BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**1873 of 2022**
Date of filing:		**04.05.2022**
Date of decision :		**29.03.2024**

Parveen Kharb
R/o # D4-502, Uniworld Gardens 2, Sector-47, Gurugram

Complainant

Versus

M/s Vatika Ltd.
Office address: Unit-A002, INXT City Centre, Ground Floor, Block A, Sector 83, Vatika India Next, Gurugram, Haryana-122012

Respondent

CORAM:
Shri Sanjeev Kumar Arora

Member

APPEARANCE:
Shri Jainder Kharb (Advocate) — Complainant
Ms. Ankur Berry (Advocate) — Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions as provided under the provision of the Act

or the Rules and regulations made there under or to the allottees as per the agreement for sale executed *inter se*.

A. Project and unit related details

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

S.no.	Particulars	Details
1.	Name of the project	Vatika Inxt City Center at Sector 83, Gurugram, Haryana
2.	Nature of the project	Commercial colony
3.	Project area	6 acres
4.	DTCP license no.	258 of 2007 dated 19.11.2007 license migrated from commercial in residential zone to commercial plotted colony vide order dated 13.10.2022.
5.	Name of licensee	M/s Shivam Infratech Pvt. Ltd.
6.	RERA Registered/ not registered	Not Registered
7.	Date of builder buyer agreement	19.01.2012 [pg. 23 of complaint]
8.	Unit no.	206A, 2nd floor, measuring 500 sq. ft. [pg. 21 of complaint]
9.	Allocation of unit	29.02.2012 [pg. 21 of complaint]

10.	Assured return clause	12 (i) Rs. 65/- per sq. ft. per month of the super area, 3 years from the date of completion of construction of the building or till the said commercial unit is put on lease, whichever is earlier. [Page 15 of the complaint]
11.	Due date of possession	No possession clause in the BBA since there is leasing arrangement between the parties and assured return clause is there
12.	Total sale consideration	₹ 38,22,000/- [pg. 25 of complaint]
13.	Paid up amount as alleged by the complainants	₹ 39,20,416.5/- [pg. 18 of complaint]
14.	Offer of possession	Not offered
15.	Occupation certificate	Not obtained
16.	Assured return paid till 07.09.2018	₹ 25,68,620/- [pg. 35 of reply]

B. Facts of the complaint

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

a. That, the complainant, Smt. Parveen Kharb W/ Shri. Sunil Kharb R/o D4-502, Uniworld gardens 2, Sector 47, Gurugram-122018, Haryana, India is a law abiding citizen, taxpayer to the public exchequer and entitled to the constitutional right to property as envisaged in the constitution of India.

b. That, the respondent i.e. Vatika Limited is a company incorporated under the provisions of Companies Act, 1956 vide CIN

U74899HR1998PLC054821 and having its registered office at Unit No. A- 002, INXT City Centre, Ground Floor, Block A, Sector 83, Vatika India Next, Gurugram- 122012 and is inter alia engaged in the business activities relating to construction, development, marketing and sales of various types of residential and commercial properties to its various customers/clients and works for gain.

c. That, in pursuant to the elaborate advertisements, assurances, representations and promises made by respondent in the brochure circulated by them about the timely completion of a premium project with impeccable facilities and believing the same to be correct and true, our client purchased a Unit measuring 500 sq. ft. in the project being unit no. 206A, 2nd floor, Tower A (Now, unit address & tower changed to 108, Tower D1) of Vatika INXT City Centre Gurugram. It was represented and assured by the respondent that the project including the unit of the complainants would be completed by 2014.

d. That, relying upon the respondent's representations and being assured that the respondent would abide by their commitments, the complainant in good faith purchased a unit in the project Vatika INXT City Centre.

e. That the booking of the said unit i.e., 108, Tower D1 (Change of Unit Tower and address from the initially assigned) in the "Vatika INXT City Centre Gurugram" project was confirmed to the complainant vide assignment letter dated January 11, 2012 wherein the respondent explicitly assigned all the rights and benefits under the builder buyer agreement dated January 19, 2012 to the

complainant. Pursuant to the execution builder buyer agreement, a letter of allotment dated February 29, 2012 in the name of complainant was issued to the complainant wherein the respondent further assured that the project would be completed by September 30, 2014, in the point (iv) of this allotment letter.

f. That, a builder buyer agreement dated January 19, 2012 was executed between the parties which included all the details of the project such as amenities promised, site plan, payment schedule, date of completion, etc. Under the said builder buyer agreement, the respondent promised, assured, represented and committed to the complainant that this commercial project would be completed and will be handed over to the buyer by the end of 2014. Further, under clause 12 of the BBA, the respondent agreed to pay Rs. 65/- per sq. ft. of the area of unit (500 sq.ft) to the complainant by way assured return till the completion of the construction of the project. That, it is stated that the complainant was getting paid the promised monthly rentals till September, 2018.

g. However, the respondent stopped paying the monthly rentals to the complainant from October 2018 without assigning any reasons whatsoever.

h. Thereafter, several efforts from the complainant were made to seek updates about the status of the construction work at the site, but due to the negligence of the respondent, there was no satisfactory response from their end. The agreement entered between the respondent and complainant provided for the full payment, the

complainant had assumed the money collected by the respondent from the complainant would be utilised for construction purposes.

i. Unfortunately, the respondent did not properly utilise the complainant's hard earned money and even after the lapse of 10 years of the date of booking, the project is yet to be completed.

j. After getting zero response from the respondents, the complainant visited the construction site, but were shocked and appalled to see that the construction had not been completed. Despite the respondent promising the complainant to provide him with a world class project with impeccable facilities, the complainant is shocked to see the construction site and the purpose of the complainant to book the unit is completely not fulfilled.

k. That the respondent at various instances violated the terms and conditions of the builder buyer agreement by not paying the promised monthly rentals to the complainant at initially promised rates. Not handing over the peaceful and vacant possession of the above said allotted unit. By not executing the sale deed of the above said unit.

l. That, even at the time of the filing of the present complaint before this Hon'ble Haryana Real Estate Regulatory Authority, Gurugram, the respondent has not got the project registered with the authority and for the same reason, the respondent has violated the provisions of Section 3 and Section 4 of the Real Estate Regulation and Development Act,2016 and therefore liable to be punished under Section 59 and Section 60 of the above said Act.

m. That, at the time of execution of the builder buyer agreement, the respondent had represented to the complainant that they are in possession of the necessary approvals from the DTCP, Haryana to commence with the construction work of the commercial project. However, till date construction is incomplete at the site.

n. That, it is abundantly clear that the respondent has no intentions of completing the above said project and have not abided by the terms and conditions mentioned in the clauses of the builder buyer agreement.

o. That, it is unambiguously lucid that no force majeure was involved, and the project has been at a standstill since several years, precisely in the end of 2014 and it has been 8 years till the present date, therefore the respondent cannot take a plea that the construction was halted due to the Covid-19 pandemic. It is submitted that the reassigned complainant has already made the full payment to the respondent towards the commercial Unit booked by them. That, despite paying such a huge sum towards the commercial unit, the respondent has failed to stand by the terms and conditions of the builder buyer agreement and the promises, assurances, representations, etc., which the respondent made to the complainant at the time of booking the above said unit.

p. That, the respondent is not only guilty of deficiency of services and for unfair trade policy along with the breach of contractual obligations, mental torture, harassment of the complainant by misguiding them, keeping them in dark and putting their future at risk by rendering them income less.

q. That, the complainant herein is constrained and left with no option but to file this present complaint seeking the payment of assured rental @65.00 per sq. ft. per month until possession/leasing of the unit and registration of the sale deed of the allotted unit at Vatika INXT City Centre. Further, the complainant herein reserve their rights) to change any submissions made herein in the complainant and further, reserve the right to produce additional documents or submissions, as and when necessary or directed by this Hon' ble Tribunal.

r. That, the complainant further declares that the after regarding which this complaint has been made is not pending before any court of law or any other authority or any other tribunal.

C. Relief sought by the complainant:

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

a. Direct the respondent to pay assured return of ₹ 65/- per sq. ft. per month until possession/leasing of the unit.

b. Direct the respondent to handover the actual, physical, vacant possession of the unit no. 108, Tower D1 of the above said project.

c. Direct the respondent to pay the delayed possession penalty charges with interest as per RERA act.

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

e. Direct the respondent to pay the amount of assured monthly return as agreed upon the complainant from October, 2018 with interest as per RERA Act to the complainant.

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

D. Reply by the respondent.

6. The respondent by way of written reply made the following submissions:

   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 19.01.2012, as shall be evident from the submissions made in the following paras of the present reply.

   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 this Ld. 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 company having not taken registration from SEBI Board cannot run, operate, and 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. Thus the Assured Return Scheme proposed and floated by the respondents 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 ₹25,68,620.69/- till September, 2018. The complainant has not come with clean hands before this Hon'ble Authority and has suppressed these material facts.

d. 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, as per the agreement, the said commercial space shall be deemed to be legally possessed by the complainant. Hence, the commercial space booked by the complainant is not meant for physical possession.

e. That the complainant has come before this Hon'ble 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 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. 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 company who has already fulfilled its obligation as defined

under the BBA dated 03.05.2010. 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.

f. It is submitted that the complainant entered into an agreement i.e., builder buyers agreement dated 19.01.2012 with respondent company owing to the name, good will and reputation of the respondent company. That it is a matter of record that the respondent duly paid the assured return to the complainant till September, 2018. That due to external circumstance which were not in control of the respondent, construction got deferred. That even though the respondents suffered from setback due to external circumstances, yet the respondents managed to complete the construction.

g. The present 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

RERA Act, 2016 describes and prescribes the function and duties of the promoter/developer, Section 19 provides the rights and duties of Allottees. Hence, the RERA 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/or omission of part of the other.

h. That the Complainant 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 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 Company. 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.

i. 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 present complaint filed by the Complainant deserves to be dismissed with heavy costs.

j. That the various contentions raised by the Complainant are fictitious, baseless, vague, wrong, and created to misrepresent and mislead this Hon'ble Authority, for the reasons stated above. That it is further submitted that none of the relief as prayed for by the Complainant are 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 this Hon'ble Authority. That the present complaint is an utter abuse of the process of law, And hence deserves to be dismissed.

7. Copies of all relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided based on these undisputed documents and submissions made by parties.

8. Written arguments on behalf of complainant has been filed on 21.03.2024 and respondent filed necessary documents to be taken on record on 20.11.2023, the authority have taken cognizance of the same.

E. Jurisdiction of the authority

9. 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

10. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by the 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 completed territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

11. 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 promoter, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

12. 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. Direct the respondent to handover the actual, physical, vacant possession of the unit no. 108, Tower D1 of the above said project.

13. Since in the present case the BBA do not incorporates any possession clause and there was a leasing arrangement between both the parties as per clause 12 of the agreement dated 19.01.2012, therefore, no direction w.r.t. the physical possession can be deliberated by the authority.

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

14. As per Section 17 (1) of Act of 2016, the respondent is under obligation to get the conveyance deed executed. In the present case the possession of the allotted unit has yet not taken by the complainant/allottee. Therefore, the respondent is directed to complete the construction of

the subject unit complete in all aspects and thereafter, execute a conveyance deed in favor of complainant within a period of three months from the date of obtaining OC from the competent authority.

F.III. Direct the respondent to pay delay possession charges on paid amount till date of handing over of possession.

15. The complainant is not entitled for any delay possession charges under Section 18 since the buyer's agreement executed between the parties do not incorporated any clause with respect to handing over of possession rather it was a leasing arrangement.

F.IV. Direct the respondent to pay assured return of ₹ 65/- per sq. ft. per month until possession/leasing of the unit.

F.V. Direct the respondent to pay the amount of assured monthly return as agreed upon the complainant from October, 2018 with interest as per RERA Act to the complainant.

16. The complainant has sought assured return on monthly basis as per clause 12 of buyers' agreement dated 19.01.2012. The complainant paid the full consideration amount of ₹38,22,000/- at the time of agreement only with a promise to get the monthly return of ₹65 per sq. ft. from the date of agreement till completion of construction of the said building. It was further agreed vide clause 12(i) of the agreement that the said returns shall be paid up till 3 years from the date of completion of construction or till the said commercial unit is put on lease, whichever is earlier. The respondent has not complied with the terms and conditions of the agreement dated 19.01.2012 and paid the assured return of an amount of ₹25,68,620/-till September, 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 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 return upto the November 2019 but did not pay assured return amount after coming into force of the Act of 2019 as the same was declared illegal.

17. The promoter and allottee would be bound by the obligations contained in the buyer's agreement and the promoter shall be responsible for all obligations, responsibilities, and functions to the allottee as per the agreement for sale executed inter se them under section 11(4)(a) of the Act. 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. Therefore, different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral parts 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 return 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 allottees. Now, two issues arise for consideration as to:

i. Whether authority is within the jurisdiction to vary its earlier stand regarding assured return due to changed facts and circumstances.
ii. Whether the authority is competent to allow assured returns to the allottees 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 allottees in pre-RERA cases

18. 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. In cases of ***Anil Mahindroo & Anr. v/s Earth Iconic Infrastructure Pvt. Ltd.*** (Company Appeal (AT) (Insolvency) No. 74 of 2017) and ***Nikhil Mehta and Sons (HUF) and Ors. vs. AMR Infrastructure Ltd.*** (CA NO. 811 (PB)/2018 in (IB)-02(PB)/2017) decided on 02.08.2017 and 29.09.2018 respectively, it was held that the allottees are investors and have chosen committed return plans. The builder in turn agreed to pay monthly committed return to the investors. Thus, the amount due to the allottee comes within the meaning of 'debt' defined in Section 3(11) of the I&B Code. 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.

19. 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.*

20. 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.*

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.*

26. 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.

27. It is not disputed that the respondent is a real estate developer, and it had obtained registration under the Act of 2016 for the project in

question. The authority under this Act has been regulating the advances received under the project and its various other aspects. 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. If the project in which the advance has been received by the developer from an allottee is an ongoing project as per section 3(1) of the Act of 2016 then, the same would fall within the jurisdiction of the authority for giving the desired relief to the complainant besides initiating penal proceedings.

28. 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 allottee arises out of the same relationship and is marked by the original agreement for sale.

29. The authority further observes that now, the proposition before the Authority whether an allottee who is getting/entitled for assured return even after expiry of due date of possession, is entitled to both the assured return as well as delayed possession charges?

30. To answer the above proposition, it is worthwhile to consider that the assured return is payable to the allottee on account of a provision in the BBA. The assured return in this case is payable from the date of agreement i.e., 19.01.2012 up till three years from the date of completion of construction or till said unit is put on lease whichever is earlier. In the present complaint since the OC has not been obtained from the competent authority accordingly, the construction of the said

building is not yet completed therefore the respondent-promoter is entitled to pay monthly assured return as promised in BBA dated 19.01.2012. Accordingly, the authority directs the respondent/promoter to pay assured return of ₹65/- per sq. ft. up till three years from the date of completion of construction i.e., the date on which OC from the competent authority shall be received in respect of the building where the said unit is situated or the said unit is put on lease whichever is earlier.

G. Directions of the authority

31. 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):

a. The respondent is directed to pay assured return of ₹65/- per sq. ft. up till three years from the date of completion of construction i.e., the date on which OC from the competent authority shall be received in respect of the building where the said unit is situated or the said unit is put on lease whichever is earlier.

b. The respondent is directed to pay the outstanding accrued assured return amount till date as agreed vide BBA dated 19.01.2012 within 90 days from the date of this order failing which that amount would be payable with interest @ 10.85% p.a. till the date of actual realization

c. The respondent is directed to execute a conveyance deed in favor of complainant within a period of three months from the date of obtaining OC from the competent authority.

32. The complaint stands disposed of.

33. File be consigned to registry.

(Sanjeev Kumar Arora)
Member
Haryana Real Estate Regulatory Authority, Gurugram

Date: 29.03.2024