. Your timely payment rebate will accrue to your account, which will be reconciled by June 2019." Hence, the respondent committed to delivering the project by April 2022 and that the timely payment rebate would accrue to the complainants' account by June 2019. However, when the complainants vide email dated 14.06.2019 sought response on the status of the investment and returns made by them, the respondents failed to give any update.

7. That the respondent vide email dated 21.06.2019 informed the complainants that the construction of the new block at Vatika Towers (bock C) would commence from August 2019. During the period the complainants went to the office of respondent several times and requested them to allow them to visit the site but it was never allowed saying and also did not furnish any clarity on the status of the returns to be paid to the complainants. The complainants even after paying huge amount, i.e., 80% of the total sale consideration did not receive anything in return but only loss of the time and money invested by them. On 11.09.2019, the complainants sent an email to the respondent asking for payment of assured returns but to no avail. Then, on 31.08.2020, the complainants visited the respondent office in Sushant Lok but the same was found closed and the complainants found that the respondent had moved their office to another location without intimating the complainants. Further, there was no update on the status of the returns even though more than a year had passed since the same were promised to be paid by the respondent vide

email dated 21.06.2019. Subsequently vide email dated 01.12.2021, the complainants brought to the notice of the respondent that their company is merely making false promises to make payments but did not provide any substantial update on either the payments or the status of the project. The complainants feeling dejected, threatened for criminal complaints against the respondent and yet, the respondent did not respond to any of the emails sent by the complainants.

8. That the complainants received no communication from the respondent despite all efforts, and despite the passing of 7 years since the payment was made, they are unaware of the status of the project and the money invested by them in the project of the respondent. The respondent has chosen deliberately and contemptuously not to act and fulfil the promises and have given a cold shoulder to the grievances raised by the complainants.
9. That the respondents have not provided the services as promised and agreed through the communication and correspondences made by them from time to time. Further, such acts of the respondent are illegal and against the spirit of RERA Act, 2016 and HRERA Rules, 2017. It is abundantly clear that the respondents have played a fraud upon the complainants and have cheated them fraudulently and dishonestly with a false promise to complete the construction of the project within stipulated period. The respondent had further malalfidely failed to execute a buyer agreement with the complainants. Hence, the complainants being aggrieved by the offending misconduct, fraudulent activities, deficiency and failure in service of the respondent is filing the complaint.

10. It submitted that the respondents were in receipt of a sum of Rs. 27,50,880/- before the execution of the buyer agreement. In this conduct, the respondent violated section 13(1) of the Act, 2016 which clearly states that "a promoter shall not accept a sum more than ten percent, of the cost of the apartment, plot or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

11. That the company as per the application for allotment dated 11.05.2015 agreed to pay an amount of Rs. 120 per sq. ft. super area per month by the way of assured return to the allottee till the date of completion. The monthly assured return of Rs. 59,360/- was paid till October 2018. However, the respondent has failed to make these payments since November 2018 citing frivolous reasons. The payments for a total of 42 months till April 2022 have not been made, amounting to a total of Rs. 24,93,120/-. Even after the receipt of 80% of the total sale consideration, the respondent has with mala fide intention considerably delayed the construction of the project, execution of the buyer agreement and consequently, the offer of possession of the above said unit.

C. Relief sought by the complainant:

The complainant has sought following relief(s):

i. Direct the respondent to execute buyer's agreement with the complainants without making any changes in the terms of allotment.

ii. Direct the respondent to provide the exact lay out plan of the said unit.

iii. Directed the respondent to hand over the possession of the said unit with the amenities and specifications as promised in all

completeness within a stipulated time period and not to hold delivery of the possession for any unwanted reasons.

iv. Direct the respondent to pay the interest on the total amount paid by the complainants at the prescribed rate of interest as per RERA from due date of possession till the date of actual physical possession as the possession is being delayed despite the receipt of 80% of the total sale consideration by the respondent.

v. Direct the respondent to pay the balance amount due to the complainant from the respondent on account of the interest, as per the guidelines laid in the RERA, 2016 and the monthly assured return amount of Rs. 59,360/- till the physical handover of the possession or first lease of the property.

vi. Restrain the respondent from raising fresh demand for payment under any head, as the Complainants had already made more than 80% of the payment.

vii. Direct the respondent to pay monthly assured amount post the completion of the construction of the said building, complainant will be paid committed return of Rs. 118.72/- or 120 per sq. ft. per Month on super area for up to 3 years from the date of completion of construction of said building or the said unit is put on lease, whichever is earlier.

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:

The respondent has filed the reply on the basis of the following grounds:

13. That the complaint under reply is a bundle of lies, proceeded on absurd grounds and is filed without any cause of action. Hence is liable to be dismissed. The complainant had failed to provide the correct facts and the same are reproduced hereunder for proper

adjudication of the present matter. The complainants are raising false, misleading and baseless allegations against the respondent with intent to make unlawful gains.

14. That at the outset, the complainant has erred gravely in filing the complaint and misconstrued the provisions of the Act. It is imperative to bring the attention of the Authority that the Act, 2016 was passed with the sole intention of regularisation of real estate projects, promoters and the dispute resolution between the parties. The same can be perused from the objective of the said Act and published in the official gazette.

15. That it is an admitted fact that by no stretch of imagination it can be concluded that the complainant herein is not a consumer. It is a matter of fact that the complainant is simply an investor who had approached the respondent for investment opportunities and for a steady rental income.

16. That in the year 2015, the complainants learned about the commercial project launched by the respondent titled as Vatika Tower situated at Sector 54, 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.

17. That after having dire interest in the commercial project constructed by the respondent the complainant vide application form had booked a unit in the aforesaid project for a total sale consideration of Rs. 27,50,880/- 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.

18. That on 11.05.2015 an application cum allotment letter was issued to the complainant for a total sale consideration of Rs. 33,00,000/- in the aforesaid project. The complainant was 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 complainant in the allotment letter.

19. That the said commercial unit in question was deemed to be leased out upon completion. The complainants have mutually agreed and acknowledged that upon completion for the said unit the same shall be leased out.

20. That the said allotment letter clearly stipulated provisions for "lease" and admittedly contained a "lease clause". In the light pf the said facts and circumstances it can be concluded beyond any reasonable doubt that the complainant is not a "consumer or allottee".

21. That an appeal bearing no. 647 of 2021, titled as Vatika Limited Vs Vinod Aggarwal, is already ending before the HREAT. Wherein, vide order dated 27.01.2021, has already stayed the order passed by the Authority, granting the relief of assured return in favour of the allottee.

22. That with utmost respect, the Authority is a creature of the Act, 2016 and derives its jurisdiction from the provisions of the statute. Conferment of jurisdiction, as is well settled in law, is a legislative function and can neither be conferred by consent of parties nor by an order of a court, and if a forum without jurisdiction passes an order, the same would be a nullity. The forum cannot derive jurisdiction apart from the statute, as the Hon'ble Supreme Court of India has held in ***Jagmittar Sain Bhagat v. Health Services,***

Haryana, (2013) 10 SCC 136. Accordingly, Respondent is constrained to raise the following aspects for the judicial consideration of the Authority.

23. In the present case, if the relief of specific performance was sought before a civil court, which alone has the jurisdiction to grant relief in accordance with the Specific Relief Act, 1963, it would have been compulsory to plead and prove readiness and willingness and other statutory preconditions for the grant of specific relief, and the above admission would have been fatal to the grant of specific relief. In such circumstances, entertaining this kind of a complaint for specific performance under the Act, 2016 is nothing but permitting the complainant to do indirectly, what he could not do directly, and the same ought to be nipped in the bud by the Authority.

24. That the complainant has misguided herself in filing the present complaint before the wrong forum. The complainant is praying for the relief of "assured returns" which is beyond the jurisdiction that the Authority has been dressed with. 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 arise between the parties with respect to the development of the project as per the agreement. Such remedy is provided under section 18 of the Act, 2016 for violation of any provision of the act. 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.

25. That it is pertinent to note, that nowhere in the said provision the Authority has been dressed with jurisdiction to grant assured

returns or any other arrangement between the parties with respect to investment and returns. Therefore, the present complaint is filed with grave illegalities and the same is liable to be dismissed at the very outset and the complainant would be directed to file pursue her complaint before the civil court for any dispute arises from the agreement pertaining to assured returns.

26. That the respondent cannot pay "assured returns" to the complainant by any stretch of imagination in the view of prevailing laws. On 21.02.2019 the Central Government passed an ordinance "Banning of Unregulated Deposits, 2019", to stop the menace of unregulated deposits and payment of returns on such unregulated deposits.

27. That later, an act titled as "The Banning of Unregulated Deposits Schemes Act, 2019" notified on 31.07.2019 and came into force. That under the said Act all the unregulated deposit schemes have been banned and made punishable with strict penal provisions. Being a law-abiding company, by no stretch of imagination the respondent could have continued to make the payments of the said assured returns in violation of the BUDS Act.

28. Further, it pertinent to mention herein that 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. 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.

29. 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").

30. 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.

31. 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.

32. 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.

33. 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 would not be added while computing the delay.

34. 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.

F. Jurisdiction of the authority

35. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

F.I Territorial jurisdiction

36. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, 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.

37. **F.II Subject matter jurisdiction**

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

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

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.'

G. Findings on the relief sought by the complainant:

G.I Assured return

28. While filing the petition besides delayed possession charges of the allotted unit as per clause 3 of the application form, 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.

29. 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 parts 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*

30. 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 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.

31. 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.

32. 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;

33. 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.

34. 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.

35. 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.

36. 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 builder failed to honour their commitments, a number of cases were filed by the creditors at different forums such as **Nikhil Mehta, Pioneer Urban Land and Infrastructure** which ultimately led the central government to enact the Banning of Unregulated Deposit Scheme Act, 2019 on 31.07.2019 in pursuant to the Banning of Unregulated Deposit Scheme Ordinance, 2018. However, the moot question to be decided is as to whether the schemes floated earlier by the builders and promising as assured returns on the basis of allotment of units are covered by the abovementioned Act or not. A similar issue for consideration arose before Hon'ble RERA Panchkula in case **Baldev Gautam VS Rise Projects Private Limited** (RERA-PKL-2068-2019) where in it was held on 11.03.2020 that a builder is liable to pay monthly assured returns to the complainant till possession of apartments stands handed over and there is no illegality in this regard.

37. 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.

38. 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.

39. 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 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.

40. 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 application form at the agreed rates i.e., 120/- till the date of completion of building. It is observed by the Authority that the clause dealing with assured return provides for a rate for assured return to be paid till completion of the building. In the instant complaint, the subject unit is booked under assured return plan. However, the application form does not specify any clause wherein providing any rate for payment of assured return to the allottee after completion of the building. Whereas as per similar situated application form of similar project it provides a rate of Rs.118.72/- per sq.ft. 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. Keeping in view the fact that the subject unit was booked under assured return plan and the respondent-builder has been paying assured return at a specified rate even after completion of building, it would be safe to conclude there might be some omission while drafting the said of Rs.118.72/- per sq.ft.. Therefore, the clause is to be taken from similar situated 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. 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.

41. Accordingly, the promoter is liable to pay assured return of the unpaid period as specified under the clause 3 of the application form dated 11.05.2015.

F. II Execution of buyer's agreement

42. A project by the name of Vatika Tower C situated in Golf Course, Gurugram was being developed by the respondent. The complainant came to know about the same and booked a unit in it for Rs. 34,22,364/-against which they paid an amount of Rs.27,50,880/-. The complainant has approached the Authority seeking relief w.r.t. execution of buyer's agreement inter se parties. The Authority observes that since the unit was booked under assured return scheme the complainant has already paid the entire amount towards consideration of allotted unit. The Act of 2016 under section 13(1) lays down that the respondent shall not received more

than 10% of sale consideration. The relevant portion reproduce here:

> ***Section 13: No deposit or advance to be taken by promoter without first entering into agreement for sale.***
>
> *13(1) A promoter shall not accept a sum more than ten per cent of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.*

43. Hence, keeping in view the provision of section 13(1) of the Act, 2016 the respondent is directed to get the buyer's agreement executed between the parties within 15 days of the date of this order.

F.II Conveyance deed

44. 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."*

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

45. 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 promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

i. The respondent is directed to pay the arrears of amount of assured return at the rate i.e., Rs. 120/- per sq.ft. of the super area per month to the complainant 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 @118.72/- 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 complainant and failing which that amount would be payable with interest @8.75% p.a. till the date of actual realization.

iii. The Authority directs the respondent/builder to get the buyer's agreement executed between the parties within 15 days.

iv. 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.

v. The respondent shall not charge anything from the complainants which is not the part of the agreement of sale.

46. Complaint stands disposed of.

47. File be consigned to registry.

(Sanjeev Kumar Arora)
Member

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 01.08.2023