

**BEFORE THE HARYANA REAL ESTATE REGULATORY
AUTHORITY, GURUGRAM**

Complaint no.	2331 of 2022
Date of filing complaint	27.05.2022
First date of hearing	02.09.2022
Date of decision	03.07.2024

Dhiraj Passi

Resident of: B-8, Kailash Apartments, Lala Lajpat
Marg, New Delhi, 110048

Complainant

Versus

M/s Vatika One on One Private Limited

Regd. office: Flat no. 22A, 2nd floor Devika Tower, 6,
Nehru Place New Delhi South Delhi- 110019

Respondent

CORAM:

Shri Ashok Sangwan

Member

APPEARANCE:

Sh. Gaurav Gupta (Advocate)

Complainant

Sh. Anurag (Advocate)

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. Unit and project-related details

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

Sr. No.	Particulars	Details
1.	Name and location of the project	"One on One, Phase 1", Sector-16, Gurugram
2.	Nature of the project	Commercial complex
3.	Area of the project	12.13125 acres
4.	RERA registered/ not registered and validity status	Registered 237 of 2017 dated 20.09.2017 valid upto 19.09.2022
5.	Application for allotment	30.04.2015 (page 31 of complaint)
6.	Allotment Letter	04.06.2015 (page 37 of complaint)
7.	Unit no.	229, Block 3 admeasuring 750 sq.ft. (super area) (page 37 of complaint)
8.	Date of buyer agreement	Not executed
9.	Possession Clause	Not available
10.	Due date of possession	04.06.2018 (Deemed to be 3 years from the date of allotment letter in view of "Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors." (12.03.2018 - SC); MANU/SC/0253/2018)
11.	Basic sale consideration	Rs.61,87,500 /- (As per allotment letter at page 37 of complaint)
12.	Amount paid by the complainant	Rs.51,33,546/- (page 39 of complaint)
13.	Occupation certificate	Not obtained
14.	Offer of possession	Not offered
15.	Assured return clause	<i>"The unit has been allotted to you with an assured monthly return of Rs. 137.22/- per sq. ft. payable till completion of the building."</i>

		<p>a) <i>Post completion of the building an amount equivalent to Rs. 130/- per sq. ft. super area of the unit per month shall be paid as committed return from for upto three years from the date of completion of construction of the said commercial unit, or till the said unit is put on lease, whichever is earlier....."</i></p> <p>(as per allotment letter page 37 of complaint)</p>
16.	Objection vide email for execution of buyer's agreement by complainant	15.12.2015 (page 44 of complaint)
17.	Reminders sent by respondent for execution of buyer's agreement	19.01.2016, 22.02.2016 and 20.02.2020 (page 51, 52 and 53 of the reply, respectively)
18.	Amount of assured returns already paid by the respondent to the complainant	Rs.42,19,515/-

B. Facts of the complaint:

3. The complainant has made the following submissions:

- a) That on the basis of representations and assurances of the respondent, the complainant booked a unit in the project "One on One", Sector 16, Gurugram on 30.04.2015 by way of an application for allotment.
- b) Based on the application and payment made by the complainant, the respondent allotted unit no. 229, block 3, admeasuring 750 sq. ft (super area) in the said project. By way of allotment letter dated 04.06.2015, following assurances were made to the complainant-
 - (i) Assured monthly return of **Rs 137.22/-** per sq. ft. payable till completion of building.
 - (ii) Post completion of the building an amount equivalent to **Rs. 130/-** per sq. ft. super area per month as committed return for up to 3 years from completion of construction.

- (iii) Obligation of the developer to lease the premises of which the flat is part @ **Rs130/-** per sq. ft. if the achieved rental is less than **Rs. 130/-** per sq. ft. then a refund of **Rs.133** per sq. ft. for every **Rs.1/-** by which rental is less than **Rs.130sq. ft.**
 - (iv) If the achieved rental is between Rs 130/- per sq. ft and Rs 150/- per sq. ft., then you will be liable to pay additional sale consideration @Rs. 66.5 per sq. ft. (Rupees Sixty-six Paisa Fifty) for every rupee of the additional rental achieved.
 - (v) If the achieved rental is above Rs 150/- Ps. ft. then you will be liable to pay additional sale consideration as per the following calculations: -
 - i) Rs 1330/- per sq. ft. (Rupees Thirteen Hundred thirty only) for achieving a lease rental till-Rs 150/- per sq. ft.
 - ii) Plus Rs. 86.5/- per sq. ft. for every rupee of additional rent above Rs 150/-.
 - (vi) No maintenance charges for the period up to which property is leased out.
 - (vii) Rental security deposit and rental advance as would be recovered from incoming lessees paid on receipt.
 - (viii) The flat would be completed and ready for lease by March 2017.
- c) The complainant paid total sale consideration of Rs.51,33,546/-. Out of this, Rs. 50,84,046/- were paid via cheque no. 811750 and Rs. 49,500/- were paid as TDS to the tax department. Further, the payments were acknowledged by the respondent vide letters dated 30.04.2015 and 08.05.2015.
- d) The builder buyer agreement received by the complainant on 11.12.2015 for signing was in complete contravention to the terms agreed in the allotment letter dated 04.06.2015. It was completely blank with respect to the clause on the assured return and the complainant made changes according to allotment letter dated 04.06.2015. The complainant then sent back the builder buyer agreement with the corrections according to terms agreed in the allotment letter, however the builder buyer agreement was not sent back by the respondent with the incorporated/suggested changes. On 15.12.2015 the complainant through email brought to the notice of the respondent the discrepancies in the proposed builder buyer agreement. Furthermore, the

complainant highlighted the fact that assured return promised in the builder buyer agreement was kept blank. Furthermore, the Clause 17 of the builder buyer agreement added the words:

"Such policy of the developer may change from time to time where the Developer may withdraw the assured return scheme."

e) As the language of the said BBA was contrary to agreed terms in the allotment letter dated 04.06.2015, the complainant categorically requested Mr. Vinay from the sales team of the respondent to amend the builder buyer agreement and after assurance filled the blank spaces according to the allotment letter dated 04.06.2015, so that it can be executed at the earliest. Further, on 19.01.2016 and 22.02.2016 the complainant received two letters to execute the unchanged builder buyer agreement which was partially blank and contrary to the terms agreed in the allotment letter dated 04.06.2015 with respect the said unit. The respondent vide letters dated 19.01.2016 and 22.02.2016 even threatened the complainant with termination of the booking and refund the amount paid by the complainant after deduction of earnest money, brokerage and other non-refundable charges in case the incomplete and arbitrary builder buyer agreement was not signed and returned within 30 days. The complainant again wrote to Mr. Vinay from the sales team of the respondent on 14.06.2016 highlighting that the amended builder buyer agreement as per the terms of the allotment letter dated 04.06.2015 has been duly signed and sent. Furthermore, the complainant highlighted that relationship manager constantly called inquiring about the reason for amendment of the builder buyer agreement, however there was no response from the respondent. The conduct of the respondent clearly shows a lack of will to execute the builder buyer agreement as per the agreed terms of the allotment letter with the complainant.

- f) Vide emails dated 31.10.2018 and 30.11.2018 the respondent highlighted the difficulty in continuing with the assured returns promised and cessation of selling properties with assured returns. Further, the respondent promised that the said unit would be leased by June 2019 and once it is done, all the accounts would be reconciled, all dues would be settled. It is pertinent to mention that the respondent stopped the payment of assured returns to the complainant in October 2018, in contravention of allotment letter dated 04.06.2015.
- g) Vide emails dated 14.06.2019 and 08.07.2019, the respondent communicated about reconciliation of the accounts. Further, respondent also sent an addendum agreement which completely omitted the assured return clause and added collection charges of 5% per month on the rentals, contrary to the terms agreed in the allotment letter dated 04.06.2015. Therefore, the complainant did not sign the agreement which altered the original agreed terms.
- h) The respondent vide letter dated 11.12.2019 sent a new builder buyer agreement for the said unit. It is pertinent to mention that the new builder buyer agreement failed to mention the agreed terms of the allotment letter dated 04.06.2015. Further, the complainant vide e-mail dated 05.03.2020 highlighted the absence of agreed terms in the builder buyer agreement with respect to allotment letter dated 04.06.2015. The complainant highlights the specific terms as follows:

Sr. No.	Clause in BBA
1.	1.4 "The Allottee agrees that escalation in the construction cost resulting from increase in the cost of construction inputs like steel, cement, fuel and other building materials and labor shall be borne by the Allottee. It is mutually agreed and binding between the Allottee and Promotr that 60% of sale price shall be treated as construction cost for the purpose of computation and escalation. Escalation shall commence from date of issuance of allotment letter by the Promoter to the Allottee....."
2.	1.5 "The Allottee(s) shall make the payment as per the payment plan set out in Schedule D (Payment Plan)."

No payment schedule given.	
3.	<p>"5. TIME IS ESSENCE <i>The Promoter shall abide by the time schedule for completing the project as disclosed at the time of registration of the project with the Authority and towards handing over the Commercial space/unit to the Allottee(s) and common area to the association of allottees or the competent authority, or as the case may be, as provided under Rule No. 2(1) of the Rules."</i></p>
4.	<p>"7.3 Failure of Allottee to take possession of the Commercial Space/Unit-.....Allottee shall be liable to pay to the Promoter holding charges @Rs.____per sq. ft. of the Carpet Area per month....." Holding charges are kept blank.</p>
5.	<p>12. CONVEYANCE OF THE SAID COMMERCIAL SPACE/UNIT <i>The Promoter on receipt of total price and applicable taxes of the Commercial Space/Unit and GST as mentioned under Schedule C for Commercial space/unit and Rs. 75,000/- as administrative charges and other ancillary charges....</i> The arbitrary ancillary charges levied by the respondent are not acceptable to the complainant.</p>
6.	<p>"18.2 The lease document will stipulate payment of rent by the lessee to the promoter or its nominated subsidiary, who in turn will remit the proportionate rent to the allottee, after deducting the expenses/costs of managing the leasing assistance and collection of rentals which presently work out to be at the rate of 2.5% of the rental value of such commercial space/unit....." The rent collection charges of 2.5% are not mentioned in the allotment letter, are also arbitrarily imposed on the complainant, hence not acceptable.</p>
7.	<p>"24. BINDING EFFECT <i>By just forwardin this agreement to the Allottee by the Promoter, does not create a binding obligation.....Total price in case the construction raised is over 50% of the Building."</i> The clause is arbitrary, vague and thus, not acceptable to the complainant.</p>
8.	<p>"35. SAVINGS <i>Any application letter, allotment letter, agreement or any other document signed by the Allottee, in respect of the Unit as the case may be, prior to execution of this agreement for sale for such Commercial Space/unit, plot or building, as the case may be shall not be construed to limit the rights and interests of the Allottee under the agreement for sale or under the Act or the rules and regulations, made thereunder."</i> This effectively nullifies the allotment letter dated 04.06.2015. Hence, not acceptable to the complainant.</p>

- i) The complainant mentioned his willingness to sign the new builder buyer agreement of the said unit which should be as per the terms agreed in the allotment letter dated 04.06.2015.

- j) Further, the complainant vide email and letter dated 28.10.2021 apprised the respondent of continuing payments of assured return promised for pending 36 months and refund the amount due to achieving less rental. As of May 2022, the amount of assured return pending from the respondent amounts to Rs.45,28,260/-.
- k) The respondent had stopped the payment of the assured return of Rs.1,02,915/- per month from October 2018. Till date no assured return has been paid by the respondent as agreed in the allotment letter dated 04.06.2015. Therefore, till May 2022, a principle of Rs.45,28,260/- has been accrued. At 18 percent simple interest the amount of total interest on the principal amount is Rs.15,28,561/-. Therefore, a total outstanding amount of Rs.60,56,821/- is pending from the respondent.

C. Relief sought by the complainants:

4. The complainant has sought the following relief(s):
- i. Direct the respondent to pay a delay interest @18% per annum for not completing and delivering the said unit within the time frame agreed in allotment letter dated 04.06.2015 till the date of formal handing over of possession.
 - ii. Direct the respondent to pay assured return for the pending 44 months @137.22 pr sq. ft. for the said unit which amounts to a total of Rs.45,28,260/- and handover possession of the property. Direct the respondent to pay assured rental @130/- per sq. ft. for the said unit upto 3 years as per the terms of allotment letter or till the time property is put on lease whichever is earlier.
 - iii. Direct the respondent to pay penal interest on assured return due till date i.e., Rs.15,28,561/-.
 - iv. Direct the respondent to execute builder buyer agreement and conveyance deed as per the terms agreed in the allotment letter dated 04.06.2015.
 - v. Direct the respondent to handover possession of the said complete in all aspects.
 - vi. Direct the respondent not to levy holding charges on the complainant.

- vii. Impose penalty on the respondent for contravention of Section 11(4)(a) of the RERA Act, 2016.
5. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to Section 11(4) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent.

6. The respondent contested the complaint on the following grounds:
 - a) That the complainant has filed the present complaint for assured return and this Authority has no jurisdiction to entertain the present complaint as in the cases of assured return, this Hon'ble Court has no jurisdiction, as has been decided by this Authority in complaint case no. 175 of 2018, titled as Sh. Bhram Singh Vs. Venetian LDF Projects LLP.
 - b) 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 relief of specific performance flows from the Specific Relief Act, 1963 and no part of the Real Estate (Regulation and Development) Act, 2016 clothes this Hon'ble Authority to exercise powers under Specific Relief Act, 1963. Therefore, this Hon'ble Authority not being a civil court could not assert to itself the jurisdiction to grant specific performance of assured returns which is a relief under the Specific Performance Act, 1963.
 - c) That the Complainant had booked a commercial shop space on 30.04.2015 and the respondent allotted a unit no. 229, block 3, admeasuring 750 sq. ft. in the project "One on One" situated at Sector- 16, Vatika One on One, Gurugram being developed by the respondent vide allotment letter dated 04.06.2015.
 - d) That the allotment letter dated 04.06.2015 stipulated some terms and conditions with regard to the said commercial space. That there was a further stipulation in the allotment letter that the timely completion of

- the project is subject to timely payment by the allottee and delay in construction can occur for reasons beyond the control of the respondent.
- e) That the construction of the said commercial space was proposed to be completed by March 2017 by the respondent, within 36 months from the date of receipt of the approval of building plans or the date of receipt of the approval of the Ministry of Environment and Forests, Government of India for the project or execution of builder buyer agreement, whichever is later.
- f) That the terms and conditions set out in the allotment letter/agreement were accepted by the complainant and he agreed to comply with the same. No grievance had been raised qua the agreed terms and conditions of the agreement nor can it be raised at this stage as parties have already acted upon the agreement.
- g) That the complainant learned about the assured return scheme and was willing and ready to pay the entire sale consideration to reap benefits of assured return upon his own judgment and investigation. Further, the complainant paid the part sale consideration amount of Rs.51,33,546/- towards the total agreed sale consideration.
- h) That the complainant herein was very well aware of the fact that the commercial unit in question was subject to be leased out post its completion and same was mentioned and agreed by the complainant in the allotment letter.
- i) That the said application form clearly stipulated provisions for lease and admittedly contained a lease clause. That the said allotment letter does not have a possession clause for physical possession. That it can be concluded herein that the complainant is not a consumer or allottee. The relationship between the complainant and the respondent is not that of

- a builder-buyer. The complainant is an investor and seeks speculative gains.
- j) That various reminders were sent to the complainant including letters dated 19.01.2016, 22.02.2016 and 20.02.2020. Thus, the complainant has defaulted in his contractual obligations and is merely trying to wriggle out of the contract.
- k) That the respondent herein had been paying assured return of Rs.1,02,915/- every month to complainant in lieu of advance payments received in respect to a unit booked in the project without any delay. Upon coming into force of the BUDS Act, any such unregulated deposits which are not approved has become illegal and continuing the same shall expose the respondent to strict penal provisions of the Act. Therefore, enactment of the BUDS Act forced the respondent to discontinue the payment of assured returns.
- l) that the Hon'ble High Court of Punjab & Haryana in CWP No. 26740 of 2022 titled as "Vatika Limited Vs. Union of India & Ors.", took cognizance in respect of Banning of Unregulated Deposits Schemes Act, 2019 and restrained the Union of India and State of Haryana from taking coercive steps in criminal cases registered against Company for seeking recovery against deposits till the next date of hearing.
- m) That the complainant has already received an amount of Rs.42,19,515/- as assured return as agreed by the respondent under the said agreement up to September 2018.
- n) Furthermore, the project was hindered due to force majeure reasons beyond the control of the respondent such as direction of Hon'ble National Green Tribunal, Environment Pollution Control Authority, Haryana State Pollution Control Board, Commissioner Municipal Corporation

Gurugram, Hon'ble Supreme Court, Covid 19 pandemic, etc. which caused a delay in completion of the project.

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

E. Jurisdiction of the authority:

8. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

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

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

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

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

F. Findings on the objections raised by the respondent:

F.1 Objection regarding maintainability of complaint on account of complainant being an investor.

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

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

13. In view of the above-mentioned definition of "allottee" as well as all the terms and conditions of the allotment letter, it is crystal clear that the complainant is an allottee as the subject unit was allotted to him by the

promoter. The concept of investor is not defined or referred to in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". Thus, the contention of the promoter that the allottee being investor is not entitled to protection of this Act also stands rejected.

F.II Objections regarding force Majeure.

14. The respondent-promoter has raised the contention that the construction of the unit of the complainant has been delayed due to force majeure circumstances such as orders passed by the Hon'ble NGT, Environment Protection Control Authority, and Hon'ble Supreme Court. The pleas of the respondent advanced in this regard are devoid of merit. The orders passed were for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. Furthermore, the respondent should have foreseen such situations. Thus, the promoter respondent cannot be given any leniency on the basis of aforesaid reasons and it is a well-settled principle that a person cannot take benefit of his own wrong. Furthermore, the respondent seeks an extension in the timeline for due date of possession in view of the Covid 19 pandemic. On perusal of records brought before this Authority, it is of the view that the allotment of the unit was done on 04.06.2015 though no specific timeline was specified as to the due date of handing over of possession, therefore, in view of "**Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 -SC); MANU/SC/0253/2018**" wherein the Hon'ble Apex Court observed that:

"a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a

time period of 3 years would have been reasonable for completion of the contract."

15. The due date of possession had to be calculated from the date of allotment, therefore the due date becomes 04.06.2018. Therefore, the plea advanced in view of Covid 19 pandemic has no merit since the due date of possession for the complainant's unit was much prior to the occurrence of the pandemic.

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

16. The respondent has raised an objection that the Hon'ble High Court of Punjab & Haryana in CWP No. 26740 of 2022 titled as "Vatika Limited Vs. Union of India & Ors.", took the cognizance in respect of Banning of Unregulated Deposits Schemes Act, 2019 and restrained the Union of India and the State of Haryana from taking coercive steps in criminal cases registered against the Company for seeking recovery against deposits till the next date of hearing.
17. With respect to the aforesaid contention, the authority place reliance on order dated 22.11.2023 in CWP No. 26740 of 2022 (supra), whereby the Hon'ble Punjab and Haryana High Court has stated that "*...there is no stay on adjudication on the pending civil appeals/petitions before the Real Estate Regulatory Authority as also against the investigating agencies and they are at liberty to proceed further in the ongoing matters that are pending with them. There is no scope for any further clarification.*" Thus, in view of the above, the authority has decided to proceed further with the present matter.

G. Findings on relief sought by the complainants.

- G.I Direct the respondent to pay a delay interest @18% per annum for not completing and delivering the said unit within the time frame agreed in allotment letter dated 04.06.2015 till the date of formal handing over of possession.**
- G.II Direct the respondent to pay assured return for the pending 44 months @137.22 pr sq. ft. for the said unit which amounts to a total of Rs.45,28,260/- and handover possession of the property. Direct the**

respondent to pay assured rental @130/- per sq. ft. for the said unit upto 3 years as per the terms of allotment letter or till the time property is put on lease whichever is earlier.

G.III Direct the respondent to pay penal interest on assured return due till date i.e., Rs.15,28,561/-.

G.IV Direct the respondent to execute builder buyer agreement and conveyance deed as per the terms agreed in the allotment letter dated 04.06.2015.

G.V Direct the respondent to handover possession of the said complete in all aspects.

18. The common issue with regard to assured return, delay possession charges, execution of builder buyer agreement and conveyance deed is involved in the aforesaid complaint.

I. Assured returns

19. The complainant is seeking unpaid assured returns on monthly basis as per allotment letter dated 04.06.2015 at the rates mentioned therein. It is pleaded that the respondent has not complied with the terms and conditions of the said addendum to builder buyer agreement. Though for some time, the amount of assured returns was paid but later on, the respondent refused to pay the same by taking a plea that the same is not payable in view of enactment of the Banning of Unregulated Deposit Schemes Act, 2019 (hereinafter referred to as the Act of 2019), citing earlier decision of the authority (*Bhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd., complaint no 141 of 2018*) whereby relief of assured return was declined by the authority. The authority has rejected the aforesaid objections raised by the respondent in *CR/8001/2022 titled as Gaurav Kaushik and anr. Vs. Vatika Ltd.* wherein the authority while reiterating the principle of prospective ruling, has held that the authority can take different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land and it was held that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum, memorandum of understanding or terms and conditions of the

allotment of a unit), then the builder is liable to pay that amount as agreed upon and the Act of 2019 does not create a bar for payment of assured returns even after coming into operation as the payments made in this regard are protected as per Section 2(4)(I)(iii) of the Act of 2019. Thus, the plea advanced by the respondent is not sustainable in view of the aforesaid reasoning and case cited above.

20. 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.
21. 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.
22. 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 latter from the former against the immovable property to be transferred to the allottee later. In view of the

above, the respondent is liable to pay assured return to the complainants-allottees in terms of the allotment letter dated 04.06.2015.

II. Delay possession charges.

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

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —

*.....
Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

24. The subject unit was allotted to the complainant vide allotment letter dated 04.06.2015. However, builder buyer agreement was not executed between the parties. The due date of possession had to be calculated from the date of allotment in view of "***Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018.***" Accordingly, the due date of possession comes out to be 04.06.2018. As per the allotment letter, the respondent developer was under an obligation to further lease out the unit of the complainant post completion.

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

"Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public."

26. The legislature in its wisdom in the subordinate legislation under the Rule 15 of the Rules, *ibid* has determined the prescribed rate of interest. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 03.07.2024 is 8.95%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.95%.

27. 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—

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 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;"

28. On consideration of documents available on record and submissions made by the complainant and the respondent, the authority is satisfied that the respondent is in contravention of the provisions of the Act. The possession of the subject unit was to be completed within a stipulated time i.e., by 04.06.2018.

29. However now, the proposition before it is as to whether the allottee who is getting/entitled for assured return even after expiry of due date of possession, can claim both the assured return as well as delayed possession charges?
30. To answer the above proposition, it is worthwhile to consider that the assured return is payable to the allottees on account of provisions in the BBA or an addendum to the BBA. The assured return in this case is payable as per "Addendum to builder buyer agreement". The rate at which assured return has been committed by the promoter is Rs. 137.22/- per sq. ft. of the super area per month till the completion of the building which is more than reasonable in the present circumstances. If we compare this assured return with delayed possession charges payable under proviso to Section 18(1) of the Act, 2016, the assured return is much better i.e., assured return in this case is payable at Rs.1,02,915/- per month till completion of building whereas the delayed possession charges are payable approximately Rs. 46,415.81/- per month. By way of assured return, the promoter has assured the allottee that they would be entitled for this specific amount till completion of construction of the said building. Moreover, the interest of the allottee is protected even after the completion of the building as the assured returns are payable even after completion of the building. The purpose of delayed possession charges after due date of possession is served on payment of assured return after due date of possession as the same is to safeguard the interest of the allottee as their money is continued to be used by the promoter even after the promised due date and in return, they are to be paid either the assured return or delayed possession charges whichever is higher.
31. Accordingly, the authority decides that in cases where assured return is reasonable and comparable with the delayed possession charges under

Section 18 and assured return is payable even after due date of possession till the date of completion of the project, then the allottees shall be entitled to assured return or delayed possession charges, whichever is higher without prejudice to any other remedy including compensation.

32. On consideration of the documents available on the record and submissions made by the parties, the complainants have sought the amount of unpaid amount of assured return as per the terms of allotment letter. As per the allotment letter dated 04.06.2015, the promoter had agreed to pay to the complainant allottee Rs.137.22/- per sq. ft. on monthly basis till completion of the building. The said clause further provides that it is the obligation of the respondent promoter to lease the premises. It is matter of record that the assured return was paid by the respondent-promoter till September 2018 at the rate of Rs. 137.22/- per sq. ft., but later on after September 2018, the respondent refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019. But that Act of 2019 does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per Section 2(4)(iii) of the above-mentioned Act.
33. In the present complaint, the Authority finds ambiguity as to whether the OC/CC for the block in which unit of complainant is situated has been received by the promoter or not. Consequently, during the last hearing dated 29.05.2024, the Authority directed the respondent to furnish a copy of occupation certificate and a copy of lease deed, in case, the unit is further leased out to any third party. However, despite given the sufficient time to the respondent, nothing has been placed on record till date by the respondent.
34. Therefore, the authority is of the view that the construction cannot be deemed to complete until the OC/CC is obtained from the concerned

authority by the respondent promoter for the said project. Thus, considering the facts of the present case and documents placed on record by both the parties, the respondent is directed to pay assured return at the agreed rate i.e., @ Rs.137.22/- per sq. ft. per month from the date the payment of assured return has not been paid i.e., October 2018 till the date of completion of the building and thereafter Rs. 130/- per sq. ft. per month till first 36 months after completion of the project or till the date said unit is put on lease, whichever is earlier. Further, in case the unit in question is leased out by the respondent at the rate lower/higher than as is fixed by the respondent, the respondent is obligated to settle the same in terms of the allotment letter dated 04.06.2015.

35. The respondent is directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of this order after adjustment of outstanding dues, if any, from the complainant and failing which that amount would be payable with interest @ 8.95% p.a. till the date of actual realization.

III. Conveyance Deed

36. Section 17 (1) of the Act deals with duties of promoter to get the conveyance deed executed and the same is reproduced below:

"17. Transfer of title.-

(1). The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws:

Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be

carried out by the promoter within three months from date of issue of occupancy certificate."

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

IV. Execution of Builder Buyer Agreement

38. A project by the name of One on One situated in Sector 16, Gurugram was being developed by the respondent. The complainant came to know about the same and booked a unit in it for Rs.61,87,500/- against which he paid an amount of Rs. 51,33,546/-. The complainant has approached the Authority seeking relief w.r.t. execution of buyer's agreement inter se parties. The Authority observes that the unit was booked under assured return scheme and the complainant has already paid more than 10% of the basic sale consideration.

39. However, despite receipt of almost entire consideration amount against the booked unit except stamp duty and other charges payable to the government and even after receipt of RERA registration back in 2017, the respondent-promoter has failed to enter into a written agreement for sale with respect to the same and has failed to get the plot registered in name of the complainant till date. Thus, in view of Section 11(4)(a) read with Section 13 of the Act of 2016, the respondent-promoter is directed to enter into a registered agreement for sale with the

complainant w.r.t. the unit in question within a period of one month and handover possession of the allotted unit to him in the said project after obtaining CC/part CC from the competent authority in terms of the allotment letter dated 04.06.2015.

G.VI Direct the respondent not to levy holding charges on the complainant.

40. In the case of **Varun Gupta vs Emaar MGF Land Limited, Complaint Case no. 4031 of 2019 decided on 12.08.2021**, the Hon'ble Authority had already decided that the respondent is not entitled to claim holding charges from the complainants at any point of time even after being part of the builder buyer agreement as per law settled by the Hon'ble Supreme Court in Civil Appeal nos. 3864-3899/2020 decided on 14.12.2020. The relevant part of same is reiterated as under-

"134. As far as holding charges are concerned, the developer having received the sale consideration has nothing to lose by holding possession of the allotted flat except that it would be required to maintain the apartment. Therefore, the holding charges will not be payable to the developer. Even in a case where the possession has been delayed on account of the allottee having not paid the entire sale consideration, the developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed."

Therefore, the respondent is directed not to levy any holding charges upon the respondent.

H. Directions issued by the Authority:

41. Hence, the Authority hereby passes this order and issues the following directions under Section 37 of the Act to ensure compliance with obligations cast upon the promoter as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- I. The respondent is directed pay assured return at the agreed rate i.e., @ **Rs.137.22/- per sq. ft. per month from the date the payment of assured return has not been paid i.e., October 2018 till the**

the date of completion of the building and thereafter Rs. 130/- per sq. ft. per month till first 36 months after completion of the project or till the date said unit is put on lease, whichever is earlier. Further, in case the unit in question is leased out by the respondent at the rate lower/higher than as is fixed by the respondent, the respondent is obligated to settle the same in terms of the allotment letter dated 04.06.2015.

- II. The respondent is directed to pay the outstanding accrued assured return amount till date along with interest rate of 8.95% per annum within 90 days from the date of this order after adjustment of outstanding dues, if any, from the complainant and failing which that amount would be payable with interest @ 8.95% p.a. till the date of actual realization.
 - III. The respondent is directed to handover possession of the unit on obtaining the occupation certificate to the complainant, as per the allotment letter dated 04.06.2015.
 - IV. The respondent-promoter is directed to enter into a registered agreement for sale with the complainant with respect to the unit in question within a period of one month and handover possession of the allotted unit to him in the said project after obtaining CC/part CC from the competent authority.
 - V. The respondent shall execute the conveyance deed of the allotted unit within the 3 months from the final offer of possession after the receipt of the OC from the concerned authority and upon payment of requisite stamp duty as per norms of the state government.
 - VI. The respondent shall not charge holding charges and anything from the complainant which is not the part of the allotment letter.
42. Complaint stands disposed of.

43. File be consigned to the Registry.

Dated: 03.07.2024


Ashok Sangwan
(Member)
Haryana Real Estate
Regulatory Authority,
Gurugram



HARERA
GURUGRAM