BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 7337 of 2022
Date of filing : 28.11.2022
Date of decision : 06.02.2024

1. Vinita Mohan
2. Sunil Mohan

Both RR/o: 25-B, Pusa Road, New Delhi-110005 **Complainants**

Versus

M/s Vatika Ltd.
Regd. Office: Vatika Triangle, Sushant Lok-1, Block A, M.G. Road, Gurugram, Haryana-122002. **Respondent**

CORAM:

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

Appearance:

Shri Harshit Goyal Advocate for the complainants
Shri Harshit Batra Advocate for the respondent

ORDER

1. The present complaint has been filed by the complainant-allottees 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	01.09.2010 [Page 20 of complaint]
7.	Date of builder buyer agreement	01.09.2010 [Page 22 of complaint]
8.	Addendum to BBA dated 01.09.2010 executed on	Undated [Page 39 of complaint]
9.	Unit no. as per the BBA dated 01.09.2010	2015, 20th floor, tower no. A admeasuring 1000 sq. ft. in Vatika Trade Centre [Page 25 of complaint]
10.	Shifting of unit vide letter dated	31.07.2013 [Page 40 of complaint]

11.	New unit no. as per letter dated 31.07.2013	231, 2nd floor, block F admeasuring 1000 sq. ft. in INXT City Centre [Page 40 of complaint]
12.	**Possession clause as per clause 2 of BBA dated 01.09.2010**	*The Developer will complete the construction of the said complex within three (3) years from the date of execution of this agreement. Further, the Allottee has paid full sale consideration on signing of this agreement, the Developer further undertakes to make payment of Rs refer annexure-A (Rupees.....) per sq. ft. of super area per month by way of committed return for the period of construction, which the Allottee duly accepts. In the event of a time overrun in completion of the said complex the Developer shall continue to pay to the Allottee the within mentioned assured return until the unit is offered by the Developer for possession.* [Page 25 of complaint]
13.	Due date of handing over possession as per BBA dated 01.09.2010	01.09.2013
14.	Assured return/ committed return as per addendum of BBA	**ANNEXURE A** **ADDENDUM TO THE AGREEMENT DATED 01.09.2010** 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 01.09.2010

		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. 01.09.2010 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 39 of complaint]
15.	Completion of construction for Block F dated	27.03.2018 [Page 41 of complaint]
16.	Total sale consideration as per clause 1 of BBA dated 01.09.2010	Rs. 40,00,000/- [Page 25 of complaint]
17.	Amount paid by the complainant as per clause 2 of BBA dated 01.09.2010	Rs. 40,00,000/- [Page 25 of complaint]
18.	Offer of possession	Not offered

19.	Occupation certificate	Not obtained
20.	Amount of assured return paid by the respondent to the complainant till October 2018	Rs.29,80,250/- [Page 3 and 32 of reply]

B. Facts of the complaint

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

a. That the respondent company issued allotment letter dated 01.09.2010 in favour of the complainant. Thereafter, the builder buyer agreement was executed inter se parties on 01.09.2010 in respect of the unit no. 20115, 20th floor, tower A later changed to unit no. 231, 2nd floor, tower F in the project namely INXT City Centre. The addendum to the builder buyer agreement dated 01.09.2010 was also executed between the complainants and the respondent.

b. That as per clause 2 of the builder buyer agreement read with addendum to the said agreement, the respondent company was liable to pay assured return amount of Rs.71.50/- per sq. ft. per month to the complainants from the date of execution of builder buyer agreement till the date of completion of construction of booked unit. As per clause 32.2 of the builder buyer agreement read with addendum to the said agreement, the respondent was liable to pay assured return amount of Rs.65/- per sq. ft. per month to the complainants for the first 36 months after date of completion or till the booked unit is put on lease whichever is earlier. However, the respondent company has failed to pay any assured return amount from October 2018 till date to the complainants.

c. That as per clause 2 of the builder buyer agreement dated 01.09.2010, the respondent company was liable to deliver possession of the booked

unit within a period of 3 years from the date of execution of agreement. Therefore, the due date of delivery of possession is 01.09.2013. The respondent has failed to offer lawful and legal possession of the booked unit along with occupation certificate to the complainant till date.

d. That the respondent company has also issued illegal and unlawful letter dated 27.03.2018 claiming completion of construction of booked unit. However, the respondent company has failed to obtain occupation certificate in respect of tower F where the booked unit is situated.

e. That the complainant has invested his hard-earned money in the booking of the unit in the project in question on the basis of false promises made by the respondent in order to allure the complainant. However, the respondent has failed to abide all the obligations of him stated orally and under the builder buyer agreement duly executed between both the parties. Hence, the present complaint.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s)"

a. Direct the respondent to pay pending monthly assured return of Rs. 71.50/- per sq. ft. (Rs.71,500 per month) accrued from the Month of October 2018 along with interest to the complainant.

b. Direct the respondent to pay delay possession charges from due date of delivery of possession i.e., 01.09.2013 till date of offer of possession along with occupation certificate in respect of the subject unit.

c. Direct the respondent to execute and register the conveyance deed in respect of the subject unit.

d. 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 it is an admitted fact that by no stretch of imagination it can be concluded that the complainants herein are an "allottee/consumer". That the complainants are simply investors who approached the respondent for investment opportunities and for steady committed returns and rental income. That the complainants being investors in the project has no locus standi to file the present complaint.

   b. That in the year 2010, the complainants learned about the commercial project launched by the respondent under the name and title 'Vatika Trade Centre' (now, Vatika INTX City Centre) *("***Project***")* and repeatedly visited the office of the respondent to know the details of the said project.

   c. That after having an interest in the commercial project being developed by the respondent, the complainants vide an application form dated 27.08.2010 tentatively booked a unit for an amount of Rs.41,30,000/- on free will and consent, without any demur whatsoever. Thereafter, considering the future speculative gains, the complainants, in August, 2010, at their own will made the due payment towards the agreed sale consideration of the said unit with the sole intention of making income from the same.

d. The respondent vide allotment letter dated 01.09.2010, allotted a unit bearing no. 2015, 20th floor, tower-A tentatively admeasuring 1000 sq. ft. in the earlier project. Thereafter, a builder buyer agreement dated 01.09.2010 was executed between the complainants and the respondent for the unit allotted in the project. The complainants were aware of terms and conditions under the aforesaid agreement and only upon being satisfied with each and every term, agreed to execute the same with free will and consent.

e. That an addendum to the buyer's agreement dated 01.09.2010 was executed between the complainants and the respondent wherein the complainants were made aware of the fact that the obligation of the respondent shall be to lease the said premises of which the said unit of the complainants is a part and moreover, the complainants will be given committed returns as agreed and the said position was duly accepted by the complainants without any protest.

f. That the unit of the complainants was tentative and subject to change, as was categorically agreed between the parties in terms of the agreement. Consequently, the complainants were allocated the unit no. 231 on 2nd Floor, Block-F admeasuring 1000 sq. ft. ("**Unit**") vide letter dated 31.07.2013. The said letter categorically mentioned that the builder buyer agreement shall stand amended with respect to the unit number. That it is a matter of fact and record that the complainants had duly, willingly and happily accepted the same.

g. That the agreement executed between the parties on 01.09.2010 was in the form of an "Investment Agreement". That the complainants had approached the respondent as investors looking for certain investment opportunities. Therefore, the allotment of the said unit contained a

"Lease Clause" which empowers the developer to put a unit of complainants along with the other commercial space unit on lease and does not have "Possession Clauses", for physical possession. Hence, the embargo of the Real Estate Regulatory Authority, in totality, does not exist. Thus, the present complaint is not maintainable and the complainants herein has no locus standi.

h. That it is humbly submitted before the Hon'ble Authority that the respondent was always prompt in making the payment of assured returns as agreed under the agreement. It is not out of the place to mention that the respondent herein had been paying the committed return every month to the complainants without any delay since 01.09.2010 till September 2018. It is to note that as on 30.10.2018, the complainants herein had already received an amount of Rs. 29,80,250/- as assured return. However, post October 2018, the respondent could not pay the agreed assured returns due to change in the legal position and the illegality of making the payment of the same.

i. That the complainants are praying for the relief of "Assured Returns" which is beyond the jurisdiction that this Ld. Authority. That from the bare perusal of the Act, it is clear that the said Act provides for three kinds of remedies in case of any dispute between a developer and allottee with respect to the development of the project as per the agreement.

j. That the issue pertaining to the assured return is already pending for adjudication before the Hon'ble Punjab and Haryana High Court wherein, the Hon'ble High Court in the matter of ***'Vatika Limited Vs. Union of India and Anr.' in CWP No. 26740 of 2022***, had issued notice to the respondent parties and had also restrained the competent

authorities from taking any coercive actions against the respondent in this matter in criminal cases for seeking recovery against the deposits till the next date of hearing.

k. That the respondent cannot pay "Assured Returns" to the complainants by any stretch of imagination in the view of the prevailing legal position. That on 21.02.2019, the Central Government passed an ordinance "Banning of Unregulated Deposits, 2019", to stop the menace of unregulated deposits and payment of returns on such unregulated deposits. Thereafter, an act titled as "The Banning of Unregulated Deposits Schemes Act, 2019" (*hereinafter referred to as "the BUDS Act")* was notified on 31.07.2019 and came into force. That under the said Act, all the unregulated deposit schemes have been banned and made punishable with strict penal provisions. That being a law-abiding company, by no stretch of imagination, the respondent could have continued to make the payments of the said assured returns in violation of the BUDS Act. The complainants cannot, under the garb of said the agreement, seek enforcement or specific performance of an Investment Return Scheme before this hon'ble tribunal, which is specifically barred and banned under section 3 of the BUDS, Act, hence the present complaint deems dismissal.

l. That the provisions of the Act are not retrospective in nature. The provisions of the Act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the Act. It is further submitted that merely because the Act applies to ongoing projects which are registered with the authority, the Act cannot be said to be operating retrospectively. The provisions of the Act relied upon by the complainants for seeking assured returns and interest cannot be called

in to aid in derogation and ignorance of the clauses of the buyer's agreement. The interest is compensatory in nature and cannot be granted in derogation and ignorance of the clauses of the buyer's agreement.

m. That the as per the agreement so signed and acknowledged, the completion of the said unit was subject to the midway hindrances which were beyond the control of the respondent. And, in case the construction of the said commercial unit was delayed due to such 'Force Majeure' conditions the respondent was entitled for extension of time period for completion. That a period of 582 days was consumed on account of circumstances beyond the power and control of the respondent, owing to the passing of orders by the statutory authorities.

n. That the construction of the project was affected on account of unforeseen circumstances beyond the control of the respondent. In the year, 2012 on the directions of the Hon'ble Supreme Court of India, the mining activities of minor minerals (which includes sand) was regulated. The Hon'ble Supreme Court directed framing of modern mineral concession rules. Reference in this regard may be had to the judgment **of "Deepak Kumar Vs. State of Haryana, (2012) 4 SCC 629"**. The competent authorities took substantial time in framing the rules and in the process the availability of building materials including sand which was an important raw material for development of the said project became scarce. Further, the respondent faced certain other force majeure events including but not limited to non-availability of raw material due to various orders of Hon'ble Punjab & Haryana High Court and National Green Tribunal thereby regulating the mining activities, brick kilns, regulation of the construction and development activities by

the judicial authorities in NCR on account of the environmental conditions, restrictions on usage of water, etc. It is pertinent to state that the National Green Tribunal in several cases related to Punjab and Haryana had stayed mining operations including in O.A No. 171/2013, wherein vide Order dated 02.11.2015 mining activities by the newly allotted mining contracts by the state of Haryana was stayed on the Yamuna Riverbed. These orders in fact inter-alia continued till the year 2018. Similar orders staying the mining operations were also passed by the Hon'ble High Court and the National Green Tribunal in Punjab and Uttar Pradesh as well. The stopping of mining activity not only made procurement of material difficult but also raised the prices of sand/gravel exponentially. It was almost 2 years that the scarcity as detailed aforesaid continued, despite which all efforts were made and materials were procured at 3-4 times the rate and the construction continued without shifting any extra burden to the customer. The time taken by the respondent to develop the project is the usual time taken to develop a project of such a large scale. Further, the parties have agreed that in the event of delay, the allottee shall be entitled to compensation on the amounts paid by the allottee, which shall be adjusted at the time of handing over of possession/execution of conveyance deed subject to the allottee not being in default under any of the terms of the agreement.

o. It is further submitted that the complainants are attempting to seek an advantage of the slowdown in the real estate sector, and it is apparent from the facts of the present case. 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.

p. That it is submitted that the respondent has duly completed the construction of the said tower in which the unit of the complainants is located. That the respondent vide its letter dated 27.03.2018 has duly informed the complainants about the completion of construction of the said tower. That the complainants were made aware of the fact that the respondent is in active discussions with prospective tenants for the property and is expecting to lease out the substantial area in due course. That the respondent has duly obliged by its commitments and delay, if any in the said project is caused due to the reasons beyond the control of the respondent.

q. That the respondent never represented the complainants that the said unit would be physically handed over to the complainants. That as per clause 32.1(d) of the buyer's agreement, it was clearly agreed between the parties that the unit shall be deemed to have been legally possessed by the complainants. Moreover, as per clause 32.1(f) of the buyer's agreement, the complainants has duly accepted that the respondent has the leasing rights over the said property.

r. 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. The complaint is an utter abuse of the process of law, and hence deserves to be dismissed.

E. Jurisdiction of the authority

7. 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

8. 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

9. 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.*

10. 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 objections raised by the respondent

F.I Objection regarding maintainability of complaint on account of complainant being investor

11. The respondent took a stand that the complainants are investors and not consumers and therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. However, it is pertinent to note that any aggrieved person can file a complaint against the promoter if he contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the allotment letter, it is revealed that the complainant is buyer's, and they have paid a considerable amount to the respondent-promoter towards purchase of unit in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

> *"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

12. In view of the above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement executed between promoter

and complainant, it is crystal clear that the complainant are allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred to in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". Thus, the contention of the promoter that the allottee being investor are not entitled to protection of this Act also stands rejected.

F.II Objection regarding delay due to force majeure circumstances

13. The respondent-promoter raised a contention that the construction of the project was delayed due to force majeure conditions such as various orders passed by the Haryana State Pollution Control Board from 01.11.2018 to 10.11.2018, lockdown due to outbreak of Covid-19 pandemic which further led to shortage of labour and various orders passed by National Green Tribunal (hereinafter, referred as NGT) and Hon'ble Apex Court. Further, the authority has gone through the possession clause of the agreement and observed that as per clause 2 of the builder buyer agreement dated 01.09.2010, the respondent-developer proposes to handover the possession of the allotted unit within a period of three years from the date of execution of the agreement. In the present case, the due date is calculated comes out to 01.09.2013. The events such as Hon'ble Supreme Court of India to curb pollution in NCR, various orders passed by NGT, EPCA etc., were for a shorter duration of time and were not continuous being annual feature. Further, all the orders referred to by the respondent are after the

lapse of the due date of possession as per the buyer's agreement and one cannot be allowed to take advantage of his own wrong. Thus, the promoter-respondent cannot be given any leniency on based of aforesaid reasons and plea taken by respondent is devoid of merits.

14. As far as delay in construction due to outbreak of Covid-19 is concerned, Hon'ble Delhi High Court in case titled as ***M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (I) (Comm.) no. 88/ 2020 and I.As 3696-3697/2020*** dated 29.05.2020 has observed that:

> *"69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself."*

15. The respondent was liable to handover the possession of the said unit by 01.09.2013 and is claiming benefit of lockdown which came into effect on 24.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself and for the said reason, the said time period is not excluded while calculating the delay in handing over possession.

F.III Objection regarding jurisdiction of the complaint w.r.t the apartment buyer's agreement executed prior to coming into force of the Act

16. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the builder buyer

agreement was executed between the parties prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.

17. The authority is of the view that the provisions of the Act are quasi retroactive to some extent in operation and would be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transactions are still in the process of completion. The Act nowhere provides, nor can be so construed, that all previous agreements would be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situations in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** decided on 06.12.2017 and which provides as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter...*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is*

competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

18. Thus, the agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement and are not in contravention of any other Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

F.IV Pendency of petition before Hon'ble Punjab and Haryana High Court regarding assured return

19. The respondent has raised an objection that the Hon'ble High Court of Punjab & Haryana in CWP No. 26740 of 2022 titled as "Vatika Limited Vs. Union of India & Ors.", took the cognizance in respect of Banning of Unregulated Deposits Schemes Act, 2019 and restrained the Union of India and the State of Haryana from taking coercive steps in criminal cases registered against the Company for seeking recovery against deposits till the next date of hearing.

20. With respect to the aforesaid contention, the authority place reliance on order dated 22.11.2023 in CWP No. 26740 of 2022 (supra), whereby the Hon'ble Punjab and Haryana High Court has stated that "*...there is no stay on adjudication on the pending civil appeals/petitions before the Real Estate Regulatory Authority as also against the investigating agencies and they are at liberty to proceed further in the ongoing matters that are pending with them. There is no scope for any further clarification.*" Thus, in view of the above, the authority has decided to proceed further with the present matter.

G. Findings on the relief sought by the complainant

G.I Assured return

21. The complainants are seeking unpaid assured returns on monthly basis as per the builder buyer agreement read with the 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), citing earlier decision of the authority (*Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd., complaint no 141 of 2018*) whereby relief of assured return was declined by the authority. The authority has rejected the aforesaid objections raised by the respondent in ***CR/8001/2022 titled as Gaurav Kaushik and anr. Vs. Vatika Ltd.*** wherein the authority while reiterating the principle of

prospective ruling, has held that 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 and it was held 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 the Act of 2019 does not create a bar for payment of assured returns even after coming into operation as the payments made in this regard are protected as per section 2(4)(l)(iii) of the Act of 2019. Thus, the plea advanced by the respondent is not sustainable in view of the aforesaid reasoning and case cited above.

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 complainants besides initiating penal proceedings. So, the amount paid by the complainants to the builder is a regulated deposit accepted by the later from the former against the immovable property to be transferred to the allottee later on. In view of the above, the respondent is liable to pay assured return to the complainants-allottees in terms of the builder buyer agreement read with addendum to the said agreement.

G.II Delayed possession charges

25. In the present complaint, the complainants intend to continue with the project and are seeking possession of the subject unit and delay possession charges as provided under the provisions of section 18(1) of the Act which reads as under:

> *"**Section 18: - Return of amount and compensation***
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
> .....
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

26. A builder buyer agreement dated 01.09.2010 was executed between the parties. The due date is calculated as per clause 2 of BBA i.e., 3 years from

the date of execution of this agreement. Therefore, the possession was to be handed over by 01.09.2013. The relevant clause is reproduced below:

> *"The Developer will complete the construction of the said complex within three (3) years from the date of execution of this agreement. Further, the Allottee has paid full sale consideration on signing of this agreement, the Developer further undertakes to make payment of Rs. As per Annexure 'A' (Rupees.....) per sq. ft. of super area per month by way of committed return for the period of construction, which the Allottee duly accepts. In the event of a time overrun in completion of the said complex, the Developer shall continue to pay to the Allottee the within mentioned assured return until the unit is offered by the Developer for possession."*

27. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges. Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***"Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
> *For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public."*

28. The legislature in its wisdom in the subordinate legislation under the rule 15 of the rules has determined the prescribed rate of interest. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 06.02.2024 is 8.85%.

Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.

29. On consideration of documents available on record and submissions made by the complainants 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 01.09.2010, the possession of the subject unit was to be delivered within stipulated time i.e., 01.09.2013.

30. However now, the proposition before it is as to whether the allottee who is getting/entitled for assured return even after expiry of due date of possession, can claim both the assured return as well as delayed possession charges?

31. To answer the above proposition, it is worthwhile to consider that 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". The rate at which assured return has been committed by the promoter is Rs. 71.50/- per sq. ft. of the super area per month which is more than reasonable in the present circumstances. If we compare this assured return with delayed possession charges payable under proviso to section 18(1) of the Act, 2016, the assured return is much better i.e., assured return in this case is payable a Rs. 71,500/- per month whereas the delayed possession charges are payable approximately Rs. 36,167/- per month. By way of assured return, the promoter has assured the allottee that he would be entitled for this

specific amount till completion of construction of the said building. Moreover, the interest of the allottees is protected even after the completion of the building as the assured returns are payable for the first 3 years after the date of completion of the project or till the date of said unit/space is put on lease, whichever is earlier. The purpose of delayed possession charges after due date of possession is served on payment of assured return after due date of possession as the same is to safeguard the interest of the allottees as their money is continued to be used by the promoter even after the promised due date and in return, they are to be paid either the assured return or delayed possession charges whichever is higher.

32. Accordingly, the authority decides that in cases where assured return is reasonable and comparable with the delayed possession charges under section 18 and assured return is payable even after due date of possession till the date of completion of the project, then the allottees shall be entitled to assured return or delayed possession charges, whichever is higher without prejudice to any other remedy including compensation.

33. On consideration of the documents available on the record and submissions made by the parties, the complainants have sought the amount of unpaid amount of assured return as per the terms of BBA and addendum executed thereto along with interest on such unpaid assured return. As per Annexure A of BBA dated 01.09.2010, the promoter had agreed to pay to the complainants 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 October 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 protected as per section 2(4)(iii) of the above-mentioned Act.

34. In the present complaint, vide letter dated 27.03.2018, the respondent has intimated the complainants that the construction of Block F 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. Admittedly, the respondent has paid an amount of Rs.29,80,250/- to the complainants as assured return till October 2018. 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., November 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.

35. 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 complainants and failing which that amount would be payable with interest @ 8.85% p.a. till the date of actual realization.

G.III Conveyance deed

36. With respect to the conveyance deed, clause 8 of the BBA provides that the respondent 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 necessary for confirming upon the allottee a marketable title to the said unit free from all encumbrances.

37. Section 17 (1) of the Act deals with duties 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."*

38. The authority observes that OC in respect of the project where the subject unit is situated has not been obtained by the respondent promoter till date. As on date, conveyance deed cannot be executed in respect of the subject unit, however, the respondent promoter is contractually and legally obligated to execute the conveyance deed upon receipt of the occupation certificate/completion certificate from the competent authority. In view of above, the respondent shall execute the conveyance deed of the allotted unit within 3 months from the final offer of possession after the receipt of the OC from the concerned authority and upon payment of requisite stamp duty by the complainants as per norms of the state government.

H. Directions of the authority

39. 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., **November 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 complainants and failing which that amount would be payable with interest @ 8.85% 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 the receipt of the OC from the concerned authority and upon payment of requisite stamp duty as per norms of the state government.

iv. The respondent shall not charge anything from the complainants which is not the part of the builder buyer agreement.

40. Complaint stands disposed of.

41. File be consigned to the registry.

(Sanjeev Kumar Arora) **(Ashok Sangwan)** **(Vijay Kumar Goyal)**
Member Member Member
Haryana Real Estate Regulatory Authority, Gurugram
Date: 06.02.2024