BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**4623 of 2022**
Date of filing complaint:	**01.07.2022**
First date of hearing:	**02.09.2022**
Date of decision :	**08.08.2023**

Girdhari Lal Uppal Mrs. Prem Lata Uppal Mrs. Meena Uppal **R/o**: V-1/56, IIIrd floor, Rajouri Garden, New Delhi-110027.	**Complainants**
Versus	
M/s Vatika Limited **address:** Vatika Triangle 4th floor, Sushant Lok, Phase I, Block A Mehrauli, Gurugram Road, Gurugram.	**Respondent**

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

ORDER

1. The present complaint has been filed by the complainant/allottees 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 under the provisions of the Act or the rules and regulations made there under or to the allottees as per the agreement for sale executed inter se.

A. Project and unit related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainants, 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	High Street, Inxt City Center, Sector 83, Gurugram, Haryana
2.	Nature of the project	Commercial complex
3.	RERA registered/ not registered	263 of 2017 valid till 02.10.2022
4.	Allotment letter	**05.02.2018 (page 44 of complaint)**
5.	Date of buyer's agreement	Not executed
6.	Unit no.	56, GF (page 44 of complaint)
7.	Assured return clause	4) The developer shall remit an assured monthly return of Rs. 159.25 per sq.ft. till completion of the building. 5) The Allottee authorizes the developer to lease out the said unit, which is part of the commercial complex and agrees that the obligation of the developer shall be to lease the said unit along with the other commercial spaces in the commercial complex. The developer shall lease the unit along with the premises @Rs. 150/- per sq.ft. However, in the eventuality the achieved lease return being higher or lower than Rs 150/- per sq.ft. of the following would be applicable. *a. If the achieved rental is less then Rs. 150/- per sq.ft. then you shall be refunded @Rs.133.33/- per sq.ft. (Rupees One Hundred Thirty Tree & Thirty-Three Paisse) for every Rs. 1/- by which achieved rental is less then Rs. 150/-per sq.ft.*

		b. If the achieved rental is more then 150/- per sq.ft. shall be liable to pay additional sales consideration @Rs. 66.67/- per sq.ft. for every rupee of additional rental achieved.
8.	Total consideration	Rs. 95,40,000/- (as per allotment letter, page 44 of complaint)
9.	Total amount paid by the complainants	Rs. 85,71,440/-
10.	Date of offer of possession to the complainants	**Not offered**
11.	Occupation certificate	**Not obtained**

B. Facts of the complaint

3. That the complainants have invested in unit no. 56 situated on the ground floor in tower A, admeasuring 1060 sq. ft. in the commercial project 'High Street at INXT', Sector-83, Gurgaon, Haryana developed and promoted by the respondent. For marketing and promotional purposes, the respondent advertised the project through print media as well as through its channel partners. In 2017, the complainants came across such advertisements and was approached by the channel partners of the respondent seeking investment in the project under the assured return plan. Further, the complainants were assured that the project would be completed in time.

4. That upon the promise of the monthly assured return plan, the complainants were thus induced and allured into investing in the project and accordingly made payments of Rs. 5,00,000/- on 12.01.2018 and Rs. 79,71,520/- on 02.02.2018 as booking amount/instalment towards purchase of a unit in the project. In view of the aforesaid payments, the complainants submitted an application to the respondent for allotment of unit in the project under the assured returns plan. The payments were received by the office of the respondent and duly acknowledged. Accordingly, the respondent issued a 'letter of allotment' dated

05.02.2018 to the complainants in reference to allotment of unit no. 56 bearing 1060 sq. ft. situated on the ground floor in tower A, 'High Street at INXT', Sector 83, Gurugram, Haryana i.e., the Unit. The letter of allotment forms the agreement between the complainants and the respondent which provided for payment of monthly assured returns to the complainants. The letter of allotment, clause 4 in particular, clearly sets out the understanding between the parties with respect to the allotment of the unit. Further, the letter of allotment clause 5 also records the obligations of the respondent to lease out the unit post completion of the project.

5. That In view of the payments made at the time of booking, the complainants deposited TDS amounting to Rs. 76,320/- on 10.04.2018. Thereafter, the respondent demanded a further payment of Rs. 23, 600/- on account of *'Agreement Execution – RERA Registration'* vide invoice dated 12.09.2018. The complainants accordingly made payment of Rs. 23,600/- towards the said invoice on 28.09.2018 which was duly received by the respondent.

6. That despite payments being made towards the execution of the agreement, no builder buyer agreement has been executed between the parties till date. This was because the respondent had informed the complainants that the builder buyer agreement is being modified to comply with the requirements of the Act. Thereafter, the complainants received the monthly assured returns/ commitment charges from the respondent till 12.10.2018 post which the monthly assured returns were abruptly stopped by the respondent. Subsequently, the complainants received a cryptic and vague email from the respondent on 09.11.2018 regarding suspension of return based sales in view of change/ developments in law in relation to return based sales. The email

highlighted that the respondent was in the process of receiving legal advice from its legal consultants and would revert in due course regarding the way forward.

7. That in furtherance of the abovementioned email, the complainants also received an email dated 17.12.2018 from the respondent wherein the respondent informed that the respondent would not be selling any properties with commitment of assured returns, construction had commenced in the project and was likely to take 12 months, timely payment rebate would accrue to the account of the complainants which would be reconciled by June 2019 and tax advantages would be passed on to the complainants. Due to the assurances provided in the above email, the complainants patiently waited till June 2019. However, no follow up was forthcoming on the part of the respondent. The complainants thus sent an email to the respondent on 29.06.2019 seeking update regarding the status of the overdue payments. Thereafter, the respondent informed the complainants telephonically that assured returns would initially be released till 30.06.2019 in lots of three months at a time. The respondent asked the complainants or their authorized representative to visit the office of the respondent for the same. In furtherance of the above, several telephonic discussions and meetings at the office of the respondent were held between the parties regarding release of payment. The respondent kept delaying making payment on one pretext or the other and repeatedly sought more time. The complainants thus sent reminder emails to the respondent on 15.11.2019, 27.11.2019 and 28.11.2019 raising concerns regarding such dilatory tactics and receipt of vague and cryptic responses from the respondent.

8. That the parties once again resumed telephonic discussions regarding payment of the assured returns by the respondent to the complainants. However, it soon became clear that the respondent was taking the complainants for a ride and had no intention to make the payments. Aggrieved by the above, the complainants issued a communication to the directors of the respondent in relation to payment of the monthly assured returns on 09.05.2022 vide email as well as physical hard copies. The communication dated 09.05.2022 *inter alia* called upon the respondent to immediately make payment of the monthly assured returns under the letter of allotment since November 2018 along with interest at 18% till date of payment. However, they, till date, neither received any response nor acknowledgement of the abovementioned communication.

9. That the respondent has continued to ignore the communications by the complainants whilst enjoying the fruits of the hard-earned monies of the complainants which the respondent is not entitled to in any manner. Such conduct of the respondent wreaks of *mala fide* and is impermissible in law and equity.

10. That the respondent has arbitrarily discontinued payment of monthly assured returns to the complainants without assigning any reason and in complete contravention of the contractual terms mutually agreed upon between the parties. It is settled law that a developer is bound by the doctrine of promissory estoppel which clearly postulates that if any person has made a promise and the promisee has acted on such promise and his altered his position, then the person/ promisor is bound to comply with his/ her promise. In the present case, the builder i.e., the respondent is bound to comply with its promise of providing assured monthly returns/ commitment charges to the complainants and cannot evade such liability whatsoever. Therefore, it is evident the respondent

has not only violated the terms of the letter of allotment but is also in violation of the law of the land. Further, it is to be noted that the amount for the project has been raised by investments made by allottees such as the complainants. Even after a lapse of more than 4 years since issuance of the letter of allotment, admittedly the work at the project is nowhere near completion despite the assurances provided to this effect including those recorded in the letter of allotment and the communications sent by the respondent. In fact, the respondent has even failed to provide any updates regarding the status of the project. Such cavalier conduct of the respondent is unprofessional, negligent and punishable in law.

11. That in view of the above, it is crystal clear that the respondent is acting in an arbitrary and whimsical manner inasmuch as the respondent is refusing to pay the assured monthly returns/ commitment charges to the complainants in fundamental breach of the agreement entered into between the parties. Admittedly, even after a lapse of more than 4 years, construction of the project is nowhere near completion. In any event, as per the terms of the letter of allotment, the respondent is required to provide the complainants with assured monthly returns till completion of the building, post which the unit is to be leased out as per clause 5 of the letter of allotment. However, the respondent has neither completed the construction of the building nor is making payment of the monthly assured returns to the complainants. The complainants thus have no alternative but to seek redressal before the Authority for the fraud and illegal acts committed upon them by the respondent.

12. That two of the complainants are senior citizens who invested their retirement money in the project solely due to the promise of monthly assured returns which was provided in the brochures as well as reiterated and reaffirmed by the executives of respondent. As senior

citizens, the complainants worked hard all their lives and invested their hard-earned monies to secure their retirement by way of the present investment in the project. However, it now appears that the respondent deceived the complainants by taking advantage of its reputation and made misrepresentations to the complainants to cause wrongful losses to them. Such conduct of the respondent in cheating senior citizens of their hard-earned monies is unacceptable and punishable in law and equity.

13. That the respondent, holding a position of power and authority, has misused it, while deceiving the complainants by seeking exorbitant amounts from the complainants and not returning the same by way of the assured monthly returns as promised and recorded in the letter of allotment. The respondent is also in violation of the mandate of the 2016 Act inasmuch as the respondent is not giving timely possession of the booked unit and appears to be redirecting the money given by the complainants for personal benefit. On the other hand, the complainants are law abiding citizens who have been dishonestly subjected to fraud, deception and malpractices adopted by the respondent.

14. That the respondent is unwilling to honour its commitments regarding payment of assured monthly returns despite the fact that the exorbitant amount of monies paid by the complainants have been lying with the respondent for more than 4 years. It is also submitted that the project is hopelessly delayed.

15. That due to the unfair trade practice on the part of the respondent, the complainants have faced immense loss and injury which in fact cannot be compensated in terms of money. The complainants submit that the difficulties and agony before the complainants are incomparable and undeniable, lifetime savings, hard-earned money has been invested by

the complainants in the respondent's project, which has now resulted in perpetual anguish.

16. That the cause of action for the present complaint arose in November, 2018 when the respondent stopped paying committed assured returns to the complainants as per the letter of allotment. The cause of action again arose on various occasions between November, 2018 to May, 2022 when the complainants followed up with the respondent through telephonic discussions, meetings and emails, on 09.05.2022 when the complainants issued a correspondence to the respondent regarding the failure of the respondent to pay assured returns and giving last opportunity to the respondent to make payment. The cause of action is alive and continuing and will continue to arise every month for non-payment of the monthly assured returns. The cause of action will continue to subsist till such time as this Hon'ble Authority passes the necessary orders in the present complaint.

C. Relief sought by the complainants:

The complainant has sought following relief(s):

i. Direct the respondent to make payment of the pending monthly assured returns/ 'commitment charges' under the letter of allotment since 13.10.2018 along with prescribed rate of interest as per the 2016 Act and Rules till the completion of the project.

ii. Direct the respondent to pay the monthly lease rentals as committed returns for up to 3 years from the date of completion of construction of the project or till the unit in the project is leased, whichever is earlier.

iii. Direct the respondent to execute the builder buyer agreement with the complainants in accordance with the terms of the letter of allotment dated 05.02.2018.

iv. Award Rs. 1,00,000/- as compensation to the complainants towards costs of litigation.

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

D. Reply by the respondents

The respondents have contested the complaint on the following grounds.

a. That in the year 2017, the complainant learned about the commercial project launched by the respondent titled as "High Street at Sector 83, Gurugram and visited the office of the respondent to know the details of the said project. the complainants further inquired about the specifications and veracity of the commercial project and were satisfied with every proposal deemed necessary for the development.

b. That after having dire interest in the commercial project constructed by the respondent the complainants booked a unit vide application form dated 30.01.2018 and paid an amount of Rs. 5,00,000/- for further registration on their own judgment and investigation. It is evident that the complainants were aware of each and every terms of the application form and agreed to sign upon the same without any protest or demur.

c. That on 05.02.2018, an allotment letter was issued to the complainants for the unit bearing no. 56 admeasuring to 1060 sq. yards for a total sale consideration of Rs. 95,40,000/- in the

aforesaid project. The complainants were well aware of the fact, that the commercial unit in question was subject to be leased out post it completion and the same was evidently mentioned and agreed by the complainants in the allotment letter dated. The said commercial unit in question was deemed to be leased out upon completion. The complainants have mutually agreed and acknowledgment that upon completion for the said unit the same would be leased out.

d. The said application form clearly stipulated provisions for "lease" and admittedly contained a "lease clause". In the light of the said facts and circumstances it can be concluded beyond and reasonable doubt that the complainants is not a consumer or allottee.

e. That the complainants are trying to mislead the court by concealing facts which are detrimental to the complaint at hand. The complainants have approached the respondent as an investor looking for certain investment opportunities. Therefore, the said allotment of the said unit contained a "lease clause: which empowers the developers to put a unit of complainant along with the other commercial space unit on lease and doe not have possession clause for physical possession.

f. That the complainant has filed the present complainant before the wrong forum. That the complainant is praying for the relief of "Assured Returns" which is beyond the jurisdiction that this Ld. Authority has been dressed with. That from the bare perusal of the RERA Act, it is clear that the said Act provides for three kinds of remedies in case of any dispute between a builder and buyer with respect to the development of the project as per the agreement. That such remedies are provided under Section 18 of the RERA Act, 2016 for violation of any provision of the act. That the said remedies are

of "Refund" in case the allottee wants to withdraw from the project and the other being "interest for delay of every month" in case the Allottee wants to continue in the project and the last one is for compensation for the loss occurred by the Allottee. That it is pertinent to note herein, that nowhere in the said provision the Ld. Authority has been dressed with jurisdiction to grant "Assured Returns".

g. It is also provided that in respect of respondent, "deposit" shall have the same meaning as assigned to it under the Companies Act, 2013. Sub section 31 of section 2 of the companies Act provides that "deposit" includes any receipt of money by way of deposit or loan or in any other form by a respondent but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India.

h. One of the amounts as set out under sub rule (1)(c)(xii)(b) of Rule 2 of the Deposit Rules (i.e. which is not a deposit) is an advance, accounted for in any manner whatsoever, received in connection with consideration for an immovable property under an agreement or arrangement, provided that such advance is adjusted against such property in accordance with the terms of the agreement or the arrangement.

i. Therefore, the agreements or any other understanding of these kinds, may, after 2018, and if any assured return is paid thereon or continued therewith may be in complete contravention of the provisions of the BUDS Act. The BUDS Act provides two forms of deposit schemes, namely Regulated Deposit Schemes and Unregulated Deposit Schemes. Thus, for any deposit scheme, for not to fall foul of the provisions of the BUDS Act, must satisfy the

requirement of being a 'Regulated Deposit Scheme' as opposed to Unregulated Deposit Scheme. Hence, the main object of the BUDS Act is to provide for a comprehensive mechanism to ban Unregulated Deposit Scheme.

j. 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.

k. 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").

l. 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.

m. 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.

n. 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.

o. The Hon'ble Supreme Court of India vide its order dated 04.11.2019 passed in writ petition bearing no. 13029/1985 titled as "MC Mehta vs Union of India" completely banned all construction activities in Delhi-NCR which restriction was partly modified vide order dated 09.12.2019 and was completely lifted by the Hon'ble Supreme Court vide its order dated 14.02.2020. These bans forced the migrant labourers to return to their native towns/states/villages creating an acute shortage of labourers in the NCR Region. Due to the said shortage the construction activity could not resume at full throttle even after the lifting of ban by the Hon'ble Apex Court. Even before the normalcy could resume the world was hit by the covid-19 pandemic. Therefore, it is safely concluded that the said delay in the seamless execution of the project was due to genuine force majeure circumstances and the said period shall not be added while computing the delay.

p. That the current covid-19 pandemic resulted in serious challenged 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 order a completed lockdown in the entire country of 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 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 Act, 2016 due to force majeure, the 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.

q. That despite, after above stated obstructions, the nation was yet again hit by the second wave of covid-19 pandemic and again all the activities in the real estate sector were forced to stop. Considering the wide spread of covid-19, firstly night curfew was imposed followed by weekend curfew and then complete curfew. That period from 12.04.2021 to 24.0.2021, each and every activity including the construction activity was banned in the state.

r. That right from the date of booking of the commercial unit the respondent had been paying the committed return of Rs. 1,68,805/- every month to the complainants without any delay. The

complainants have already received an amount of RS. 14,83,073/- as assured return as agreed by the respondent under the aforesaid agreement.

s. That since starting the complainant has always been in advantage of getting assured return as agreed by the respondent. The complainants have received an amount of Rs. 14,83,073/- as assured return right from the date of allotment.

t. That the complainant in the instant complaint has harped that the respondent has failed to offer timely possession of the respective unit. The said agreement was of the nature of an "investment agreement. The same does not stipulate about possession, in fact it clearly specified and as mutually agreed by the complainant.

u. That the complainants have suppressed the above stated facts and has raised this complaint under reply upon baseless, vague, wrong grounds and has mislead the Authority for the reasons stated above. None of the reliefs as prayed for by the complainants are sustainable before the Authority and in the interest of justice.

18. 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

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

E. I Territorial jurisdiction

20. 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 comple1te territorial jurisdiction to deal with the present complaint.

E. II Subject-matter jurisdiction

21. 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.*

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

F. Findings on the relief sought by the complainant:

F.I Assured return

23. While filing the petition, the claimant has 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.

24. 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

25. While taking up the cases of ***Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd. (complaint no 141 of 2018), and Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP" (supra),*** it was held by the authority that it has no jurisdiction to deal with cases of assured returns.

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

26. 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.*

27. 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;*

28. 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.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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.

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

35. On consideration of documents available on record and submissions made by parties, the complainants have sought assured return on monthly basis as per clause 4 of allotment letter at Rs. 159.25 per sq.ft. till the date of completion of building. It was also agreed that as per clause 5 of allotment letter, the developer would pay assured return to the buyer Rs. 150/- per sq. ft. super area of the said commercial unit. However, in the eventuality the achieved lease return being higher or lower than Rs. 150/- per sq.ft. the following would be applicable.

a. If the achieved rental is less then Rs. 150/- per sq.ft. then you shall be refunded @Rs.133.33/- per sq.ft. (Rupees One Hundred Thirty Tree & Thirty-Three Paisse) for every Rs. 1/- by which achieved rental is less then Rs. 150/-per sq.ft.

b. If the achieved rental is more then 150/- per sq.ft. shall be liable to pay additional sales consideration @Rs. 66.67/- per sq.ft. for every rupee of additional rental achieved.

36. 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.

37. Accordingly, the promoter is liable to pay assured return of the unpaid period as specified under the allotment letter dated 05.02.2018.

F.II Execution of buyer's agreement.

38. A project by the name of High Street, Gurugram was being developed by the respondent. The complainants came to know about the same and booked a unit in it for Rs. 95,40,000/-against which they paid an amount of Rs. 85,71,440/-. The complainants have 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*

39. 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.III Litigation expenses & compensation

40. The complainants are also seeking relief w.r.t. litigation expenses & compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as ***M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors.*** (supra), has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, the complainants are advised to approach the adjudicating officer for seeking the relief of litigation expenses

G. Directions of the authority

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

i. The respondent is directed to pay the arrears of amount of assured return at agreed rate to the complainant(s) from the date the payment of assured return till the date of completion of construction of building. After completion of the construction of the building, the respondent/builder would be liable to pay monthly assured returns as per clause 5 of the allotment letter dated 05.02.2018.

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

42. Complaints stand disposed of.

43. File be consigned to registry.

(Sanjeev Kumar Arora)
Member

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

08.08.2023