BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**2391 of 2023**
Date of decision :		**24.05.2024**

1. Rajesh Kumar Batra
2. Parth Batra
   R/o # E-58, South Extension Part-1, New Delhi-110049

Complainants

Versus

1. M/s Vatika One on One Pvt. Ltd.
   Office address: #621-a, 6th floor, devika towers, 6, Nehru place, New Delhi-110019
2. M/s Vatika Ltd.
   Office address: Tower A, Vatika city centre, 5th floor, near Kherki Daula toll plaza, Sector 83, Gurugram, Haryana-122012

Respondents

CORAM:

Shri Sanjeev Kumar Arora — **Member**

APPEARANCE:

Mr. Harshit Goyal (Advocate) — Complainants

Mr. Venkat Rao (Advocate) — Respondents

ORDER

1. The present complaint dated 16.06.2023 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 One on One phase 1 at Sector 16, Gurugram, Haryana
2.	Nature of the project	Commercial Complex
3.	Project area	12.13125 acres
4.	DTCP license no.	05 of 2015 dated 06.08.2015
5.	Name of licensee	Sh. Keshav DLltt & others in collaboration with Calder Developers Pvt' Ltd'
6.	RERA Registered/ not registered	237 of 207 dated 20.09.2017
7.	Date of builder buyer agreement	25.02.2016 [pg. 19 of complaint]
8.	Date of allotment	23.01.2015

		[pg. 17 of complaint]
9.	Unit no.	119, 1st floor, block 3, 500 sq. ft. [page 23 of complaint]
10.	Possession clause	***17*** *The Developer based on its present plans and estimates and subject to all just exceptions, contemplates to* ***complete construction of the said Building/ said Commercial Unit within a period of 48 (Forty Eight) months from the date of execution of this Agreement*** *unless there shall be delay or there shall be failure due to reasons mentioned in this agreement or due to failure of Buyers) to pay in time the price of the said Commercial Unit along with all other charges and dues in accordance with the Schedule of Payments. Subject to the provisions of Leasing Arrangement option, the Developer, on completion of construction shall offer in writing to such Buyer to take over the physical possession of his commercial unit for his occupation and use in terms of this Agreement within sixty (60) days of issue of the notice as aforesaid, subject to such buyer having complied with all the terms and conditions of this Agreement including payment of the Sale Price and other charges such as EDC, IDC, IFMSD, etc as per demands raised by the Developer or as agreed in this agreement.*
11.	Due date of possession	25.02.2020
12.	Assured return clause	***15*** *The Developer may, where the Buyer has paid 100% of the Total sale consideration and other charges for the Commercial Unit, upon signing of this Agreement pay ₹151.65/-per sq. ft. super area per month*

		by way of assured return to the Buyer, of certain category (ies) of commercial Unit as per its policy, from the date of execution of this agreement till the construction of the Said Commercial Unit is complete. Such Policy of the Developer may change from time to time where the Developer may withdraw the assured return scheme.
13.	Total Sale Consideration as per BBA	₹ 68,46,000/- [pg. 24 of complaint]
14.	Paid up amount as per BBA	₹ 68,46,000/- [pg. 37 of complaint]
15.	Offer of possession	Not offered
16.	Occupation certificate	06.09.2021 [pg. 118 of reply]
17.	assured return paid till	September 2018
18.	Assured return paid	₹ 22,74,750/- [pg. 15 of reply]
19.	Addendum agreement w.r.t. deletion of clause 15 of assured return	26.12.2019 [pg. 114 of reply]

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint:

a. That the respondent company No 1 is a real estate developer responsible for development of project in question and a group company of Vatika Limited.

b. The respondent company no 2 is a real estate developer company.

c. The respondent no 1 had obtained license no 05 of 2015 dated 06.08.2015 from Director Town and Country Planning Haryana for construction of real estate project in question.

d. The Builder Buyer Agreement was duly executed between complainants and respondents on 25.02.2016 in respect of Unit No. 119 on 1st Floor, Block No. 3 measuring 500 sq ft super area at real estate project in question namely 'One-On-One' situated at Sector 16, Gurugram.

e. As per clause 15 of Builder Buyer Agreement dated 25.02.2016, the respondents were liable to pay assured return of Rs. 151.65/- per sq ft per month from the date of execution of agreement i.e., 25.02.2016 till date of completion of construction of booked unit.

f. The respondent company no 1 obtained Occupation Certificate in respect of Block 3 where booked unit is situated on 06.09.2021.

g. As per clause 16.1 of Builder Buyer Agreement dated 25.02.2016, the respondents were liable to pay assured return of Rs. 130/- per sq ft per month for a period of 3 years from the date of completion of construction of booked unit or till the booked unit is put on Lease whichever is earlier.

h. The respondents have failed to pay pending promised Assured Return from the month of October 2018.

i. As per clause 17 of the Builder Buyer Agreement dated 25.02.2016, the respondents were liable to deliver possession of the booked unit within a period of 48 months from date of execution of agreement. Therefore, the due date of delivery of possession was 25.02.2020.

j. The respondents have failed to offer physical possession of the booked unit to the complainant till date.

k. That the complainant had 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 at 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 present parties.

l. Therefore, the present complainant is forced to file present complaint before this hon'ble authority under Section 31 of Real Estate Regulation and Development Act, 2016 read with Rule 28 of Haryana Real Estate (Regulation and Development) Rules, 2017 to seek redressal of the grievances against the respondent company.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s):

a. To direct the respondents to pay pending assured monthly return of Rs. 151.65/- per sq. ft. pending from the October 2018 till 06.09.2021 and Rs 130/- per sq. ft from 06.09.2021 till date along with Interest to the complainant.

b. To restrain respondents from creation of third-party interest and maintain status quo in respect of booked unit.

c. To direct the respondents to execute and register the conveyance deed of the booked unit.

d. To direct the respondents to pay delayed possession charges from due date of delivery of possession i.e. 25.02.2020 till date of final offer of possession along with occupation certificate.

e. To direct respondents to deliver possession of the booked unit.

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 in the year 2014, the complainants being in search of investment opportunities learned about the project launched by the respondent no. 1 titled as "ONE ON ONE" (herein referred to as 'Project') at Sector 16, Gurugram and visited the office of the respondent no. 1 to know the details of the said project. The complainants further inquired about the specifications and veracity of the commercial project and was satisfied with every proposal deemed necessary for the development.

b. That after having dire interest in the commercial project constructed by the respondents the complainants booked the unit, under the assured return scheme, upon own judgement and investigation. Further, upon knowing the assured return scheme, the complainants upon own will paid entire sale consideration amount to the respondent for making steady monthly returns.

c. It may be noted, that the complainants were aware of the status of the project and thus invested in the project of the respondent without any protest or demur, to make steady monthly returns upon own judgment and investigation.

d. That on 23.01.2015, respondent vide allotment letter allotted a unit bearing no. 203, admeasuring 500 sq. ft. (hereinafter referred to as 'erstwhile unit') to the complainants.

e. Subsequently, the respondent vide letter dated 03.08.2015, allocated a new unit to the complainants and re-allotted another unit bearing no. 119, 1st floor, block 3 admeasuring 500 sq. ft. (hereinafter referred to as 'unit') against the erstwhile unit, in the project, in favour of the complainant.

f. That a builder buyer agreement dated 25.02.2016 (hereinafter referred to as 'agreement'), was executed between the complainants and the respondents for the erstwhile unit, for a basic sale consideration of ₹68,46,000/- in the project, which was duly paid by the complainants.

g. That as per the terms of the agreement, the unit was supposed to be leased out upon the completion and in case the complainants wish not to lease the unit then as per the provision of clause 16, the unit was proposed to be handed over within an estimated period of 48 (forty-eight) months from the date of execution of agreement. But, in the present complaint the complainants had already opted for leasing out and authorized the respondents to lease out the unit.

h. That the agreement, clearly stipulated provisions for "lease" and admittedly contained a "lease clause". That in the light of the said facts and circumstances it can be concluded beyond any reasonable doubt that the complainants are not an "allottee" but investor who has invested the money for making steady monthly returns.

i. It is pertinent to note herein that the objective of the Act of 2016 is to regulate the real estate sector in terms of the development of the project in accordance with the law and to provide relief of interest, compensation or refund to the allottees in case of violation of the provisions of the Act of 2016. The objective of the Act of 2016 is very clear to regulate the Real Estate Sector and form balance amongst the promoter, allottee and real estate agent. However, the entire Act of 2016 nowhere provides any provision to regulate the commercial understanding regarding returns on investment or lease rentals between the builder and the buyer.

j. That the complainants are merely trying to hoodwink the ld. authority by concealing facts which are detrimental to this complaint at hand. Therefore, the said Allotment of the said commercial unit contained a "lease clause" which empowers the developer to put a unit of complainants along with other commercial space unit on lease. Further, the possession clause was to only take effect when the complainants opted out of the leasing arrangement, which is not the case herein.

k. It is submitted that the complainants herein had authorized the respondents to further lease the unit upon completion of the same however, the construction of the project was obstructed due to many reasons beyond the control of the respondent no. 1.

l. That the respondent was committed to complete the development of the project and handover the possession with the proposed timelines. It is pertinent to apprise to the Ld. Authority that the developmental work of the said project was slightly decelerated

due to the reasons beyond the control of the respondent company due to the impact of Good and Services Act, 2017 [hereinafter referred to as 'GST'] which came into force after the effect of demonetisation in last quarter of 2016 which stretches its adverse effect in various industrial, construction, business area even in 2019. The respondent had to undergo huge obstacle due to effect of demonetization and implementation of the GST.

m. That due to above unforeseen circumstances and causes beyond the control of the respondent, the development of the project got decelerated. That it is pertinent to mention herein that such delay was not intentional. It is also submitted that the respondent was bound to adhere with the order and notifications of the Courts and the Government.

n. That the delay caused due to unforeseen circumstances, shall be considered and calculated, before determination of the date to offer possession to the complainant. That after considering the above delay, the date to offer possession has to be extended by approximately 1.4 years.

o. Subsequently, upon removal of the Covid-19 restrictions it took time for the workforce to commute back from their villages, which led to slow progress of the completion of project. Despite, facing shortage in workforce, materials and transportation, the respondent managed to continue with the construction work. That the respondent also has to carry out the work of repair in the already constructed building and fixtures as the construction was left abandoned for more than 1 year due to Covid-19 lockdown.

This led to further extension of the time period in construction of the project.

p. That all these factors being force majeure may be taken into consideration for the calculation of the period of the construction of the project. It may also be noted, that the respondent had carried out its obligations in agreement with utmost diligence.

q. As per clause 15 and clause 16, of the agreement, the respondents were obligated to pay the assured return to the complainants, wherein the respondent assured to provide assured return of ₹151.65/- per sq. ft till the completion of the building and ₹130/- per sq. ft., after completion of building for three years or till the unit is put on lease, whichever is earlier.

r. It is to note, the respondents herein was committed to complete the construction of the project and subsequently lease out the same as agreed under the agreement. However, the respondents in due compliance of the terms of the agreement has paid assured return up till September, 2018.

s. It is imperative to bring into the knowledge of the Ld. Authority that since starting the complainants have always been in advantage of getting assured return as agreed by the respondents. It is an admitted fact that the complainants have received an amount of ₹22,74,750/- as assured return right from the date of allotment up to September, 2018.

t. That a reading of the entire complaint on a demurrer reveals that the true nature of the relief sought is specific performance of the assured returns commitment. It is respectfully submitted that the

relief of specific performance flows from the Specific Relief Act, 1963 and no part of the RERA Act, 2016 clothes this Ld. Authority to exercise powers under Specific Relief Act, 1963.

u. In the present case, if the relief of specific performance was sought before a civil court, which alone has the jurisdiction to grant relief in accordance with the Specific Relief Act, 1963, it would have been compulsory to plead and prove readiness and willingness and other statutory preconditions for the grant of specific relief, and the above admission would have been fatal to the grant of specific relief. In such circumstances, entertaining this kind of a complaint for specific performance under the Real Estate (Regulation and Development) Act, 2016 is nothing but permitting the complainants to do indirectly, what he could not do directly, and the same ought to be nipped in the bud by this Ld. Authority.

v. That the respondents cannot pay "assured returns" to the complainants by any stretch of imagination in the view of prevailing laws. 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.

w. Thereafter, the act titled as "The Banning of Unregulated Deposits Schemes Act, 2019" (hereinafter referred to as "the BUDS Act") 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 respondents could have

continued to make the payments of the said assured returns in violation of the BUDS Act.

x. That, it is evident that the entire case of the complainants is nothing but a web of lies, false and frivolous allegations made against the respondents. That the complainants have not approached the ld. authority with clean hands hence the present complaint deserves to be dismissed with heavy costs. That it is brought to the knowledge of the ld. authority that the complainants are guilty of placing untrue facts and are attempting to hide the true colour of intention of the complainants.

y. That the complainants herein, have suppressed the above stated facts and has raised this complaint under reply upon baseless, vague, wrong grounds and has mislead this Ld. Authority, for the reasons stated above. It is further submitted that none of the reliefs as prayed for by the complainants are sustainable before this Ld. Authority and in the interest of justice.

z. Hence, the present complaint under reply 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.

E. Jurisdiction of the authority

8. The plea of the respondents regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has

territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by 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

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

> ***Section 11(4)(a)***
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
>
> ***Section 34-Functions of the Authority:***
>
> .....
>
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoter, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

11. So, in view of the provisions of the act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation

which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the relief sought by the complainants.

F.I. To direct respondents to deliver possession of the booked unit.

12. The respondent promoter has obtained the OC for the tower where subject unit is situated on 06.09.2021 from the competent authority. The issuance of occupational certificate by the competent authority in itself is a proven fact that the promoter has sought all necessary governmental clearances regarding infrastructural and other facilities including road, water, sewerage, electricity, environmental etc. as these clearances are preconditions for grant of OC. Therefore, respondent promoter is directed to offer the possession of the subject unit complete in all respect as per specifications as mentioned in the BBA within 30 days from the date of this order under section 17(2) of the Act, 2016 as the OC for the same has been obtained from the competent authority.

F.II. To direct the respondents to pay delayed possession charges from due date of delivery of possession i.e. 25.02.2020 till date of final offer of possession along with Occupation Certificate.

13. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges on the amount paid by him in respect of subject unit. Sec. 18(1) of the Act is reproduced below for ready reference:

> *"**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. -*
> *in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
> *due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,*
> ***he shall be liable on demand to the allottees**, in case the allottee wishes to withdraw from the project, without prejudice to any other*

remedy available, ***to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed*** *in this behalf including compensation in the manner as provided under this Act:*
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."

(Emphasis supplied)

14. In the present matter the promoter has proposed to hand over the possession of the plot according to clause 17 of the BBA within a period of 48 months from date of buyers' agreement. The due date of possession is calculated from the date of BBA i.e., 25.02.2016. Therefore, the due date of possession comes out to be 25.02.2020. However, the possession has not been offered to the allottees till date. Since in the present matter the complainant has paid an amount of ₹68,46,000/- towards the total consideration of the unit i.e., ₹68,46,000/- and are seeking possession of the said unit.

15. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoters. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoters and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoters may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the flat buyer

agreement by the promoters are just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

16. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges as one of the reliefs. However, 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]*
> *(1) 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."*

17. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

18. 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., 24.05.2024

is 8.85%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.85%.

19. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
> *(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

20. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.85% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.

21. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 17 of the agreement executed between the parties on 25.02.2016, the possession of the subject apartment was to be delivered within 48 months from the date of execution of agreement. Therefore, the due date of handing over possession is

25.02.2020. The respondent has not offered the possession of the subject unit till date. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 25.02.2020 till the valid offer of possession of unit plus two months or actual handing over of possession whichever is earlier at prescribed rate i.e., 10.85 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

F.III. To direct the respondents to execute and register the conveyance deed of the booked unit.

22. Furthermore, 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 plot has not yet been handed over by the respondent to the complainants. Therefore the respondents are directed to handover the physical possession of the subject unit after issuing valid offer of possession within 30 days from the date of this order and thereafter, execute a conveyance deed in favor of complainants within a period of three months from the date of this order since the OC has been received from the competent authority.

F.IV. To direct the respondents to pay pending assured monthly return of Rs. 151.65/- per sq. ft. pending from the October 2018 till 06.09.2021 and Rs 130/- per sq. ft from 06.09.2021 till date along with Interest to the complainant

23. The complainant has sought assured return on monthly basis as per clause 15 of buyers' agreement dated 25.02.2016. The complainant paid

the full consideration amount of ₹68,46,000/- at the time of agreement only with a promise to get the monthly return of ₹151.65/- per sq. ft. from the date of agreement till completion of construction of the said building. The respondent has not complied with the terms and conditions of the agreement dated 25.02.2016 and paid the assured return of an amount of ₹22,74,750/-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 up to the September 2018 but did not pay assured return amount after coming into force of the Act of 2019 as the same was declared illegal.

24. 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

25. 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 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 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.

26. 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.*

27. 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.*

28. 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.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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.

34. 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.

35. 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.

36. 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?

37. 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. As per clause 15 of the agreement the assured return was payable from the date of agreement i.e., 25.02.2016 up till the date of completion of construction. In the present complaint since the OC has been obtained from the competent authority on 06.09.2021 accordingly, the construction of the said building is completed therefore the respondent-promoter is entitled to pay monthly assured return till 06.09.2021 i.e., the date of OC as promised in BBA dated 25.02.2016. Further, on 26.12.2019 an addendum agreement was executed between the parties vide which the clause 15 of the BBA was deleted. Also clause 1 of the addendum agreement clearly states that this agreement shall become effective from 01.07.2019. Accordingly, the respondent was liable to pay assured return up till 01.07.2019 only therefore, the authority directs the respondent/promoter to pay assured return of ₹151.65/- per sq. ft. per month up till the date on which the addendum agreement become effective i.e., till 01.07.2019.

F.V. To restrain respondents from creation of third-party interest and maintain status quo in respect of booked unit

38. In the present matter the complainants have already paid full consideration w.r.t the subject unit and the OC have also been received by the respondent from the competent authority and the complainants intends to continue with the project accordingly, the respondent is

hereby restrained from terminating the unit and further restrained from creating any third-party rights w.r.t the subject unit.

G. 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):

a. The complainant is entitled to delayed possession charges as per the proviso of section 18(1) of the Real Estate (Regulation and Development) act, 2016 at the prescribed rate of interest i.e., 10.85%p.a. for every month of delay on the amount paid by him to the respondent from due date of possession i.e., 25.02.2020 till the valid offer of possession of unit plus two months or actual handing over of possession whichever is earlier at prescribed rate i.e., 10.85 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules after deducting the amount paid or adjusted by the respondent on account of delay possession charges, if any.

b. The respondent is directed to pay assured return of ₹151.65/- per sq. ft. per month up till the date when the addendum agreement dated 26.12.2019 was effected i.e., till 01.07.2019.

c. The respondent is directed to pay the outstanding accrued assured return amount payable till 01.07.2019 and delay possession charges payable till date within 90 days from the date of this order failing which that amount would be payable with interest @ 8.85% p.a. till the date of actual realization.

d. The respondent promoter is directed to offer the possession of the

subject unit complete in all respect as per specifications as mentioned in the BBA within 30 days from the date of this order since the OC for the same has been obtained from the competent authority on 06.09.2021.

e. The respondent is directed to execute a conveyance deed in favor of complainant within a period of three months from the date of this order since the OC has been received from the competent authority.

f. The promoter shall not charge anything which is not part of the buyer's agreement.

40. The complaint stands disposed of.

41. File be consigned to registry.

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

Date: 24.05.2024