BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**3576 of 2021**
Complaint filed on	**:**	**21.09.2021**
First date of hearing	**:**	**23.11.2021**
Order pronounced on	**:**	**17.10.2023**

Shri Anil Sood
R/o: H.No. 190, Sector 18A, Chandigarh- 160018. **Complainant**

Versus

M/s Vatika Ltd.
(Through its Managing Director/Director/AR)
Regd. Office: Vatika Triangle, Sushant Lok-1, Block A,
M.G. Road, Gurugram-122002, Haryana. **Respondent**

CORAM:

Shri Vijay Kumar Goyal **Member**
Shri Ashok Sangwan **Member**
Shri Sanjeev Kumar Arora **Member**

Appearance:
Shri Nishant Kumar Advocate for the complainant
Ms. Ankur Berry & Shri Ishan Singh Advocates for the respondent

ORDER

1. The present complaint has been filed by the complainant/allottee in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the rules) for

violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se them.

A. Project and unit related details

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

S.no.	Particulars	Details
1.	Name of the project	Vatika INXT City Centre at Sector 83, Gurugram, Haryana
2.	Nature of the project	Commercial complex
3.	Area of the project	10.48 acres
4.	DTCP license no.	122 of 2008 dated 14.06.2008
	Valid up to	13.06.2016
5.	HRERA registered or not	Not registered
6.	Allotment letter dated	21.07.2011 [Page 60 of complaint]
7.	Date of builder buyer agreement	21.07.2011 [Page 38 of complaint]

8.	Unit no. as per the BBA dated 21.07.2011	465, 4th floor, tower no. A admeasuring 500 sq. ft. [Page 41 of complaint]
9.	Change in unit as is evident from letter dated 04.10.2013	415, 4th floor, block C [Page 70 of compliant]
10.	Due date of handing over possession as per BBA dated 21.07.2011	21.07.2014 [As per clause 2 of BBA, the developer will complete the construction of the said complex within three (3) years from date of execution of this agreement, page 41 of complaint]
11.	Assured return/ committed return as per Annexure A of BBA	**ANNEXURE A** **ADDENDUM TO THE AGREEMENT DATED 21.07.2011** 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. 6.50/- per sq. ft. Therefore, your return payable to you shall be as follows: This addendum forms an integral part of builder buyer Agreement dated 21.07.2011 A. Till Completion of the building: Rs. 71.50/- per sq. ft. B. After Completion of the building: Rs. 65/- per sq. ft. You would be paid an assured return w.e.f. 21.07.2011 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. the following would be payable. 1. If the rental is less then Rs. 65/- per sq. ft. then you shall be refunded @Rs. 120/- per sq. ft. (Rupees One Hundred Twenty only) for every Rs. 1/- by which achieved rental is less then Rs. 65/- per sq. ft. 2. If the achieved rental is higher than Rs. 65/- per sq. ft. then 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. (Rupees One Hundred Twenty Only) for every rupee of additional rental achieved in the case of balance 50% of increased rentals. [Page 57 of complaint]
12.	Letter 'Completion of construction for Block C' dated	15.03.2018 [Page 71 of complaint]
13.	Total sale consideration as per clause 1 of BBA dated 21.07.2011	Rs. 24,37,500/- [Page 41 of complaint]
14.	Amount paid by the complainant as per clause 2 of BBA dated 21.07.2011	Rs. 25,00,000/- [Page 41 of complaint]
15.	Offer of possession	Not offered
16.	Occupation certificate	Not obtained

17.	Amount of assured return paid by the respondent to the complainant till 30.06.2018	Rs. 28,08,000 /- [admitted by respondent on page 15 of reply and supporting document at page 45 of reply]

B. Facts of the complaint

4. The complainant has made the following submissions in the complaint:

a. That in 2010, the respondent launched a commercial project by the name 'Vatika Trade Centre' on NH8 in Sector 82, Gurugram, Haryana. Later on, the mane of the project was changed to "Vatika INXT CITY CENTRE". Having lured by the wide publicity and promise of assured returns followed by minimum guarantee return, the complainant got interested in the project of the respondent and vide application form dated 16.07.2011 applied for commercial unit in the project of the respondent.

b. That subsequently, a builder buyer agreement (BBA) was executed between the parties on 21.07.2011 thereby allotting a unit bearing no. 465 located on 4th floor of the complex "Vatika Trade Centre" having super area of 500 sq. ft. for a total sale consideration of Rs.24,37,500/- @ Rs.4875/- per sq. ft. of super area. The entire sale consideration was paid by the complainant at the time of signing the agreement vide cheque dated 16.07.2011 and the same is acknowledged by the respondent in clause 2 of the said agreement. In terms of the addendum, the respondent promised to give an investment return to the complainant at the rate of Rs.71.50 per sq. ft. per month i.e., Rs.32,175/- per month with effect from 21.07.2011 on or before 15th day of every month. The assured return were to be paid till the time the

unit was constructed and offered for possession by the respondent. The aforesaid agreement is accompanied by an addendum to the agreement which form an integral part of the agreement and contained provisions with respect to the assured return payable to the complainant

c. That as per clause 2 of the agreement, the respondent was required to complete the construction of the complex within 3 years from the date of the execution of the agreement. The said clause also mentioned that in case the respondent failed to complete the construction within the stipulated time, they would continue to pay assured returns to the complainant until the unit is offered for possession by the respondent. Clause 32 of the agreement contained provisions with respect to obligation of the respondent to lease out the unit to a suitable tenant upon completion of the project at a minimum rental of Rs.65/- per sq. ft. per month less TDS failing which the respondent was required to pay Minimum Guarantee Rent of Rs.65/- per sq. ft. per month to the complainant till 36 months from the completion of the project or till the time the unit is leased out whichever is earlier. Upon executing the agreement, the respondent issued an allotment letter dated 21.07.2011 to the complainant and clause (iv) of the said letter also reaffirmed that the unit would be completed or ready for lease by 30.09.2014.

d. That subsequent to signing of agreement, the respondent issued a letters dated 28.12.2011 and 07.03.2012 to the complainant informing that he had been relocated to another project "INXT City Centre" and was asked to sign addendum shared with him to acknowledge the said relocation. Even though the complainant did not acknowledge the said relocation, however, the letter dated 07.03.2012 stated that the

encashment of the cheque towards the assured return would be deemed as his acknowledgement towards relocation to new site. From the language of the said letter, it is clear that the complainant was not keen on acknowledging the relocation but was forced to accept the relocation due to arbitrary condition imposed on him. Thereafter, a new unit bearing no.415, 4th floor tower C was allotted to the complainant in the project Vatika INXT City Centre.

e. That after an inordinate delay of more than 4 years, the respondent issued a letter dated 15.03.2018 to the complainant informing that the construction work of block C of the project has been completed and accordingly in terms of the agreement revised amount of commitment charges i.e., Rs.65/- per sq. ft. per month (Rs.29,250/- after deducting TDS) is payable w.e.f. 01.03.2018. However, the respondent paid revised commitment charges till the month of June 2018 and thereafter has stopped in making payment towards commitment return.

f. That being aggrieved of the continuous default on the part of the respondent, the complainant wrote to respondent multiple times requesting them to make the payment towards outstanding commitment charges and fulfil their part of the agreement. However, no response was received from the respondent. Thereafter, the complainant sent a legal notice dated 09.03.2021 to the respondent asking them to make the payment of Rs.9,36,000/- towards the commitment charges from July 2018 onwards along with interest @ 21% from the respective dates within 15 days of legal notice.

g. That after continuously following up with respondent, no response was received from the respondent and the complainant was left in lurch

despite old age and financial difficulty. The respondent has no intention to settle the pending dues of the complainant and was only playing tactics to prevent complainant from filing a case before appropriate court for recovery of his legitimate dues. Hence, this complaint.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s)

   a. Direct the respondent to make the outstanding payment towards commitment charges from July 2018 onwards along with interest as per section 18 read with rule 15 of the rules.

   b. Punish the respondent with maximum penalty in the shape of fine for breach of the contract and for breach of the provisions of the Act.

   c. Hold the respondent guilty of deficiency in services, guilty of unfair trade practices and guilty of restrictive trade practices.

   d. Award the litigation cost of Rs.2,00,000/- in favour of the complainant.

   e. Pass such other and further order(s) as this Hon'ble Authority may deem fit and proper in the facts and circumstances of the present case.

5. 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

6. The respondent 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 21.07.2011.

b. That at the very outset it is submitted that the present complaint is not maintainable or tenable in the eyes of law. The complainant has misdirected himself in filing the above captioned complaint before the Authority as the reliefs being claimed by the complainant cannot be said to fall within the realm of jurisdiction of this Ld. 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 section 2(4) defines the term "Deposit" to include an amount of money received by way of an advance or loan or in any form, by any deposit taker and the *Explanation* to the section 2(4) further expands the definition of the "*Deposit*" in respect of company, to have same meaning as defined within the Companies Act, 2013. The Companies

Act, 2013 in section 2 (31) defines "*Deposit*" as "*deposit includes any receipt of money 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*". The Legislature while defining the term "*deposit*" intentionally used the term *prescribed* so as to further clarify and connect the same to be read with rule 2(1)(c) of the Companies (Acceptance of Deposits) Rules, 2014. Further the Explanation for the clause (c) of section 2(1) states that any amount: - received by the company, whether in the form of instalments or otherwise, from a person with promise or offer to give returns, in cash or in kind, on completion of the period specified in the promise or offer, or earlier, accounted for in any manner whatsoever, shall be treated as a deposit. Thus, the simultaneous reading of the 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 illegal.

d. That Section 2(17) of the Banning of Unregulated Deposit Schemes Act, 2019 defines the "Unregulated Deposit Scheme" as '*means a Scheme or an arrangement under which deposits are accepted or solicited by any deposit taker by way of business and which is not a Regulated Deposit Scheme, as specified under column (3) of the First Schedule*'. Thus, the 'Assured Return Scheme' proposed and floated by the respondent has

become infructuous due to operation of law, thus the relief prayed for in the present complaint cannot survive due to operation of law. As a matter of fact, the respondent duly paid Rs. 28,08,000/- till July, 2018. The complainant has not come with clean hands before this Hon'ble Authority and has suppressed these material facts.

e. 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 person/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. Also, it is important to rely upon clause 35 of the BBA dated 21.07.2011 which specifically caters to situation where certain provisions of the BBA become inoperable due to application of law.

f. That as a matter of fact, the respondent has duly executed the lease deed with DPA Institute of Tourism and Hospitality Industries and

thereafter, the tenant has sought some rent free period for fit-outs which the respondent has agreed. However, due to COVID 19, the tenant till date has not occupied the said premises and the respondent is looking for prospective tenants. Moreover, the liability for the payment of assured return was limited till execution of first lease.

g. That further in the matter of *Bharam Singh &Ors* vs. *Venetian LDF Projects LLP* (Complaint No. 175 of 2018) and *Jasjit Kaur Grewal vs. M/s MVL Ltd.* (Complaint No. 58 of 2018), the Hon'ble Real Estate Regulatory Authority, Gurugram has taken upheld its earlier decision of not entertaining any matter related to assured returns.

h. That the complaint has been filed by the complainant just to harass the respondent and to gain the unjust enrichment. The actual reason for filing of the present 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. 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.

i. That the respondent company was facing umpteen roadblocks in construction and development work in the project comprised in township 'Vatika India Next' beyond the control of the respondent such

as construction, laying and/or rerouting of Chainsa-Gurgaon-Jhajjar-Hissar Gas Pipeline by GAIL; non-acquisition of land by HUDA; labour issues; delay in removal of high tension line; total/partial ban on construction; direction by NGT/EPCA directions to counter the deterioration in air quality in Delhi-NCR; etc.

j. 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 present 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.

k. 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. 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.

7. 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 based on these undisputed documents and submission made by the complainant.

E. Jurisdiction of the authority

8. 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

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

E. II Subject matter jurisdiction

10. 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;

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.

11. So, in view of the provisions of the Act 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/commitment charges

12. The complainant is seeking unpaid assured returns on monthly basis as per addendum to the agreement at the rates mentioned therein. 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 that the same is not payable in view of enactment of the Banning of Unregulated Deposit Schemes Act, 2019 (hereinafter 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 up to July 2018 but did not pay the same amount after coming into force of the Act of 2019 as it was declared illegal.

13. 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.

14. While taking up the cases of ***Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd. (complaint no 141 of 2018)***, and ***Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP"*** **(complaint no 175 of 2018)** decided on 07.08.2018 and 27.11.2018 respectively, it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the issue of assured returns was involved to be paid by the builder to an allottee but at that time, neither the full facts were

brought before the authority nor it was argued on behalf of the allottee 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 a 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 different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. It is now well settled preposition of law that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum, memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement for sale defines the builder-buyer relationship. So, it can be said that the

agreement for assured returns between the promoter and allotee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arise 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 is 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 Ltd & Anr. (supra) 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(1)(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.

15. It is pleaded on behalf of respondent/builder that after the Banning of Unregulated Deposit Scheme 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 taken 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.*

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

i. *as an advance, accounted for in any manner whatsoever, received in connection with consideration for an immovable property;*
ii. *as an advance received and as allowed by any sectoral regulator or in accordance with directions of Central or State Government;*

17. 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.

18. 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.

19. 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.

20. 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 complainant till possession of respective apartments stands handed over and there is no illegality in this regard.

21. 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.

22. 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.

23. 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 defines the builder/buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allotee arises out of the same relationship and is marked by the original agreement for sale.

24. 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.

25. On consideration of documents available on record and submissions made by the complainant and the respondent, the authority is satisfied that the respondent is in contravention of the provisions of the Act. The agreement executed between the parties on 21.07.2011, the possession of the subject unit was to be delivered within stipulated time i.e., 21.07.2014. The assured return is payable to the allottees on account of provisions in the BBA or an addendum to the BBA. The assured return in this case is payable as per "Annexure A – Addendum to the agreement". As per Annexure A of BBA dated 21.07.2011, the promoter had agreed to pay to the complainant allottee Rs.71.50/- per sq. ft. on monthly basis till completion of the building and Rs.65/- per sq. ft. on monthly basis after the completion of the building. The said clause further provides that it is the obligation of the respondent promoter to lease the premises. It is matter of record that the amount of assured return was paid by the respondent promoter till July 2018 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 of 2019 does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are exempted as per section 2(4)(iii) of the above-mentioned Act.

26. In the present complaint, vide letter dated 15.03.2018, the respondent has intimated the complainant that the construction of Block C is complete wherein the subject unit is located. However, admittedly, OC/CC for that block has not been received by the promoter till this date. The authority is of the view that the construction cannot be deemed to complete until the OC/CC is obtained from the concerned authority by the respondent promoter for the said project. Another plea of the respondent is that it has effectuated first lease, thus it is not liable to pay assured return. The said plea of the respondent cannot be considered as the said lease was done without obtaining occupation certificate and the respondent has itself admitted in the reply filed by it that due to COVID 19, the tenant till date has not occupied the said premises and the respondent is looking for prospective tenant. Thus, the liability of the respondent to pay assured return as per agreement and addendum to the said agreement is still continuing. Therefore, considering the facts of the present case, the respondent is directed to pay the amount of assured return at the agreed rate i.e., @ Rs. 71.50/- per sq. ft. per month from the date the payment of assured return has not been paid i.e., **July 2018 till the date of completion of the building and thereafter, Rs. 65/- per sq. ft. per month after the completion of the building till the first 36 months after the completion of the project or till the date the said unit is put on lease, whichever is earlier.**

27. The respondent is directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of this 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.

F.II Compensation

28. Hon'ble Supreme Court of India, in case titled as ***M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of UP & Ors.*** (civil appeal nos. 6745-6749 of 2021, decided on 11.11.2021), has held that an allottee is entitled for claiming compensation 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 shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. Therefore, the complainants are at liberty to approach the adjudicating officer for seeking compensation.

G. Directions of the authority

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

i. The respondent is directed to pay the amount of assured return at the agreed rate i.e., **@ Rs. 71.50/- per sq. ft. per month** from the date the

payment of assured return has not been paid i.e., **July 2018 till the date of completion of the building and thereafter, Rs. 65/- per sq. ft. per month after the completion of the building till the first 36 months after the completion of the project or till the date the said unit is put on lease, whichever is earlier.**

ii. The respondent is directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of this 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 respondent shall not charge anything from the complainant which is not the part of the builder buyer agreement.

30. Complaint stands disposed of.

31. File be consigned to the registry.

(Sanjeev Kumar Arora) Member
(Ashok Sangwan) Member
(Vijay Kumar Goyal) Member

Haryana Real Estate Regulatory Authority, Gurugram

Date: 17.10.2023