BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Order pronounced on: 18.08.2023

Name of the Builder		Vatika Limited	
Project Name		Vatika City INX City Centre	
1.	CR/130/2022	Santosh Yadav V/S Vatika Limited	Mr. Varun Kathuria Ms. Ankur Berry
2.	CR/520/2022	Sarita Rani & Anr. V/S Vatika Limited	Mr. Varun Kathuria Ms. Ankur Berry

CORAM:	
Shri. Sanjeev Kumar Arora	Member

ORDER

1. This order shall dispose of both the complaints titled as above filed before this authority 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 these

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, unit no., date of agreement, assured return clause, assured return rate, possession clause, due date of possession, total sale consideration, amount paid up are given in the table below:

Project: Vatika INXT City Centre, Sector 83, Vatika India Next, Gurugram, HR-122012
Assured return clause in complaint bearing no. 130-2022 The unit has been allotted to you with an assured monthly return of Rs. 65/- per sq.ft. However, during the course of construction till such time the building in which your unit is situated is ready for possession you will be paid an additional return of Rs. 13/- per sq.ft. Therefore, your return payable to you shall be as follows: This addendum forms an integral part of builder buyer Agreement A. Till offer of the possession: Rs. 78/- per sq. ft. B. After Completion of the building: Rs. 65/- per sq. ft. You would be paid an assured return w.e.f. 03.10.2009 on a monthly basis before the 15th of each calendar month. The obligation of the developer shall be to lease the premises of which your flat is part @Rs. 65/- per sq.ft. In the eventuality the achieved return being higher or lower than Rs. 65/- per sq.ft. 1. If the rental is less than Rs. 65/- per sq.ft. than you shall be returned @Rs. 120/- per sq.ft. for every Rs. 1/- by which achieved rental is less than Rs. 65/- per sq.ft. 2. If the achieved rental is higher than R. 65/- per sq.ft. than 50% of the increased rental shall accrue to you free of any additional sale consideration. However, you will be requested to pay additional sale consideration @Rs. 120/- per sq.ft. for every rupee of additional rental achieved in the case of balance 50% of increased rentals.
Assured return clause in complaint bearing no. 520-2022 Since the Buyer has paid the full basic sale consideration for the said commercial unit upon signing of this agreement and has also requested for putting the same on lease in combination with other adjoining units/spaces of other owners after the said Building is ready for occupation and use, the Developer has agreed to pay Rs. 65/- per sq.ft. super area of the said commercial unit per month by way of assured return to the Buyer from the date of execution of this agreement till the completion of construction of the said Building. The buyer hereby gives full authority and powers to the Developer to put the said Commercial Unit in combination with other adjoining commercial units of other

owners, on lease, for and on behalf of the Buyer, as and when the said Building/said commercial Unit is ready and fit for occupation. The buyer has clearly understood the general risks involved in giving any premises on lease to third parties and has undertaken to bear the said risks exclusively without any liability whatsoever on the part of the Developer or the confirm party. It is further agreed that:

i. The Developer will pay to the Buyers Rs. 65/- per sq.ft. super area of the said commercial unit as committed return for upto three years from the date of completion of construction of the said building or till the said commercial unit is put on lease, whichever is earlier. After the said commercial unit is put on lease in the above manner, then payment of the aforesaid committed return will come to an end and the Buyer will start receiving lease rental in respect of the said commercial unit in accordance with the lease document as may be executed and as described hereinafter.

ii.....

iii.....

iv.....

v. The developer expects to lease out the said commercial unit (individually or in combination with other adjoining units) at a minimum lease rental of Rs. 65/- per sq.ft. super area per month for the first term (of whatsoever period). If on account of any reason the lease rent achieved in respect of the first term of the lease is less than the aforesaid Rs. 65/- per sq. ft. super area per month, then the Developer shall pay to Buyer a onetime compensation calculated at the rate of @Rs. 120/- per sq.ft. super area for everyone rupee drop in the lease rental below Rs. 65/- per sq.ft. super area per month. This provision shall not apply in case of second and subsequent leases/lease terms of the said Commercial unit.

vi. However, if the lease rental in respect of the aforesaid first term of the lease exceeds the aforesaid minimum lease rental of Rs. 65/- per sq.ft. super area, then, the buyer shall pay to the Developer additional basic sale consideration calculated at Rs. 60/- per sq.ft. super area of the said commercial unit for everyone rupee increase in the lease rental over and above the said minimum lease rental of Rs. 65/- per sq.ft. super area per month. This provision is confined only to the first term of the lease and shall not be applicable in case of second and subsequent leases/lease terms of the said commercial unit.

1	2	3	4	5	6	7
Sr. no	**Complaint no./title/reply status**	**Unit no. & area admeasuring**	**Allotment letter**	**Date of agreement**	**Due date of possession**	**Total sale consideration/ Amount paid**
1.	CR/130/2022 Santosh Yadav VS Vatika Limited	113, block A, 500 Initially allotted unit no. 508, toweA	03.10.2009 Re-allotment: 31.07.2013	03.10.2009	03.09.2012	Rs. 26,00,000/- Rs. 26,00,000/-

2.	CR/520/2022 Sarita Rani & Anr. VS Vatika Limited	110, 1 floor, block D, 500 sq.ft. Initially allotted unit no. 208A,2 floor, tower A	27.01.2012 Re-allotment: 25.04.2013	19.01.2012	30.09.2012	Rs. 24,37,500/- Rs. 24,37,500/-

4. The aforesaid complaints were filed by the complainants against the promoter on account of violation of the builder buyer's agreement executed between the parties *inter se* in respect of said units for not handing over the possession by the due date, seeking award of delayed possession charges, assured return, and the execution of the conveyance deeds.

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 130/2022 titled as Santosh Yadav Vs. M/s Vatika Limited*** are being taken into consideration for determining the rights of the allottee(s) qua delay possession charges, assured return and execution of conveyance deeds.

A. Project and unit related details

7. The particulars of the project, the details of sale consideration, the amount paid by the complainant(s), date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form: **CR 130/2022 titled as Santosh Yadav Vs. M/s Vatika Limited**

S. No.	Heads	Information
1.	Name and location of the project	"Vatika Inxt City Center" at Sector 83, Gurugram, Haryana
2.	Nature of the project	Commercial complex
3.	Area of the project	10.72 acres
4.	DTCP License	122 of 2008 dated 14.06.2008
	valid upto	13.06.2018
	Licensee name	M/s Trishul Industries
5.	RERA registered/ not registered	**Not registered**
6.	Allotment letter	03.10.2009 (page 12 of complaint)
7.	Date of execution of builder buyer's agreement	03.10.2009 (page 16 of complaint)
8.	Unit no.	113A, block A, 500 sq.ft. (page 14 of complaint) Initially allotted unit no. 508, tower A was allotted to the complainant
9.	Total consideration	Rs. 26,00,000/- (page 18 of complaint)
10.	Total amount paid by the complainant	Rs. 26,00,000/- (page 18 of complaint)
11.	Due date of possession	03.09.2012
12.	Offer of possession	**Not offered**
13.	Occupation certificate	**Not obtained**

B. Facts of the complaint

8. That the respondent made false representations and claims of being a big company and a reputed developer and thereby induced the complainant to booked a 500 sq.ft. unit in its project then known as "Vatika Trade Centre", by showing a fancy brochure which depicted that the project would be developed and constructed as state of the art being one of its kind with all modern amenities and facilities. A builder buyer agreement dated

03.10.2009 was executed between the parties and the complainant was allotted unit no. 508 having 500 sq.ft. super area on the fifth floor of the said project vide allotment letter of the same date for a total sale consideration of Rs. 26,00,000/- which was paid upfront at the time of execution of the agreement. As per the allotment letter the unit was to be completed by 30.09.2012. As per annexure A, the respondent was liable to pay monthly returns at Rs. 78/- per sq.ft. per month till completion and post completion @Rs. 65/- per sq.ft. per month for upto 3 years or till first leasing whichever is earlier. The agreements further specified formulas by which the respondent was to compensate the complainant if her unit was not leased out atr Rs. 65/- per sq.ft. per month. The builder buyer agreement was a pre-printed booklet drafted by the respondent containing unilateral terms and conditions favouring the respondent and prejudicing the complainant and the complainant was never given the option of changing the same.

9. The complainant was unilaterally shifted to the project Vatika INXT City Centre located in Sector 83, Gurgaon, vide letter dated 17.08.2011 and was unilaterally and arbitrarily allotted unit no. 113A on the first floor in the said project vide letter dated 31.07.2013.

10. The respondent claimed completion of the block where the unit of the complainant is located in March 2016 and was liable to pay monthly rent at Rs. 65/- per sq.ft. the completion or an occupation certificate for the said block was never shared by the respondent.

11. The respondent unilaterally sent an email dated 06.06.2018, unilaterally claiming that it had leased the unit of the complainant to M/s Kruegar International Furniture Systems Pvt. Ltd. W.e.f. 01.06.2018 and has given a 1 year rent free period to the lease amount of Rs. 65/- per sq.ft. per month

would be payable after a period of 1 year from the lease commencement or from the date of removal of kherki Baula toll plaza whichever was earlier. It is pertinent to mention here neither was the said email accompanied by a copy of the lease deed nor was the consent of the complainant obtained at the time of execution of the said lease. It is also a matter of record that the respondent did not even transfer the amount of security deposit, which was equivalent to three months rent, allegedly collected by it from the intending lessee, to the respondent. Furthermore, assuming not admitting that the said lease was executed in the manner claimed by the respondent is illegal and void as it is contrary to the letter and spirit of the agreement executed between the parties. Therefore, the respondent is liable to pay monthly returns as per the BBA and annexure A or compensate the complainant as per the terms mentioned in BBA and the annexure A. The complainant visited the office of the respondent demanding to see a copy of the lease deed and also demanding the relase of the payment of the monthly assured returns due to her but the respondent did not comply with either requests. The respondent further did not pay any lease rent to the complainant in 2019, as per terms or lease also and the complainant again visited the office of the respondent demanding the above amounts but was made to wait and eventually no one came to meet her.

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

come to the knowledge of the complainant that the respondent has played a fraud upon her as the building where her unit is located has not received an occupation certificate and therefore, cannot be leased out the respondent has create a forged and fictitious lease agreement to get out of its liability to pay the monthly returns to the complainants.

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

14. That the conduct of the respondent is illegal and arbitrary and the respondent is guilty of deficiency of services and of unfair and monopolistic trade practices. The respondent is clearly in breach of its contractual obligations and causing financial loss to the complainant and the conduct of the respondent has cause and is continuing to cause a great amount of financial loss stress, grief and harassment to the complainant and her family members. The present claim is within limitation in view of the orders passed by the Supreme Court of India extending limitation. Hence, the present complaint.

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

The complainant has sought following relief(s):

i. Direct the respondent to pay an amount of assured return.

ii. Direct the respondent to execute the sale deed of the above said unit in favour of the complainant.

iii. Direct the respondent to pay interest at the prescribed rate on the unpaid monthly returns to the complainant(s) to be calculated from the date the monthly returns were due till the date of actual payment.

13. 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. That the complainant has got no locus standi or cause of action to file the present complaint. The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the builder buyers' agreement dated 03.10.2009, as would be evident from the submissions made in the following paras of the reply.

b. That at the very outset it is submitted that the complaint is not maintainable or tenable in the eyes of law. The complainant has misdirected himself in filing the above captioned complaint before the Ld. Authority as the reliefs being claimed by him cannot be said to fall within the realm of jurisdiction of the Authority. It is humbly submitted that upon the enactment of the Banning of Unregulated Deposit Schemes Act, 2019, (hereinafter referred as BUDS Act) the 'assured return' and/ or any "committed returns" on the deposit schemes have been banned. The respondent having not taken registration from SEBI board cannot run, operate, continue an assured return scheme. The implications of enactment of BUDS Act read with the Companies Act, 2013 and Companies (Acceptance of Deposits) Rules, 2014, resulted in making the

assured return/committed return and similar schemes as unregulated schemes as being within the definition of "Deposit".

c. That as per Section 3 of the BUDS Act all Unregulated Deposit Scheme have been strictly banned and deposit takers such as builders, cannot, directly or indirectly promote, operate, issue any advertisements soliciting participation or enrolment in; or accept deposit. Thus, the section 3 of the BUDS Act, makes the assured return schemes, of the builders and promoter, illegal and punishable under law. Further as per the Securities Exchange Board of India Act, 1992 (hereinafter referred as SEBI Act) Collective Investment Schemes as defined under section 11 AA can only be run and operated by a registered company. Hence, the assured return scheme of the respondent has become illegal by the operation of law and the respondent cannot be made to run a scheme which has become infructuous by law.

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

e. That it is also relevant to mention here that the commercial unit of the complainant is not meant for physical possession as the said unit is only meant for leasing the said commercial space for earning rental income. Furthermore, 1as per the agreement, the said commercial space would be deemed to be legally possessed by the complainant. Hence, the

commercial space booked by the complainant is not meant for physical possession. Further the allottee was provided letter regarding completion of construction dated 29.02.2016.

f. That in view of the judgment and order dated 16.10.2017 passed by the Maharashtra RERA Authority in the complaint titled ***Mahesh Pariani* vs. *Monarch Solitaire* order, Complaint No: CC006000000000078 of 2017** wherein it has been observed that in case where the complainant has invested money in the project with sole intention of gaining profits out of the project, then the complainant is in the position of co-promoter and cannot be treated as 'allottee'. Thus, in view of the aforesaid decision, the complainant could not and ought not have filed the present complaint being a co-promoter.

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

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

i. That the complainant has come before the Authority with un-clean hands. The complaint has been filed by the complainant just to harass the respondent and to gain unjust enrichment. The actual reason for filing of the complaint stems from the changed financial valuation of the real estate sector, in the past few years and the allottee malicious intention to earn some easy buck. The covid pandemic has given people

to think beyond the basic legal way and to attempt to gain financially at the cost of others. The complainant has instituted the present false and vexatious complaint against the respondent who has already fulfilled its obligation as defined under the buyers' agreement dated 03.10.2009. It is pertinent to mention here that for the fair adjudication of grievance as alleged by the complainant, detailed deliberation by leading the evidence and cross-examination is required, thus only the civil court has jurisdiction to deal with the cases requiring detailed evidence for proper and fair adjudication.

j. It is submitted that the complainant entered into an agreement i.e., builder buyers' agreement dated 03.10.2009 with respondent owing to the name, good would and reputation of the respondent. It is a matter of record that the respondent duly paid the assured return to the complainant till September 2018. Due to external circumstance which were not in control of the respondent, construction got deferred. Even though the respondent suffered from setback due to external circumstances, yet it managed to complete the construction.

k. The complaint of the complainant has been filed on the basis of incorrect understanding of the object and reasons of enactment of the RERA, Act, 2016. The legislature in its great wisdom, understanding the catalytic role played by the Real Estate Sector in fulfilling the needs and demands for housing and infrastructure in the country, and the absence of a regulatory body to provide professionalism and standardization to the said sector and to address all the concerns of both buyers and promoters in the real estate sector, drafted and notified the RERA Act, 2016 aiming to gain a healthy and orderly growth of the industry. The Act has been enacted to balance the interests of consumer and promoter by imposing

certain responsibilities on both. Thus, while section 11 to section 18 of the Act, 2016 describes and prescribes the function and duties of the developer, section 19 provides the rights and duties of allottees. Hence, the Act, 2016 was never intended to be biased legislation preferring the allottees, rather the intent was to ensure that both the allottee and the developer be kept at par and either of the party should not be made to suffer due to act and omission of part of the other.

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

m. That the complainant is attempting to seek an advantage of the slowdown in the real estate sector, and it is apparent from the facts of the present case that the main purpose of the present complaint is to harass the respondent by engaging and igniting frivolous issues with ulterior motives to pressurize the respondent. Thus, the complaint is without any basis and no cause of action has arisen till date in favour of the complainant and against the respondent and hence, the complaint deserves to be dismissed.

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

fact that the commercial unit was only intended for lease and never for physical possession.

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

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

q. 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

13. 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

14. 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

15. 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.*

16. 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:

17. The common issues with regard to assured return and execution of conveyance deeds are involved in all these cases.

F.I Assured return

18. The complainant has sought assured returns on monthly basis as per addendum to the agreement & Buyer's agreement 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.

19. The Act of 2016 defines "agreement for sale" means an agreement entered into between the promoter and the allottee [Section 2(c)]. An agreement for sale is defined as an arrangement entered between the promoter and allottee with freewill and consent of both the parties. An agreement defines the rights and liabilities of both the parties i.e., promoter and the allottee and marks the start of new contractual relationship between them. This contractual relationship gives rise to future agreements and

transactions between them. The different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral part of this agreement is the transaction of assured return inter-se parties. The "agreement for sale" after coming into force of this Act (i.e., Act of 2016) shall be in the prescribed form as per rules but this Act of 2016 does not rewrite the "agreement" entered between promoter and allottee prior to coming into force of the Act as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors., (Writ Petition No. 2737 of 2017) decided on 06.12.2017.*** Since the agreement defines the buyer-promoter relationship therefore, it can be said that the agreement for assured returns between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate regulatory authority has complete jurisdiction to deal with assured return cases as the contractual relationship arise out of agreement for sale only and between the same parties as per the provisions of section 11(4)(a) of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the agreement for sale till the execution of conveyance deed of the unit in favour of the allottee. Now, three issues arise for consideration as to:

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

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

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

19. While taking up the cases of B***rhimjeet & 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.

20. It is pleaded on behalf of respondent/builder that after the Banning of Unregulated Deposit Schemes Act of 2019 came into force, there is bar for payment of assured returns to an allottee. But again, the plea taken in this regard is devoid of merit. Section 2(4) of the above mentioned Act defines the word ' deposit' as *an amount of money received by way of an advance or loan or in any other form, by any deposit taker with a promise to return whether after a specified period* or otherwise, either in cash or in kind or in

the form of a specified service, *with or without any benefit in the form of interest, bonus, profit or in any other form, but does not include*

i. an amount received in the course of, or for the purpose of, business and bearing a genuine connection to such business including—

ii. advance received in connection with consideration of an immovable property under an agreement or arrangement subject to the condition that such advance is adjusted against such immovable property as specified in terms of the agreement or arrangement.

21. A perusal of the above-mentioned definition of the term 'deposit' shows that it has been given the same meaning as assigned to it under the Companies Act, 2013 and the same provides under section 2(31) includes any receipt by way of deposit or loan or in any other form by a company but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India. Similarly rule 2(c) of the Companies (Acceptance of Deposits) Rules, 2014 defines the meaning of deposit which includes any receipt of money by way of deposit or loan or in any other form by a company but does not include.

i. as a advance, accounted for in any manner whatsoever, received in connection with consideration for an immovable property

ii. as an advance received and as allowed by any sectoral regulator or in accordance with directions of Central or State Government;

22. So, keeping in view the above-mentioned provisions of the Act of 2019 and the Companies Act 2013, it is to be seen as to whether an allottee is entitled to assured returns in a case where he has deposited substantial amount of sale consideration against the allotment of a unit with the builder at the

time of booking or immediately thereafter and as agreed upon between them.

23. The Government of India enacted the Banning of Unregulated Deposit Schemes Act, 2019 to provide for a comprehensive mechanism to ban the unregulated deposit schemes, other than deposits taken in the ordinary course of business and to protect the interest of depositors and for matters connected therewith or incidental thereto as defined in section 2 (4) of the BUDS Act 2019 mentioned above.

24. It is evident from the perusal of section 2(4)(l)(ii) of the above-mentioned Act that the advances received in connection with consideration of an immovable property under an agreement or arrangement subject to the condition that such advances are adjusted against such immovable property as specified in terms of the agreement or arrangement do not fall within the term of deposit, which have been banned by the Act of2019.

25. Moreover, the developer is also bound by promissory estoppel. As per this doctrine, the view is that if any person has made a promise and the promisee has acted on such promise and altered his position, then the person/promisor is bound to comply with his or her promise. When the builders failed to honour their commitments, a number of cases were filed by the creditors at different forums such as ***Nikhil Mehta, Pioneer Urban Land and Infrastructure*** which ultimately led the central government to enact the Banning of Unregulated Deposit Scheme Act, 2019 on 31.07.2019 in pursuant to the Banning of Unregulated Deposit Scheme Ordinance, 2018. However, the moot question to be decided is as to whether the schemes floated earlier by the builders and promising as assured returns on the basis of allotment of units are covered by the abovementioned Act or not. A similar issue for consideration arose before Hon'ble RERA

Panchkula in case ***Baldev Gautam VS Rise Projects Private Limited (RERA-PKL-2068-2019)*** where in it was held on 11.03.2020 that a builder is liable to pay monthly assured returns to the complainants till possession of respective apartments stands handed over and there is no illegality in this regard.

26. The definition of term 'deposit' as given in the BUDS Act 2019, has the same meaning as assigned to it under the Companies Act 2013, as per section 2(4)(iv)(i) i.e, explanation to sub-clause (iv). In pursuant to powers conferred by clause 31 of section 2, section 73 and 76 read with sub-section 1 and 2 of section 469 of the Companies Act 2013, the Rules with regard to acceptance of deposits by the companies were framed in the year 2014 and the same came into force on 01.04.2014. The definition of deposit has been given under section 2 (c) of the above-mentioned Rules and as per clause xii (b), as advance, accounted for in any manner whatsoever received in connection with consideration for an immovable property under an agreement or arrangement, provided such advance is adjusted against such property in accordance with the terms of agreement or arrangement shall not be a deposit. Though there is proviso to this provision as well as to the amounts received under heading 'a' and 'd' and the amount becoming refundable with or without interest due to the reasons that the company accepting the money does not have necessary permission or approval whenever required to deal in the goods or properties or services for which the money is taken, then the amount received shall be deemed to be a deposit under these rules. However, the same are not applicable in the case in hand. Though it is contended that there is no necessary permission or approval to take the sale consideration as advance and would be considered as deposit as per sub-clause 2(xv)(b)

but the plea advanced in this regard is devoid of merit. First of all, there is exclusion clause to section 2 (xiv)(b) which provides that unless specifically excluded under this clause. Earlier, the deposits received by the companies or the builders as advance were considered as deposits but w.e.f. 29.06.2016, it was provided that the money received as such would not be deposit unless specifically excluded under this clause. A reference in this regard may be given to clause 2 of the First schedule of Regulated Deposit Schemes framed under section 2 (xv) of the Act of 2019 which provides as under:-

> *(2) The following shall also be treated as Regulated Deposit Schemes under this Act namely:-*
> *(a) deposits accepted under any scheme, or an arrangement registered with any regulatory body in India constituted or established under a statute; and*
> *(b) any other scheme as may be notified by the Central Government under this Act.*

27. The money was taken by the builder as deposit in advance against allotment of immovable property and its possession was to be offered within a certain period. However, in view of taking sale consideration by way of advance, the builder promised certain amount by way of assured returns for a certain period. So, on his failure to fulfil that commitment, the allottee has a right to approach the authority for redressal of his grievances by way of filing a complaint.

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

regulated deposit accepted by the later from the former against the immovable property to be transferred to the allottee later on.

29. On consideration of documents available on record and submissions made by parties, the complainants have sought assured return on monthly basis as per addendum to the agreement, & clause 12 at the agreed rates till the date of completion of building. It was also agreed that the developer would pay assured return to the buyer at the agreed rate. The said clause further provides that it would pay assured return to the buyer after the completion of building at the agreed rate 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.

36. Accordingly, the promoter is liable to pay assured return of the unpaid period as specified under addendum to the agreement & clause 12 of BBA.

F.III Conveyance deed

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

> ***D. Conveyance***
> *Subject to the approval/no objection of the appropriate the Developer shall sell the Said Unit to the Allottee by executing and registering the Conveyance Deed and also do such other acts/deeds as may be ne necessary for confirming upon the Allottee a marketable title to the Said*

Unit free from all encumbrances. The Conveyance Deed shall be in the form and content as approved by the Developer's legal advisor and shall be in favour of the Allottee.

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

> ***"17. Transfer of title.-***
> *(1). The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws:*
> *Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate."*

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

G. Directions of the authority

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

i. The respondent is directed to pay the arrears of amount of assured return at agreed rate to the complainant(s) in each case from the date the payment of assured return has not been paid till the date of completion of construction of building. After completion of the construction of the building, the respondent/builder would be liable to pay monthly assured returns at agreed rate of the super area up to 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 @8.75% 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 after obtaining valid OC & upon payment of requisite stamp duty as per norms of the state government

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

43. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.

44. The complaints stand disposed of. True certified copies of this order be placed in the case files of each matter.

45. Files be consigned to registry.

Sanjeev Kumar Arora
Member
18.08.2023
Haryana Real Estate Regulatory Authority