BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Order pronounced on: 16.05.2023

Name of the Builder		Vatika Limited	
Project Name		Vatika City INX City Centre	
1.	CR/489/2022	Sandhya Singh Parmar V/s Vatika Limited & Anr.	Mr. Sukhbir Yadav & Sabina Mr. Pankaj Chandola
2.	CR/490/2022	Sandhya Singh Parmar V/s Vatika Limited & Anr.	Mr. Sukhbir Yadav & Sabina Mr. Pankaj Chandola

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

ORDER

1. This order shall dispose of both 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, India Next City Centre (commercial complex) being developed by

the same respondent/promoter i.e., Vatika Ltd. The terms and conditions of the builder buyer's agreements fulcrum of the issues involved in both the cases pertains to failure on the part of the promoter to deliver timely possession of the units in question, seeking award of delayed possession charges, assured return and the execution of the conveyance deeds.

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

Project: Vatika One on One, Sector 16, Gurugram,						
Assured return clause Clause 2 of allotment letter That the payment of your assured return of Rs. 150.26/- per sq.ft. per month on super area will c only on receipt of 100% of BSC by us from you in terms of the payment plan/schedule of pa agreed/opted by you and will be paid till the completion of the construction of the said buil completion of construction of the said building, you will be paid committed return of Rs.131/- per month on super area for upto three years from the date of completion of construction o building or the said unit is put on lease whichever is earlier.						
Unit related details						
1.	**2.**	**3.**	**4.**	**5.**	**6.**	**7.**
Sr.no	**Complaint no. /title/reply statu**	**Unit no. & Area admeasuring**	**Allotment letter**	**Date of agreement**	**Total sale consideration Amount paid**	**Assured Return paid till date**
1.	CR/489/2022 Sandhya Singh Parmar. V/s Vatika Limited. & Anr.	521, 5th floor, block 3 admeasuring 500 sq.ft. (Annexure p3, page 45 of compliant)	25.09.2017	Not executed	Rs.46,20,000/ Rs.46,20,000/-	September 2018
2.	CR/490/2022 Sandhya Singh Parmar. V/s Vatika Limited.	522, 5th floor, block 3 (Annexure p3, page 45 of compliant)	25.09.2017	Not executed	Rs.46,20,000/ Rs. 46,20,000/	September 2018

4. The aforesaid complaints were filed by the complainants against the promoter on account of violation of the allotment letter executed between the parties *inter se* in respect of said unit for not handing over the possession, seeking award of handing over of possession, assured return.

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 489/2022 titled as Sandhya Singh Parmar Vs. M/s Vatika Limited*** are being taken into consideration for determining the rights of the allottee(s) qua delay possession charges, assured return.

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 489/2022 titled as Sandhya Singh Parmar Vs. M/s Vatika Limited

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	25.09.2017 (annexure P2, page 83 of complaint)
7.	Date of execution of builder buyer's agreement	**Not executed**
8.	Unit no.	521,5th floor, block 3, admeasuring 500 sq.ft. (annexure P3, page 45 of complaint)
9.	Total consideration	Rs. 46,20,000/- (page 41 of complaint)
10.	Total amount paid by the complainants	Rs. 46,20,000/-
11.	Date of offer of possession to the complainants	**Not offered**
12.	Occupation certificate	**Not obtained**

B. Facts of the complaint

8. That August 2017 the complainant, received a marketing call from a real estate agent, who represents himself as an authorized agent of the respondent and marketed commercial project namely "One On One" situated at Sector – 16, Gurugram. She visited the project site and local office of the respondent along with the real estate agent and interacted with the marketing staff and office bearers of the respondent. its marketing staff allured her with proposed specifications and assured that committed assured return would be paid by it to her at Rs. 150.26/- per sq. ft. per month on the super area from the date of receipt of 100% of basic sale consideration till the completion of construction of the said building and thereafter committed return of Rs.131/- per sq. ft. per month on the super area for up to 3 years from the date of completion of construction of the said building or till the commercial unit is put on the lease. The respondent assured that possession of the unit would be handed over on

completion of the project. It gave them a brochure and a pre-printed application form.

9. That, believing on the representation and assurance of respondent, on 01.09.2017, the complainant booked a commercial unit being unit no. 521 in the tower/block 3, 5th floor in commercial building One on One, Sector-16, Gurgaon measuring 500 sq. ft. for a basic sale price (including EDC & IDC) of Rs. 41,25,000/- and signed a pre-printed application form and issued a cheque of Rs. 46,20,000/- dated 05.09.2017 drawn on Standard Chartered Bank, Gurgaon. It is highly pertinent to mention here that at the time of booking she has paid the entire sale consideration of the unit in advance.

10. That as per clause 2 of the allotment letter, the assured returns came into operation from September 2017 onwards and the respondent continued to pay the monthly assured return to the complainant till October, 2018. However, after October 2018 the respondent without any reason stopped paying the monthly assured returns to her and has not paid till the date of filing of this complaint.

11. That the complainant visited several times to the office of the respondent and had meetings with the office bearers of the respondent to get the assured return, but nothing fruitful came out. Thereafter, she sent an email dated 06.05.2019 to the respondent and raised a demand for payment of assured returns pending from October 2018 onwards, but there is no positive response from the respondent.

12. That the complainant booked the commercial unit after coming into force of the Act, 2016 and Rules, 2017 and the project of the respondent was and is an ongoing project and it gets the project registered with Haryana Real

Estate Regulatory Authority, Panchkula vide registration no. 237 of 2017 dated 20.09.2017.

13. That after the issuance of allotment letter, the complainant followed-up the respondent to execute the builder buyer's agreement, but on 03.07.2018, one intermediary of the respondent came to the residence of the complainant on a very short notice, when she was alone at home and without allowing her any time to go through the terms and conditions carefully, hastily made her sign a builder buyer agreement. This was done in such a hurried manner, without allowing the complainant to read the agreement and the complainant was not even given a copy of the said buyer's agreement by the said intermediary. To her utter shock and dismay, when she asked for a copy of the signed BBA later, the respondent informed her that the said buyer's agreement had been disposed of and was "no longer valid due to compliance with the newly enforced rules of Haryana RERA". The complainant was given such a shoddy explanation by it despite the fact that she had paid Rs. 23,600/- for to the respondent register the said agreement. It appears from the conduct of the respondent that it deliberately disposed of the original buyer's agreement in order to get a more onerous buyer's agreement signed by the complainant, after the entire sale consideration had already been paid, under the guise of change in rules and regulations under the Real Estate Regulatory Authority Act, 2016.

14. That after a long follow-up on 23.04.2019, the respondent sent another buyer's agreement, which was a completely new arrangement that was not even close to the terms and conditions of the allotment letters. The respondent asked to sign the attached proposed buyer's agreement within

30 days. However, there were glaring inconsistencies and deviations in the proposed buyer's agreement from the allotment letters dated 25.09.2017.

15. That the complainant raised the issue of discrepancy in proposed buyer's agreement and allotment letter and modal buyer's agreement of Haryana Real Estate Regulatory Authority, with the CRM and office bearers of the respondent, but it did not pay any heed to just and reasonable demands of the complainant. Therefore, under the compelling circumstances, she filed a complaint with Hon'ble Haryana Real Estate Regulatory Authority, Gurugram vide CRN – 5581 of 2019 dated 13.11.2019 for two units 521 and 522. It is pertinent to mention here that the matter is still sub-judice with the Hon'ble Authority.
16. That as per information available at the website of the Department of Town and Country Planning, BR-III for the project was issued on 18.05.2017 and there is no occupation certificate till date i.e., 30.01.2022.
17. The Respondent has agreed to pay Rs. 150.26- per sq. ft. per month on the super area of the said commercial unit by the way of assured return to the allottee. The respondent had paid the assured return till September 2018; therefore, the respondent is liable to pay the assured return of Rs. 75,130/- from October 2018 to completion of construction of the project and to pay the committed return as per term & condition 2 of the allotment letter. Since **October 2018** the complainant is regularly requesting the respondent to pay the committed assured return and also to provide a copy of the occupation certificate. Despite several visits and requests by the complainant, it did not pay the committed assured returns from October 2018.
18. That it is highly germane to mention here that the respondent has assured to give committed assured returns to the complainant as per clause no. 2

of the allotment letter, but it has paid assured returns to the complainant only till September 2018 and thereafter the respondent has stopped paying assured returns. The respondent has misused his highly dominant position to harass her. Despite paying the 100% sale consideration of the unit, the respondent has failed to offer possession and failed to pay assured return. Moreover, till today i.e., 30.01.2022, the respondent did not procure the OC from the concerned department.

19. That the main grievance of the complainant in the present complaint is that despite the complainant having paid more than 100% of the actual cost of the unit, the respondent has failed to deliver the possession of the unit on promised time and till date project is without amenities and stopped paying assured return.

20. That there are a clear unfair trade practice and breach of contract and deficiency in the services of the respondent party and much more a smell of playing fraud with the complainant and others and is prima facie clear on the part of the respondent which makes them liable to answer the Authority.

C. Relief sought by the complainants:

The complainants have sought following relief(s):

i. To get an order in her favour by directing the respondent to pay the committed assured returns as per the allotment letter from October 2018 to till completion of the project and thereafter 3 years/the first lease from the date of completion of the project.

ii. Directing the respondent party to hand over physical possession of her commercial unit.

21. On the date of hearing, the authority explained to the respondent/ promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the act to plead guilty or not to plead guilty.

D. Reply by the respondent

The respondent has contested the complaint on the following grounds.

a. The complainant has failed to provide the correct/complete facts and the same are reproduced hereunder for proper adjudication of the present matter. She is raising false, misleading and baseless allegations against the respondent with intent to make unlawful gains.

b. At the outset, the complainant has erred gravely in filing the present complaint and misconstrued the provisions of the Act, 2016. 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.

c. That it is an admitted fact that by no stretch of imagination it can be concluded that the complainant herein is not a "*Consumer*". She is simply investor who approached the respondent for investment opportunities and for a steady rental income.

d. That in the year 2017, 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. She further inquired about the specifications and veracity of the commercial project and were satisfied with every proposal deemed necessary for the development.

e. That after having dire interest in the commercial project constructed by the respondent the complainant herein booked a unit no. 521, vide application form dated 01.09.2017, for a basic sale price of Rs.

41,25,000/- on their own judgement and investigation. The complainant was aware of each and every term of the application form and agreed to sign upon the same without any protest or demur. Thereafter, upon knowing the scheme of assured return offered by the respondent, she herein upon his own will further paid an amount of Rs. 41,25,000/- towards the said unit. On 25.09.2017; an allotment letter was issued by it wherein the unit bearing no. 521, block 3, tower 5 admeasuring to 500 Sq. ft. was allotted to her in the aforesaid project.

f. It is pertinent to bring into the knowledge of the Authority that the matter pertaining to the relief of assured return is already pending before the Hon'ble Haryana Real Estate Regulatory Tribunal (HREAT). And, Hon'ble Tribunal vide order dated 27.01.2021 in the matter titled as Vatika Limited & Vinod Agarwal has already provided stay in order granting relief of assured return.

g. 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.

h. That under the Act, 2016, in order for the Authority to assert its jurisdiction, there are conditions precedent which are stated in the statute itself, which are required to be fulfilled before the Authority

would assert its jurisdiction over the respondent. On a careful reading of the complaint on a demurrer, it is evident that the complainant, by clever drafting, has not cited any provision of the Act, 2016 and demonstrated how the Authority enjoys any subject matter jurisdiction to entertain the complaint.

i. 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.

j. 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.

k. 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.

l. 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.

m. 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.

n. 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.

o. 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.

p. 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").

q. 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.

r. 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.

s. 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.

t. 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.

22. 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

23. 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

24. 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

25. 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.*

26. 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 complainants:

27. The common issues with regard to handover possession, assured return is involved in **both the cases.**

F.I Assured return

28. While filing the complainants besides delayed possession charges of the allotted unit as per builder buyer agreement, the claimants have also sought assured returns on monthly basis as per clause 2 of 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 agreement. Though for some time, the amount of assured returns was paid but later on, the respondent refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019 (herein after referred to as the Act of 2019). But that Act does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act. However, the plea of respondent is otherwise and who took a stand that though it paid the amount of assured returns upto the year 2018 but did not pay the same amount after coming into force of the Act of 2019 as it was declared illegal.

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 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

30. While taking up the cases of ***Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd.*** and ***Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP"*** (supra), it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the issue of assured returns was involved to be paid by the builder to an allottee but at that time, neither the full facts were brought before the authority nor it was argued on behalf of the allottees that on the basis of contractual obligations, the builder is obligated to pay that amount. However, there is no bar to take a different view from the earlier one if new facts and law have been brought before an adjudicating authority or the court. There is a doctrine of "prospective overruling" and which provides that the law declared by the court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. A reference in this regard can be made to the case of ***Sarwan Kumar & Anr Vs. Madan Lal Aggarwal Appeal*** (civil) 1058 of 2003 decided on 06.02.2003 and wherein the hon'ble apex court observed as mentioned above. So, now the plea raised with regard to

maintainability of the complaint in the face of earlier orders of the authority in not tenable. The authority can take a different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. It is now well settled preposition of law that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum, memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement for sale defines the builder-buyer relationship. So, it can be said that the agreement for assured returns between the promoter and an allotee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arises out of the agreement for sale only and between the same contracting parties to agreement for sale. In the case in hand, the issue of assured returns is on the basis of contractual obligations arising between the parties. Then in case of ***Pioneer Urban Land and Infrastructure Limited & Anr. v/s Union of India & Ors.*** (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019, it was observed by the Hon'ble Apex Court of the land that "...allottees who had entered into "assured return/committed returns' agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of agreement till the date of handing over of

possession to the allottees". It was further held that 'amounts raised by developers under assured return schemes had the "commercial effect of a borrowing' which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code" including its treatment in books of accounts of the promoter and for the purposes of income tax. Then, in the latest pronouncement on this aspect in case ***Jaypee Kensington Boulevard Apartments Welfare Association and Ors. vs. NBCC (India) Ltd. and Ors.*** (24.03.2021-SC): MANU/ SC/0206/2021, the same view was followed as taken earlier in the case of Pioneer Urban Land Infrastructure Ld. & Anr. with regard to the allottees of assured returns to be financial creditors within the meaning of section 5(7) of the Code. Then after coming into force the Act of 2016 w.e.f. .01.05.2017, the builder is obligated to register the project with the authority being an ongoing project as per proviso to section 3(1) of the Act of 2017 read with rule 2(o) of the Rules, 2017. The Act of 2016 has no provision for re-writing of contractual obligations between the parties as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.,*** (supra) as quoted earlier. So, the respondent/builder can't take a plea that there was no contractual obligation to pay the amount of assured returns to the allottee after the Act of 2016 came into force or that a new agreement is being executed with regard to that fact. When there is an obligation of the promoter against an allottee to pay the amount of assured returns, then he can't wriggle out from that situation by taking a plea of the enforcement of Act of 2016, BUDS Act 2019 or any other law. 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.*

31. 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 an 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;

32. 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.

33. 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.

34. 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.

35. 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.

36. 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.*

37. 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.

38. It is not disputed that the respondent is a real estate developer, and it had not obtained registration under the Act of 2016 for the project in question. However, the project in which the advance has been received by the developer from the allottee is an ongoing project as per section 3(1) of the Act of 2016 and, the same would fall within the jurisdiction of the authority for giving the desired relief to the complainants besides initiating penal proceedings. So, the amount paid by the complainants to the builder is a regulated deposit accepted by the later from the former against the immovable property to be transferred to the allottee later on.

39. 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 that document, the developer would pay assured return to the buyer Rs. 150.26/- 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 Rs. 131/- 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. 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.

40. Accordingly, the promoter is liable to pay assured return of the unpaid period as specified under the clause 2 of the allotment letter dated 25.09.2017.

G. Directions of the authority

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

i. The respondent is directed to pay the arrears of amount of assured return 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 also be liable to pay monthly assured returns at agreed rate 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(s) and failing which that amount would be payable with interest @8.70% p.a. till the date of actual realization.

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

iv. The respondent shall not charge anything from the complainant(s) which is not the part of the agreement of sale.

42. This decision shall *mutatis mutandis* apply to cases mentioned in para 3 of this order.
43. Complaints stand disposed of. True certified copy of this order shall be placed in the case file of each matter.
44. Files be consigned to registry File be consigned to the registry.

Sanjeev Kumar Arora
Member

Ashok Sangwan
Member

Haryana Real Estate Regulatory Authority, Gurugram
16.05.2023