BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**754 of 2022**
Date of pronouncement of order :	**02.02.2024**

M/s Classic Coal Construction Pvt. Ltd. **R/o**: 3rd floor, Vatika Apartment, Line Tank Road, Ranchi, Jharkhand -834001	**Complainant**
Versus	
M/s Vatika Limited **Address:** Flat no. 621-A, 6th floor, Devika Towers, Nehru Place, New Delhi - 110019	**Respondent**

CORAM:	
Sh. Sanjeev Kumar Arora	Member

APPEARANCE:	
Sh. Gaurav Rawat	**Advocate for the complainant**
None	**Advocate for the respondent**

ORDER

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

made there under or to the allottee as per the agreement for sale executed inter se.

A. Project and unit related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainant, 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.	Allotment letter	09.12.2009
3.	Date of builder buyer agreement	09.12.2009 (page 22 of complaint)
4.	Unit no.	1101, 11th floor (page 24 of complaint)
5.	Addendum to buyer agreement	27.07.2011 (page 38 of complaint)
6.	New unit	512, 5th floor, block A (annexure D, page 41 of complaint)
7.	Due date of possession	09.12.2012 (Calculated from date of execution of agreement i.e., 09.12.2009 +3 years (as per clause 2 of the agreement)
8.	Total sale consideration	Rs. 1,95,00,000/- as per clause 1 of the agreement (page 24 of complaint)
9.	Paid up amount	Rs. 1,95,00,000/- as per clause 2 of the agreement (page 24 of complaint)

10.	Possession clause	***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.* **(Emphasis supplied)**
11.	Offer of possession	Not offered
12.	Occupation certificate	Not obtained
13.	Assured return amount paid by the respondent till 30.09.2018	Rs.1,73,89,729/- (annexure R2, page 40 of reply)
14.	Assured return clause	Annexure A page 4 of application under order 8 rule 1 read with section 151 of CPC

B. Facts of the complaint

3. That That it is necessary to submit here that the complainant is company duly incorporated with the registrar of companies Affairs - Jharkhand under the provisions contemplated in the Companies Act. That it is relevant to specifically submit here that Mr. Pankaj Singh being the director of the complainant company has been duly

authorised vide board resolution passed by the board of the directors of the complainant company on dated 22.02.2022 to file, sign, depose, institute, prefer complaint, applications, vakalatnama, evidences, affidavit etc. against the respondent builder and to perform such other act which are necessary for the purposes of the present complaint or any other proceedings associated therewith as the authorised representative of the complainant company is well acquainted with the facts and circumstances of the present matter.

4. That it is needful to respectfully submit here that the complainant company came to know about the commercial projects of the respondent company through wide range of the alluring advertisements made in the various newspapers. That after analysing the advertisements in the newspapers, complainant found suitable and desirable space in the ongoing project of the respondent company namely Vatika Trade Centre, situated in the Village Sikhopur, Tehsil Sohna, District -Gurgaon known as Sector -82A now.
5. That it is specifically submitted that considering the representation of the marketing team of the respondent company, complainant had booked a unit bearing no. 1101 measuring around 2500 sq. ft. area situated on the 11th floor in tower A in the commercial Complex and thereafter a builder buyer agreement dated 09.12.2009 was executed between the complainant company and the respondent company wherein the detailed terms and conditions were laid down. That it is pertinent to specifically mention here that according to the terms and conditions of the builder buyer agreement, sale consideration for the above-mentioned unit was fixed to be Rs. 1,95,00,000/- @ 7,800/-per sq. ft. It was specifically laid down under the builder buyer agreement that respondent undertakes to complete the construction of the

project within a period of three (03) years from the date of the execution of the agreement.

6. That it is further pertinent to mention here that the complainant company had made entire payment of the consideration amount as laid down under the builder buyer agreement in lieu whereof, respondent company further undertakes to make the payment of minimum rental / committed minimum rental to the complainant as per the Clause N (i) of annexure appended with the builder buyer agreement dated 09.12.2009.
7. That it is necessary to submit here that after efflux of the period of the three years complainant through its representatives enquired about the construction going on in respect of the project, whereupon it was revealed that no construction was taking place at the construction site and project seemed to be left unattended.
8. That it is pertinent to mention here that on repeated persuasion of the grievance with the respondent company, respondent company with malafide intention trivialised the grievance of the complainant and proposed to provide different substituted unit bearing no. 512 super area measuring around 2500 sq. ft. situated at 5th Floor in Block A in lieu of the Unit No. 1101 in its another commercial project namely Vatika Inxt City Centre situated at NH- 8, Sector -83 , District - Gurugram . That it is essential to respectfully submit here that an addendum dated 27.07.2011 to the builder buyer agreement dated 09.09.2009 was executed between the respondent company and the complainant company. Except unit number and its location all the terms and conditions was kept as identical in the addendum also. Even the possession clause was also kept as similar as that of the previous builder buyer agreement dated 09.09.2009. That a letter regarding the

confirmation of the allocation of the substituted unit was also issued on dated 17.09.2013.

9. That it is specifically submitted that respondent company had made the payment towards the committed rental /minimum rental return as laid down under the builder buyer agreement and kept in continuity in addendum as well till the period of the September 2018, however respondent company categorically failed in making the payment of the committed rental / minimum rental return from October 2018 to till date and further failed to provide the possession of even substituted unit. That it is relevant to bring to the notice of this Hon'ble Forum that complainant company finding no alternative issued a notice through its advocate regarding the default committed by the respondent in adhering with the essential terms and conditions with respect to the committed return and possession of the unit. Complainant company shocked to receive the unfair demand being raised by the respondent company through mail regarding of the pre-condition of withdrawal of notice for providing the committed return. That it is necessary to submit here that unfair trade practice adopted by the respondent company speaks larger from their acts and conducts as the respondent company till date failed in handing over the possession of the unit to the complainant and further failed to provide the committed return / assured return to the complainant since October 2018. There is likelihood that respondent had duped large number of gullible customer through their acts and conducts by syphoning the money collected to sum other projects. The grievance of the complainant is continuing and subsisting.

10. That it is essential to submit here that this Hon'ble Authority and Hon'ble Appellate Tribunal through its catena of judgments

redressed the grievances of the such customers. The complainant is entitled for the possession of the unit with OC as well as delay penalty compensation. The complainant is further entitled for the committed return in accordance of admitted terms and conditions contemplated in Builder Buyer Agreement and continued in addendum as well.

C. Relief sought by the complainant:

The complainant has sought following relief(s):

i. Direct the respondent to pay the monthly assured returns.

ii. Direct the respondent to pay interest at prevailing rate on the amount paid by the complainant.

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

D. Reply by the respondent

The respondent has contested the complaint on the following grounds.

a. That the complainant has got no locus standi or cause of action to file the present complaint. The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the builder buyers' agreement dated 03.12.2009, as would be evident from the submissions made in the following paras of the reply.

b. That at the very outset it is submitted that the complaint is not maintainable or tenable in the eyes of law. The complainant has misdirected himself in filing the above captioned complaint before the Ld. Authority as the reliefs being claimed by him cannot be said to fall within the realm of jurisdiction of the Authority. It is humbly submitted that upon the enactment of the Banning of Unregulated

Deposit Schemes Act, 2019, (hereinafter referred as BUDS Act) the 'assured return' and/ or any "committed returns" on the deposit schemes have been banned. The respondent having not taken registration from SEBI board cannot run, operate, continue an assured return scheme. The implications of enactment of BUDS Act read with the Companies Act, 2013 and Companies (Acceptance of Deposits) Rules, 2014, resulted in making the assured return/committed return and similar schemes as unregulated schemes as being within the definition of "Deposit".

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

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

maintainable as the unit is not meant for personal use rather it is meant for earning rental income.

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

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

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

h. That further in the matter of ***Bharam Singh &Ors*** **vs.** ***Venetian LDF Projects LLP*** **(Complaint No. 175 of 2018)**, the Hon'ble Real Estate

Regulatory Authority, Gurugram upheld its earlier decision of not entertaining any matter related to assured returns.

i. That the complainant has come before the Authority with un-clean hands. The complaint has been filed by the complainant just to harass the respondent and to gain unjust enrichment. The actual reason for filing of the complaint stems from the changed financial valuation of the real estate sector, in the past few years and the allottee malicious intention to earn some easy buck. The covid pandemic has given people to think beyond the basic legal way and to attempt to gain financially at the cost of others. The complainant has instituted the present false and vexatious complaint against the respondent who has already fulfilled its obligation as defined under the buyers' agreement dated 03.12.2009. It is pertinent to mention here that for the fair adjudication of grievance as alleged by the complainant, detailed deliberation by leading the evidence and cross-examination is required, thus only the civil court has jurisdiction to deal with the cases requiring detailed evidence for proper and fair adjudication.

j. It is submitted that the complainant entered into an agreement i.e., builder buyers' agreement dated 09.12.2009 with respondent owing to the name, good would and reputation of the respondent. It is a matter of record that the respondent duly paid the assured return to the complainant till September 2018. Due to external circumstance which were not in control of the respondent, construction got deferred. Even though the respondent suffered from setback due to external circumstances, yet it managed to complete the construction.

k. The complaint of the complainant has been filed on the basis of incorrect understanding of the object and reasons of enactment of

the RERA, Act, 2016. The legislature in its great wisdom, understanding the catalytic role played by the Real Estate Sector in fulfilling the needs and demands for housing and infrastructure in the country, and the absence of a regulatory body to provide professionalism and standardization to the said sector and to address all the concerns of both buyers and promoters in the real estate sector, drafted and notified the RERA Act, 2016 aiming to gain a healthy and orderly growth of the industry. The Act has been enacted to balance the interests of consumer and promoter by imposing certain responsibilities on both. Thus, while section 11 to section 18 of the Act, 2016 describes and prescribes the function and duties of the developer, section 19 provides the rights and duties of allottees. Hence, the Act, 2016 was never intended to be biased legislation preferring the allottees, rather the intent was to ensure that both the allottee and the developer be kept at par and either of the party should not be made to suffer due to act and omission of part of the other.

l. That in matter titled ***Anoop Kumar Rath Vs M/S SethInfraworld Pvt. Ltd.*** in appeal no. AT00600000010822 vide order dated 30.08.2019 the Maharashtra Appellate Tribunal while adjudicating points be considered while granting relief and the spirit and object behind the enactment of the Act, 2016 in para 24 and para 25 discussed in detail the actual purpose of maintaining a fine balance between the rights and duties of the promoter as well as the allottee. The Ld. Appellate Tribunal vide the said judgment discussed the aim and object of the Act, 2016.

m. That the complainant is attempting to seek an advantage of the slowdown in the real estate sector, and it is apparent from the facts

of the present case that the main purpose of the present complaint is to harass the respondent by engaging and igniting frivolous issues with ulterior motives to pressurize the respondent. Thus, the complaint is without any basis and no cause of action has arisen till date in favour of the complainant and against the respondent and hence, the complaint deserves to be dismissed.

n. That it is brought to the knowledge of the Authority that the complainant is guilty of placing untrue facts and is attempting to hide the true colour of the intention of the complainant. Before buying the property, the complainant was aware of the status of the project and the fact that the commercial unit was only intended for lease and never for physical possession.

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

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

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

E. Jurisdiction of the authority

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

E. I Territorial jurisdiction

14. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District. Therefore, this authority has comple1te territorial jurisdiction to deal with the present complaint.

E. II Subject-matter jurisdiction

15. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

> ***Section 11(4)(a)***
>
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
>
> *The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.*
>
> ***Section 34-Functions of the Authority:***

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

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

F. Findings on the relief sought by the complainant:

F.I Assured return

17. While filing the petition besides delayed possession charges of the allotted unit as per addendum to the agreement, the claimant has also sought assured returns on monthly basis as per addendum to the agreementallotment letter at the rates mentioned therein till the completion of the building. It is pleaded that the respondent has not complied with the terms and conditions of the allotment letter. Though for some time, the amount of assured returns was paid but later on, the respondent refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019 (herein after referred to as the Act of 2019). But that Act does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act. However, the plea of respondent is otherwise and who took a stand that though it paid the amount of assured returns upto the year 2018 but did not pay the same amount after coming into force of the Act of 2019 as it was declared illegal.

18. 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 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 returns between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate regulatory authority has complete jurisdiction to deal with assured return cases as the contractual relationship arise out of agreement for sale only and between the same parties as per the provisions of section 11(4)(a) of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the agreement for sale till the execution of conveyance deed of the unit in favour of the allottee. Now, three issues arise for consideration as to:

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

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

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

19. While taking up the cases of ***Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd. (complaint no 141 of 2018), and Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP" (supra),*** it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the issue of assured returns was involved to be paid by the builder to an allottee but at that time, neither the full facts were brought before the authority nor it was argued on behalf of the allottees that on the basis of contractual obligations, the builder is obligated to pay that amount. However, there is no bar to take a different view from the earlier one if new facts and law have been brought before an adjudicating authority or the court. There is a doctrine of "prospective overruling" and which provides that the law declared by the court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. A reference in this regard can be made to the case of ***Sarwan Kumar & Anr Vs. Madan Lal Aggarwal Appeal (civil) 1058 of 2003 decided on 06.02.2003*** and wherein the hon'ble apex court observed as mentioned above. So, now the plea raised with regard to maintainability of the complaint in the face

of earlier orders of the authority in not tenable. The authority can take a different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. It is now well settled preposition of law that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum , memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement for sale defines the builder-buyer relationship. So, it can be said that the agreement for assured returns between the promoter and an allottee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arises out of the agreement for sale only and between the same contracting parties to agreement for sale. In the case in hand, the issue of assured returns is on the basis of contractual obligations arising between the parties. Then in case of ***Pioneer Urban Land and Infrastructure Limited & Anr. v/s Union of India & Ors. (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019***, it was observed by the Hon'ble Apex Court of the land that "...allottees who had entered into "assured return/committed returns' agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of agreement till the date of handing over of possession to the allottees". It was further held that 'amounts raised by developers under assured return schemes had the "commercial effect of

a borrowing' which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code" including its treatment in books of accounts of the promoter and for the purposes of income tax. Then, in the latest pronouncement on this aspect in case ***Jaypee Kensington Boulevard Apartments Welfare Association and Ors. vs. NBCC (India) Ltd. and Ors. (24.03.2021-SC): MANU/ SC/0206 /2021***, the same view was followed as taken earlier in the case of Pioneer Urban Land Infrastructure Ld & Anr. with regard to the allottees of assured returns to be financial creditors within the meaning of section 5(7) of the Code. Then after coming into force the Act of 2016 w.e.f 01.05.2017, the builder is obligated to register the project with the authority being an ongoing project as per proviso to section 3(1) of the Act of 2017 read with rule 2(o) of the Rules, 2017. The Act of 2016 has no provision for re-writing of contractual obligations between the parties as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors., (supra)*** as quoted earlier. So, the respondent/builder can't take a plea that there was no contractual obligation to pay the amount of assured returns to the allottee after the Act of 2016 came into force or that a new agreement is being executed with regard to that fact. When there is an obligation of the promoter against an allottee to pay the amount of assured returns, then he can't wriggle out from that situation by taking a plea of the enforcement of Act of 2016, BUDS Act 2019 or any other law.

20. It is pleaded on behalf of respondent/builder that after the Banning of Unregulated Deposit Schemes Act of 2019 came into force, there is bar for payment of assured returns to an allottee. But again, the plea taken in

this regard is devoid of merit. Section 2(4) of the above mentioned Act defines the word ' deposit' as *an amount of money received by way of an advance or loan or in any other form, by any deposit taker with a promise to return whether after a specified period* or otherwise, either in cash or in kind or in the form of a specified service, *with or without any benefit in the form of interest, bonus, profit or in any other form, but does not include*

i. an amount received in the course of, or for the purpose of, business and bearing a genuine connection to such business including—
ii. advance received in connection with consideration of an immovable property under an agreement or arrangement subject to the condition that such advance is adjusted against such immovable property as specified in terms of the agreement or arrangement.

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

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

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

amount of sale consideration against the allotment of a unit with the builder at the time of booking or immediately thereafter and as agreed upon between them.

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

24. It is evident from the perusal of section 2(4)(l)(ii) of the above-mentioned Act that the advances received in connection with consideration of an immovable property under an agreement or arrangement subject to the condition that such advances are adjusted against such immovable property as specified in terms of the agreement or arrangement do not fall within the term of deposit, which have been banned by the Act of 2019.

25. Moreover, the developer is also bound by promissory estoppel. As per this doctrine, the view is that if any person has made a promise and the promisee has acted on such promise and altered his position, then the person/promisor is bound to comply with his or her promise. When the builders failed to honour their commitments, a number of cases were filed by the creditors at different forums such as ***Nikhil Mehta, Pioneer Urban Land and Infrastructure*** which ultimately led the central government to enact the Banning of Unregulated Deposit Scheme Act, 2019 on 31.07.2019 in pursuant to the Banning of Unregulated Deposit Scheme Ordinance, 2018. However, the moot question to be decided is as to whether the schemes floated earlier by the builders and promising as assured returns on the basis of allotment of units are covered by the

abovementioned Act or not. A similar issue for consideration arose before Hon'ble RERA Panchkula in case ***Baldev Gautam VS Rise Projects Private Limited (RERA-PKL-2068-2019)*** where in it was held on 11.03.2020 that a builder is liable to pay monthly assured returns to the complainant till possession of respective apartments stands handed over and there is no illegality in this regard.

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

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

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

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

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

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

29. On consideration of documents available on record and submissions made by parties, the complainant has sought assured return on monthly basis as per one of the provisions of addendum to agreement at the agreed rates till the date of completion of building. It was also agreed that as per addendum to the agreement, the developer would pay assured return to the buyer Rs. 78/- per sq. ft. super area of the said commercial unit. The said clause further provides that it would pay assured return to the buyer after the completion of building Rs. 65/- per sq.ft. per month on super area for up to three years from the date of completion of construction of building or the unit is put on lease whichever is earlier. Though for some time, the amount of assured returns was paid but later on, the respondent refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019. But that Act does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act.

30. Accordingly, the promoter is liable to pay assured return of the unpaid period as specified under the addendum to the agreement.

31. Vide previous proceedings, the document w.r.t. assured return was in question. The counsel for the complainant placed a document which is addendum to agreement that is neither signed/stamped by respondent nor the date is available. The counsel for the respondent contended that the said document is invalid as assured return was never supposed to be paid. On the contrary, it agreed that it has paid assured return till September 2018 to the complainant. The question arises before the authority is that whether the complainant is entitled to get the relief of

assured return or not. As per documents available on record and submissions made by the parties, it is observed that if the amount of assured return was never supposed to be paid then why respondent has paid assured return till September 2018. Also, as per Annexure – 2 page 40 of reply, the respondent submitted that it has paid assured return till 30.09.2018. Thus, it becomes a matter of record. Also, as per maxim, ***Auegans contraria non est audiendus*** which means one making contradictory statements is not to be heard. In the present case respondent cannot be allowed to state hot and cold at different times about same event. In conclusion, he is directed to pay assured return as per agreed rate.

G. Directions of the authority

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

i. The respondent is directed to pay the arrears of amount of assured return at agreed rate to the complainant(s) from the date the payment of assured return has not been paid till the date of completion of construction of building. After completion of the construction of the building, the respondent/builder would be liable to pay monthly rental at agreed rate of the super area up to 3 years or till the unit is put on lease whichever is earlier.

ii. The respondent is also directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of order after adjustment of outstanding dues, if any, from the complainant and failing which that amount would be payable with interest @8.70% p.a. till the date of actual realization.

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

33. Complaints stand disposed of.

34. File be consigned to registry.

(Sanjeev Kumar Arora)
Member
Haryana Real Estate Regulatory Authority, Gurugram
02.02.2024