BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.: 2556 of 2023
Date of complaint: 21.06.2023
Order reserved on: 08.02.2024

1.Harish Capoor
2.Kamal Capoor
Both R/o:- 11, Silver Oaks Avenue, DLF Phase-1, Gurugram — **Complainants**

Versus

Vatika Limited.
Regd. Office at:- Unit no. A-002, INXT city Centre, Ground floor, Vatika India Next, Sector 83, Gurugram — **Respondent**

CORAM:
Shri Vijay Kumar Goyal — **Member**

APPEARANCE:
Shri Varun Kathuria (Advocate) — Complainants
Ms. Ankur Berry (Advocate) — Respondent

ORDER

1. This complaint has been filed by the complainant/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 under the provision of the Act or the Rules and regulations made thereunder or to the allottee as per the agreement for sale executed *inter se*.

A. Project and unit related details.

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

S.No.	Particulars	Details
1.	Name of the project	"Vatika INXT City Centre, Sector 85, Gurugram
2.	Type of project	Commercial
3.	DTCP license no.	122 of 2008 dated 14.06.2008
4.	Date of execution of buyer's agreement	27.04.2011 (page 13 of complaint)
5.	Reallocation letter in name of complainants	27.07.2011 (page 33 of complaint)
6.	Unit no.	288, 2nd floor, Tower A (as per BBA page 16 of complaint) 622, block-F (new unit) (page 49 of reply)
7.	Due date of handing over possession as per BBA dated 27.04.2011	27.04.2014 (as per clause 2 of BBA dated 27.04.2011, the developer will complete the construction of the said complex within three (3) years from date of execution of this agreement)
8.	Assured return/ committed return as per Annexure A of BBA dated 27.04.2011	***Annexure A*** ***Addendum to the agreement dated 27.04.2011*** *The unit has been allotted to you with an assured monthly return of Rs. 65/- per sq.ft. However, during the course of construction till such time the building in which your unit is situated is ready for possession you will be paid an additional return of Rs. 6.50/- per sq.ft. Therefore, your return payable to you shall be as follows:* *This addendum forms an integral part of*

		builder buyer Agreement dated 27.04.2011 *A. Till Completion of the building: Rs. 71.50/- per sq. ft.* *B. After Completion of the building: Rs. 65/- per sq. ft.* *You would be paid an assured return w.e.f. 27.04.2011 on a monthly basis before the 15th of each calendar month.* *The obligation of the developer shall be to lease the premises of which your flat is part @Rs. 65/- per sq.ft. In the eventuality the achieved return being higher or lower than Rs. 65/- per sq.ft. the following would be payable.* *1. If the rental is less then Rs. 65/- per sq.ft. then you shall be returned @Rs. 120/- per sq.ft. (Rupees One Hundred Twenty only) for every Rs. 1/- by which achieved rental is less then Rs. 65/- per sq.ft.* *2. If the achieved rental is higher than R. 65/- per sq.ft. then 50% of the increased rental shall accrue to you free of any additional sale consideration. However, you will be requested to pay additional sale consideration @Rs. 120/- per sq.ft. (Rupees One Hundred Twenty Only) for every rupee of additional rental achieved in the case of balance 50% of increased rentals.* (Confirmed by the respondent)
9.	Due date of possession	27.04.2014 (Calculated from the date of execution of buyer's agreement)
10.	Total sale consideration	Rs. 37,50,000/- (As per BBA page 16 of complaint)
11.	Paid up amount	Rs. 37,50,000/- (As per BBA page 16 of complaint)
12.	Assured return paid by the	Rs.50,86,963/- till April 2019

	respondent	(as per the creditors ledger dated 22.11.2023 page 33-38 of reply)
13.	Offer of possession	Not offered
14.	Occupation certificate/completion certificate	Not obtained

B. Facts of the complaint

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

a. That the respondent, through false representations, induced the complainants to purchase a 750 sq. ft. unit in its project "Vatika Trade Centre," portraying it as a state-of-the-art development with modern amenities. Relying on these assurances, the complainants purchased the unit in resale from Mr. Jolly Narang. The builder buyer agreement was executed between the complainants and respondent on 27.04.2011, the complainants were allotted unit no. 288, 2nd floor, tower A admeasuring 750 sq. ft. super area for a total sale consideration of Rs.37,50,000/-, and the respondent was obligated to pay monthly returns as per the agreement.

b. That as per Annexure – A of the agreement executed between the parties, the respondent was liable to pay monthly returns calculated @ Rs.71.5/- per sq. ft. per month till the offer of possession and thereafter @ Rs.65/- per sq. ft. per month for up to 3 years post offer of possession or till the leasing of the unit, whichever is earlier. Clause 32 of the BBA also contained the terms regarding the leasing of the unit of the complainants by the respondent and further stipulated amounts to be paid by the parties if the unit was leased at an amount lesser or greater than Rs.65/- per sq. ft. per month. The unit was assigned in the name of the complainants on 03.05.2011.

c. Thereafter, the respondent, unilaterally without the consent or approval of the complainants changed the project and the unit of the complainants to Unit no. 622, 3rd floor, block F "VATIKA INXT CITY CENTRE" Sector-83, Gurugram vide letter dated 27.07.2011 on a different floor from the unit originally booked by the complainants. The complainants were asked to sign an addendum to give their consent to the relocation of the unit. The builder buyer agreement was a pre-printed booklet drafted by the respondent containing unilateral terms and conditions favoring the respondent and prejudicing the complainants and the complainants were never given the option of changing the same.

d. That the respondent vide letter dated 27.03.2018 falsely claimed the completion of construction of the tower where the unit of the complainants is located in order to reduce their liability to pay the monthly returns to Rs.65/- per sq. ft. per month. However, the respondent never shared the occupation certificate of any proof of the same issued by the competent authority. The subject project/tower has not received any occupation certificate or completion certificate till date and the respondent has not even applied for the same till date and therefore, the project or the construction thereof cannot be considered to be complete.

e. Further, the respondent with mala fide intentions and ulterior motives, without assigning any reason stopped the payment of the monthly returns to the complainants from April, 2019 onwards. The complainants sent repeated requests and repeated reminders to the respondent to pay the amount and even sent a legal notice to the respondents but the respondents did not paid the assured returns to the complainant.

f. Subsequently, the respondent sent an undated addendum to the complainants in June 2019, asking them to execute it and assuring the

payment of returns till July 2019. However, the complainants refused to execute it as it meant forfeiting their claims of assured returns post July 2019. The respondent also transferred an amount of Rs.22,547/- each into the accounts of the complainants in February 2021 without providing any explanation.

g. That the complainants learned that the respondent has duped several other buyers by refusing to pay the monthly returns, even though the project has not received the completion/occupation certificate from the competent authority and the respondent denies for the payment of the same on different grounds including but not limited to the notification of the BUDS Act.

h. That the tower where the unit of the complainants is located has not received an occupation certificate from the competent authority till date and neither the project nor the construction of the tower can be considered as complete.

i. That the respondent has nor offered the possession of the subject unit and has further stopped responding to the communications of the complainants and has also restricted entry into its office for the complainants and other such buyers. The conduct of the respondent is illegal and arbitrary and the respondent is guilty of deficiency of services and of unfair and monopolistic trade practices. The respondent is clearly in breach of its contractual obligations and of causing financial loss to the complainants and the conduct of the respondent has caused and is continuing to cause a great amount of financial loss stress, grief and harassment to the complainants and their family members.

C. Relief sought by the complainants: -

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

   i. Direct respondent to pay the assured monthly returns to the complainants from May, 2019, onwards to be calculated at Rs.71.5/- per sq. ft. per month as per the terms of the BBA as the project of the respondent or the construction thereof is not complete till date.
   ii. Declare the status of the construction of the tower where the unit of the complainants is located as "incomplete" as the Respondent has neither received nor applied for the occupation certificate of the project till date;
   iii. Direct the respondent to continue paying the investment returns / monthly returns to the complainants as per the terms of the Builder buyer's agreement.
   iv. Direct the respondent to pay interest at the prescribed rate on the unpaid monthly returns/investment returns to the complainants, to be calculated from the date the monthly returns became due till the date of realization;
   v. The respondent be restrained from demanding any amounts from the complainants at the time of offer of possession which do not form a part of the agreements executed between the parties.
   vi. To award costs of the litigation in favour of the complainants and against the respondent.

D. Reply by the respondent

5. The respondent contested the complaint on the following grounds: -

   a. That the respondent company is registered under the Companies Act, 1956, with its office at unit no. A-002, INXT City Centre ground floor, block A, Sector 83, Vatika India Next, Gurugram – 122012, Haryana, India. The respondent has been engaged in the business of Real Estate Sector for the past two decades.

   b. That the complainants got no locus standi or cause of action to file the complaint. The complaint is based on an erroneous interpretation of the Act and an incorrect understanding of the terms and conditions of the builder buyers agreement dated 27.04.2011.

c. That the present complaint is not maintainable under the law, upon the enactment of the Banning of Unregulated Deposit Schemes Act, 2019 (BUDS Act). The Assured Return/Committed Returns on deposit schemes have been banned under the BUDS Act, making such schemes illegal. Therefore, the relief sought by the complainants falls outside the jurisdiction of the Authority.

d. That Section 2(4) defines the term "Deposit" to include an amount of money received by way of an advance or loan or in any form by any deposit taker and the explanation to the Section 2(4) further expands the definition of the "Deposit" in respect of company, to have same meaning as defined within the Companies Act, 2013. The companies Act, 2013 in Section 2(31) defines "Deposit" as "deposit includes any receipt of money 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 Indi". The term prescribed so as to further clarify and connect the same to be read with rule 2(1)(c) of the Companies(Acceptance of Deposits) Rules, 2014. Further, the explanation for the clause (s) of Section 2(1) states that any amount:- received by the company, whether in the form of any instalments or otherwise, form a person with promise or offer to give returns, in cash or in kind, on completion of the period specified in the promise or offer, or earlier, accounted for in any manner whatsoever, shall be treated as deposit. Thus, the simultaneous reading of the BUDS Act read with Companies Act, 2013 and Companies(Acceptance of Deposits) Rules, 2014, resulted in making the assured return/committed return and similar schemes illegal.

e. That Section 2(17) of the Banning of Unregulated Deposit Schemes Act, 2019 defines the "Unregulated Deposit Scheme "as 'means a Scheme or on

arrangement under which deposits are accepted or solicited by any deposit taker by way of business and which is not a Regulated Deposit Scheme, as specified under column (3) of the First Schedule." Thus the 'Assured Return Scheme' proposed and floated by the respondent has become infructuous due to operation of law thus the relief prayed for the present complaint cannot survive due to operation of law. As a matter of fact, the respondent duly paid Rs.50,86,981/, till September, 2018*(sic i.e. April 2019)*. The complainants have not come with clean hands before the Authority and have suppressed these material facts.

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

g. That further 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. That in the said

matter the Hon'ble High Court has already issued notice and the matter is to be re-notified on 22.11.2023. That once the Hon'ble High Court has taken cognizance and State of Haryana has already notified the appointment of competent authority under the BUDS Act, thus it flows that till the question of law i.e., whether such deposits are covered under the BUDS Act or not, and whether this Hon'ble Authority has the jurisdiction to adjudicate upon the matters coming within the purview of the special act namely, BUDS Act, 2019, the present complaint ought not be adjudicated

h. That further in view of the pendency of the CWP 26740 of 2022 before the Hon'ble High Court of Punjab & Haryana, the Hon'ble Haryana Real Estate Appellate Tribunal, in Appeal No. 647 of 2021 while hearing the issue of assured return, considered the factum of pendency of the writ, wherein the question regarding jurisdiction of any other authority except the competent authority under Section 7 of the Banning of Unregulated Deposits Schemes Act, 2019. That the Hon'ble Haryana Real Estate Appellate Tribunal after consideration of the pendency of the pertinent question regarding its own jurisdiction in assured return matters, adjourned the matter simpliciter understanding that any order violative of the upcoming judgment of the Hon'ble High Court would be bad in law. Thus the Hon'ble Authority should consider the act of Hon'ble Haryana Real Estate Appellate Tribunal and keep the present matter pending till final adjudication of CWP 26740 of 2022.

i. That the commercial unit of the complainants was not meant for physical possession as the said unit is only meant for leasing the said commercial space for earning rental income. Furthermore, as per the agreement, the said commercial space shall be deemed to be legally possessed by the

complainants. Hence, the commercial space booked by the complainant's is not meant for physical possession and rather is for commercial gain only.

j. That the complainants have approached the Authority with unclean hands, and filed the complaint with the intention of harassment and unjust enrichment. The grievance alleged by the complainants necessitates detailed deliberation and cross-examination, indicating that only the Civil Court has the jurisdiction to deal with cases requiring such extensive evidence for proper and fair adjudication.

k. That the complainants entered into buyer's agreement dated 27.04.2011 with respondent owing to the name, good will and reputation of the respondent. The respondent duly paid the assured return to the complainants till March, 2019*(sic i.e. April 2019)*. The buyer's agreement only intended to pay assured returns to the allottees as per agreed rate till construction and thereafter the rate was revised @Rs.65/- per sq. ft. w.e.f March 2018 as the construction was completed and the respondent issued a letter dated 27.03.2018. Further due to external circumstances which were not in control of the respondent, construction got deferred. Even though the respondent suffered from setback due to external circumstances, yet the respondent managed to complete the construction and duly issued letter of completion on 27.03.2018.

l. That the complainants' complaint is founded on a misinterpretation of the objectives behind the enactment of the RERA Act, 2016. The legislative intent behind the RERA Act, 2016 was to acknowledge the pivotal role of the Real Estate Sector in meeting housing and infrastructure needs, and to address the absence of a regulatory body to standardize and professionalize the sector while addressing concerns of both buyers and promoters. The Act aims to facilitate a healthy and orderly growth of the industry by balancing

the interests of consumers and promoters, as reflected in the delineation of responsibilities in Sections 11 to 18 for promoters/developers and the rights and duties of allottees in Section 19. Therefore, the RERA Act, 2016 was not designed to favor allottees over developers, but to ensure equitable treatment for both parties and prevent either from suffering due to the actions or inactions of the other.

m. That the complainants' pursuit of pending assured returns is seen as an attempt to capitalize on the real estate sector's slowdown, aimed at harassing the respondent and exerting undue pressure. The complaint lacks a valid basis, as no cause of action has arisen in favour of them against the respondent. The delay in seeking recovery of dues, spanning five years, places the onus on the complainants to demonstrate receipt of assured returns and establish the emergence of a cause of action. The complaint is without merit and should be dismissed.

n. Furthermore, the delay in pursuing the relief, coupled with the characterization of the case as a web of falsehoods and afterthought. The complainants' contentions are fictitious, baseless and intend to mislead the Authority. The present complaint is an utter abuse of the process of law, and hence deserves to be dismissed.

6. All other averments made in the complaint were denied in toto.

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 on the basis of these undisputed documents and written submissions made by the parties.

E. Jurisdiction of the authority

8. The authority has complete territorial and 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, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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 agreement for sale. Section 11(4)(a) is reproduced as hereunder:

> ***Section 11***
>
> .....
>
> *(4) The promoter shall-*
>
> *(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. Hence, in view of the authoritative pronouncement of the Hon'ble Supreme Court in the case mentioned above, the authority has the jurisdiction to entertain a complaint seeking refund of the amount and interest on the refund amount.

F. Findings on the relief sought by the complainant.

F.I Direct respondent to pay the assured monthly returns to the complainants from May, 2019, onwards to be calculated at Rs.71.5/- per sq. ft. per month

as per the terms of the BBA as the project of the respondent or the construction thereof is not complete till date.

F.II Declare the status of the construction of the tower where the unit of the complainants is located as "incomplete" as the Respondent has neither received nor applied for the occupation certificate of the project till date;

F.III Direct the respondent to continue paying the investment returns / monthly returns to the complainants as per the terms of the Builder buyer's agreement.

F.IV Direct the respondent to pay interest at the prescribed rate on the unpaid monthly returns/investment returns to the complainants, to be calculated from the date the monthly returns became due till the date of realization;

F.V The respondent be restrained from demanding any amounts from the complainants at the time of offer of possession which do not form a part of the agreements executed between the parties.

12. The above-mentioned reliefs sought by the complainants are being taken together as the findings in one relief will definitely affect the result of the other relief and the same being interconnected.

13. The complainants are seeking unpaid assured returns on monthly basis from the respondent as per the agreed terms. It is pleaded that the respondent has not complied with the terms and conditions of the agreement. Though for some time, the amount of assured returns was paid but later on, the respondent refused to pay the same by taking a plea 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.

14. The Act of 2016 defines "agreement for sale" means an agreement entered into between the promoter and the allottee [Section 2(c)]. An agreement for

sale is defined as an arrangement entered between the promoter and allottee with freewill and consent of both the parties. An agreement defines the rights and liabilities of both the parties i.e., promoter and the allottee and marks the start of new contractual relationship between them. This contractual relationship gives rise to future agreements and transactions between them. The different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral part of this agreement is the transaction of assured return inter-se parties. The "agreement for sale" after coming into force of this Act (i.e., Act of 2016) shall be in the prescribed form as per rules but this Act of 2016 does not rewrite the "agreement" entered between promoter and allottee prior to coming into force of the Act as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors., (Writ Petition No. 2737 of 2017) decided on 06.12.2017.*** Since the agreement defines the buyer-promoter relationship therefore, it can be said that the agreement for assured returns between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate regulatory authority has complete jurisdiction to deal with assured return cases as the contractual relationship arise out of agreement for sale only and between the same parties as per the provisions of section 11(4) (a) of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the agreement for sale till the execution of conveyance deed of the unit in favour of the allottee. Now, three issues arise for consideration as to:

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

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

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

15. While taking up the cases of ***Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd. (complaint no 141 of 2018), and Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP" (supra)***, it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the issue of assured returns was involved to be paid by the builder to an allottee but at that time, neither the full facts were brought before the authority nor it was argued on behalf of the allottees that on the basis of contractual obligations, the builder is obligated to pay that amount. However, there is no bar to take a different view from the earlier one if new facts and law have been brought before an adjudicating authority or the court. There is a doctrine of "prospective overruling" and which provides that the law declared by the court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. A reference in this regard can be made to the case of ***Sarwan Kumar & Anr vs. Madan Lal Aggarwal Appeal (civil) 1058 of 2003 decided on 06.02.2003*** and wherein the hon'ble apex court observed as mentioned above. So, now the plea raised with regard to maintainability of the complaint in the face of earlier orders of the authority in not tenable. The authority can take a different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. It is now well settled preposition of law that when payment of assured returns is part and

parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum, memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement for sale defines the builder-buyer relationship. So, it can be said that the agreement for assured returns between the promoter and an allotee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arises out of the agreement for sale only and between the same contracting parties to agreement for sale. In the case in hand, the issue of assured returns is on the basis of contractual obligations arising between the parties. Then in case of ***Pioneer Urban Land and Infrastructure Limited & Anr. V/s Union of India & Ors. (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019***, it was observed by the Hon'ble Apex Court of the land that "... allottees who had entered into "assured return/committed returns' agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of agreement till the date of handing over of possession to the allottees". It was further held that 'amounts raised by developers under assured return schemes had the "commercial effect of a borrowing' which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code" including its treatment in books of accounts of the

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

16. 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.

17. 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;

18. 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.

19. 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.

20. 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.

21. 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 complainants till possession of respective apartments stands handed over and there is no illegality in this regard.

22. 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.*

23. 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.

24. The builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement defines the builder/buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allotee arises out of the same relationship and is marked by the original agreement for sale

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

26. On consideration of documents available on record and submissions made by the complainants and the respondent, the authority is satisfied that the respondent is in contravention of the provisions of the Act. The agreement executed between the parties on 27.04.2011, the possession of the subject unit was to be delivered within stipulated time i.e., 27.04.2014.

27. It is worthwhile to consider that the assured return is payable to the allottees on account of provisions in the buyers agreement or an addendum to the buyers agreement. The assured return in this case is payable as per "Annexure A – Addendum to the agreement dated 27.04.2011". The rate at which assured return has been committed by the promoter is Rs. 71.5/- per sq. ft. of the super area per month which is more than reasonable in the present circumstances. 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 allottees is protected even after the completion of the building as the assured returns are payable for the first 3 years after the date of completion of the project or till the date of said unit/space is put on lease, whichever is earlier.

28. 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 buyer's agreement and addendum executed thereto along with interest on such unpaid assured return. As per Annexure A of buyer's agreement dated 27.04.2011, the promoter had agreed to pay to the complainants allottee Rs.71.5/- per sq. ft. on monthly basis till completion of the building and Rs.65/- per sq. ft. on monthly basis after the completion of the building. The said clause further provides that it is the obligation of the respondent promoter to lease the premises. It is matter of record that the amount of assured return was paid by

the respondent promoter till April 2019 but later on, the respondent refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019. But that Act of 2019 does not create
a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act.

29. In the present complaint, vide letter dated 27.03.2018, the respondent has intimated the complainants that the construction of subject tower is complete wherein the subject unit is located. However, admittedly, OC/CC for that block has not been received by the promoter till this date. The authority is of the view that the construction cannot be deemed to complete until the OC/CC is obtained from the concerned authority by the respondent promoter for the said project. Therefore, considering the facts of the present case, the respondent is directed to pay the amount of assured return at the agreed rate i.e., @ Rs. 71.5/- per sq. ft. per month from the date the payment of assured return has not been paid i.e., May 2019 till the date of completion of the building and thereafter, Rs. 65/- per sq. ft. per month after the completion of the building till the first 36 months after the completion of the project or till the date the said unit is put on lease, whichever is earlier.

30. The respondent is directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of this order after adjustment of outstanding dues, if any, from the complainants and failing which that amount would be payable with interest @ 8.85% p.a. till the date of actual realization.

F.VI. Award the litigation cost to the tune of Rs.50,000/- in the favor of the complainant.

31. The complainants are seeking above mentioned relief w.r.t. compensation. Hon'ble Supreme Court of India in case titled as ***M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors. 2021-2022(1) RCR (C)***, 357 held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses.

G. Directions of the authority

32. 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):

    i. The the respondent is directed to pay the amount of assured return at the agreed rate i.e., @ Rs.71.5/- per sq. ft. per month from the date the payment of assured return has not been paid i.e., May 2019 till the date of completion of the building and thereafter, Rs.65/- per sq. ft. per month after the completion of the building till the first 36 months after the completion of the project or till the date the subject unit is put on lease, whichever is earlier.

    ii. The respondent is directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of this order after adjustment of outstanding dues, if any, from the complainants

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

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

33. Complaint stand disposed of.

34. File be consigned to registry.

Dated: 08.02.2024

V.I-

(Vijay Kumar Goyal)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram