BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Date of decision: 19.04.2024

NAME OF THE BUILDER		M/S VATIKA PVT. LTD.	
PROJECT NAME		VATIKA INXT CITY CENTER	
S. No.	Case No.	Case title	Appearance
1	CR/1364/2023	Rajan Arora V/S M/s Vatika Limited	Sh. Varun Kathuria Ms. Ankur Berry
2	CR/1365/2023	Prakrit Arora V/S v M/s Vatika Limited	Sh. Varun Kathuria Ms. Ankur Berry
3	CR/1370/2023	Meenal Arora and Nitin Arora V/S M/s Vatika Limited	Sh. Varun Kathuria Ms. Ankur Berry

CORAM:

Shri Sanjeev Kumar Arora **Member**

ORDER

1. This order shall dispose of the three complaints titled above filed before this authority under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "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 its obligations, responsibilities and functions to the allottees as per the agreement for sale executed inter se between parties.
2. The core issues emanating from them are similar in nature and the complainant(s) in the above referred matters are allottees of the project,

namely, India Next City Centre situated at Sector-83, Gurugram being developed by the same respondent/promoter i.e., M/s Vatka Ltd. The terms and conditions of the buyer's agreements fulcrum of the issue involved in all these cases pertains to failure on the part of the promoter to deliver timely possession of the units in question, seeking award of assured return.

3. The details of the complaints, reply status, unit no., date of agreement, possession clause, due date of possession, total sale consideration, total paid amount, and relief sought are given in the table below:

Project Name and Location	**"Vatika INXT City Center" at sector 83, Gurgaon, Haryana.**
Project area **DTCP License No.**	10.72 acres 122 of 2008 dated 14.06.2018 valid upto 13.06.2018
Rera Registered	Not registered
Assured Return clause: ***CR/1364/2023:*** *This addendum forms an integral part of builder buyer agreement dated 22.07.2010* *a. Till offer of possession @ 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. 22.07.2010 on a monthly basis before the 15th of each calendar month.* ***CR/1365/2023:*** *This addendum forms an integral part of builder buyer agreement dated 03.08.2010* *a. Till offer of possession @ 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. 03.08.2010 on a monthly basis before the 15th of each calendar month.* ***CR/1370/2023:*** *This addendum forms an integral part of builder buyer agreement dated 15.07.2010* *a. Till offer of possession @ 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. 15.07.2010 on a monthly basis before the 15th of each calendar month.*	

Sr. No	Complaint No., Case Title, and Date of filing of complaint	Unit No. & Unit area admeasuring	Date of apartment buyer agreement	Date of addendum	Amount of AR already paid	Total Sale Consideration / Total Amount paid by the complainant	Relief Sought
1.	CR/1364/2023 Rajan Arora V/S M/s Vatika Limited **DOF:** 18.04.2023 **Reply status:** 08.09.2023	Earlier allotted : 1548, 15th floor New allotted: 328, 3rd floor, Block B 500 sq. ft.	22.07.2010	22.07.2010	Rs. 1,62,500/- paid upto September 2018	BSP: Rs. 20,00,000/- AP:- Rs. 20,00,000/-	AR
2.	CR/1365/2023 Prakrit Arora V/S v M/s Vatika Limited **DOF:** 18.04.2023 **Reply status:** 08.09.2023	Earlier allotted : 1549, 15th floor New allotted: 329, 3rd floor, Block B 750 sq. ft.	03.08.2010	03.08.2010	Rs. 43,58,250/- paid upto September 2018	BSP: Rs. 30,00,000/- AP: - Rs. 30,00,000/-	AR

3	CR/1370/2023 Meenal Arora and Nitin Arora V/S M/s Vatika Limited **DOF:** 18.04.2023 **Reply status:** 08.09.2023	Earlier allotted : 1547, 15th floor New allotted: 327, 3rd floor, Block B 500 sq. ft.	15.07.2010	15.07.2010	Rs. 14,52,750/- paid upto September 2018	TSC : Rs. 20,00,000/- AP: - Rs. 20,00,000/-	AR

Note: In the table referred above certain abbreviations have been used. They are elaborated as follows:

Abbreviation	**Full form**
TSC	Total Sale consideration
AP	Amount paid by the allottee(s)

4. The aforesaid complaints were filed by the complainants against the promoter on account of violation of the builder buyer's agreement or addendum to builder buyer agreement executed between the parties in respect of said units, seeking assured return which was agreed.
5. It has been decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter /respondent in terms of section 34(f) of the Act which mandates the authority to ensure compliance of the obligations cast upon the promoters, the allottee(s) and the real estate agents under the Act, the rules and the regulations made thereunder.
6. The facts of all the complaints filed by the complainant(s)/allottee(s) are similar. Out of the above-mentioned case, the particulars of lead case ***CR/1370/2023 Meenal Arora and Nitin Arora V/S M/S Vatika Limited.***

are being taken into consideration for determining the rights of the allottee(s).

A. Project and unit related details

7. 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:

CR/1370/2023 Meenal Arora and Nitin Arora V/S M/S Vatika Limited.

S. No.	Heads	Information
1.	Name and location of the project	"Vatika Inxt City Center" at Sector 83, Gurugram, Haryana
2.	Nature of the project	Commercial complex
3.	Area of the project	10.72 acres
4.	DTCP License	122 of 2008 dated 14.06.2008
	valid upto	13.06.2018
	Licensee name	M/s Trishul Industries
5.	RERA registered/ not registered	Not registered
6.	Allotment letter	15.07.2010 (page no. 12 of complaint)
7.	Unit no.	1547, 15th floor (as per allotment letter on page no. 12 of complaint)
8.	Unit area admeasuring	500 sq. ft. (as per allotment letter on page no. 12 of complaint)

9.	New unit no.	327, 3rd floor, Block B (page no. 33 of complaint)
10.	Date of execution of buyer's agreement	15.07.2010 (page no. 13 of complaint)
11.	Addendum to the agreement	15.07.2010 (page no. 32 of complaint)
12.	Addendum to BBA [project was reallocated from trade center to INXT city centre]	29.02.2012 (page no. 35 of complaint)
13.	Assured return clause	This addendum forms an integral part of builder buyer agreement dated 15.07.2010 c. Till offer of possession @ Rs. 71.50/- per sq. ft. d. After completion of the building @ Rs. 65/- per sq. ft. You would be paid an assured return w.e.f. 15.07.2010 on a monthly basis before the 15th of each calendar month.
14.	Re-Allocation of unit	17.09.2013 (page no. 33 of complaint)
15.	Total consideration	Rs. 20,00,000/- (as per BBA on page 16 of complaint)
16.	Total amount paid by the complainants	Rs. 20,00,000/- (as per BBA on page 16 of complaint)
17.	Amount of assured return paid by the respondent	Rs. 14,52,750/- till September 2018 (annexure R2 on page no. 35 of reply)

18.	Date of offer of possession to the complainants	Not offered
19.	Occupation certificate	Not obtained

B. Facts of the complaint

The complainant has made the following submissions in the complaint: -

8. That the respondent made false representations and claims of being a big company and a reputed developer and thereby induced the complainants to book/purchase a 500 sq. ft. unit in its project then known as "Vatika Trade Centre" by showcasing a fancy brochure which depicted that the project will be developed and constructed as state of the art being one of its kind with all modern amenities and facilities.

9. That a builder buyer agreement was executed on 15.7.2010 between the parties and the complainants were allotted unit no. 1547, having 500 sq. ft. super area on the fifteenth floor of tower A.

10. That the respondent was liable to pay assured monthly returns to the complainants calculated at Rs. 71.5/- per sq. ft. per month till the completion of the building and thereafter @ Rs. 65/- per sq. ft. per month. The said BBA contained terms regarding the leasing of the unit of the complainant 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.

11. That the respondent, unilaterally without the consent or approval of the complainants changed the project and the unit of the complainants to "Vatika Inxt City Centre" in Sector - 83, Gurgaon and to unit no. B - 327

located on the third floor of Block B vide its letter dated 17.09.2013 which was on a different floor from the unit originally booked by the complainants. The complainants were asked to sign an addendum dated 29.02.2012.

12. That the respondent claimed completion of the block where the unit of the complainant in March, 2016, and informed that they will be liable to pay monthly rent (returns) at Rs. 65/- per square foot per month. The completion or an occupation certificate for the said block was never shared by the respondent.

13. That the respondent in furtherance of its mala fide intentions and ulterior motives without assigning any reason stopped the payment of the monthly returns to the complainants from October, 2018 onwards. Despite of repeated requests, the same have not been paid to the complainants till date.

14. Thereafter, the respondent contacted the complainants in July, 2019 and in 2021, asking the complainants to execute an addendum post which the respondent will clear the dues of the monthly returns till July, 2019, within a period of 90 days. The complainants even visited the office of the respondent to do so but the language and terms of the said addendum specified that the complainants were required to forego its claim of monthly returns post June, 2019, in view of the notification of the BUDS Act, to which the complainants outrightly refused. The offer of the respondent to execute the said addendum amounts to acknowledgement of debt by the respondent and therefore, the claim of the complainants of monthly returns since October, 2018 is within limitation.

15. That the respondent has not received the completion/occupation certificate from the competent authority till date. Buyers have been paid the monthly returns for different periods and have been denied the payment of the same on different grounds including but not limited to the notification of the BUDS Act.

16. That the respondent has not even offered the possession of the unit of the complainants to them 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.

C. Relief sought by the complainant: -

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

I. Direct the respondent to pay assured monthly return to the complainant from October, 2018, onwards to be calculated at Rs. 71.5/- per sq. ft. per month for the period for which the project/tower where the unit of the complainant is located did not receive the completion/occupation certificate from the competent authority and thereafter @ 65/- per sq. ft. per month as per the terms of Annexure A to BBA.

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

D. Reply by the respondent.

19. That the complainant has got no locus standi or cause of action to file the present complaint. The present complaint is based on an erroneous

interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the builder buyers agreement dated 15.07.2010, as shall be evident from the submissions made in the following paras of the present reply.

20. That at the very outset it is submitted that the present complaint is not maintainable or tenable in the eyes of law. The complainant has misdirected himself in filing the above captioned complaint before this Ld. Authority as the reliefs being claimed by the complainant cannot be said to fall within the realm of jurisdiction of this Ld. Authority. It is humbly submitted that upon the enactment of the Banning of Unregulated Deposit Schemes Act, 2019, (hereinafter referred as BUDS Act) the 'assured return' and/ or any "committed returns" on the deposit schemes have been banned. The respondent company having not taken registration from SEBI Board cannot run, operate, and continue an assured return scheme. The implications of enactment of BUDS Act read with the Companies Act, 2013 and Companies (Acceptance of Deposits)Rules, 2014, resulted in making the assured return/committed return and similar schemes as unregulated schemes as being within the definition of "Deposit".
21. Thus the Assured Return Scheme proposed and floated by the respondents has become infructuous due to operation of law, thus the relief prayed for in the present complaint cannot survive due to operation of law. As a matter of fact, the respondent duly paid ₹14,52,750/- till September, 2018. The complainant has not come with clean hands before this Hon'ble Authority and has suppressed these material facts.
22. That it is also relevant to mention here that the commercial unit of the complainant is not meant for physical possession as the said unit is only meant for leasing the said commercial space for earning rental income.

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

23. That the complainant has come before this Hon'ble Authority with un-clean hands. The complaint has been filed by the complainant just to harass the respondent and to gain unjust enrichment. The actual reason for filing of the present complaint stems from the changed financial valuation of the real estate sector, in the past few years and the allottee malicious intention to earn some easy buck. The Covid pandemic has given people to think beyond the basic legal way and to attempt to gain financially at the cost of others. The complainant has instituted the present false and vexatious complaint against the respondent company who has already fulfilled its obligation as defined under the BBA dated 15.07.2010. It is pertinent to mention here that for the fair adjudication of grievance as alleged by the complainant, detailed deliberation by leading the evidence and cross-examination is required, thus only the Civil Court has jurisdiction to deal with the cases requiring detailed evidence for proper and fair adjudication.
24. It is submitted that the complainant entered into an agreement i.e., builder buyers agreement dated 15.07.2010 with respondent company owing to the name, good will and reputation of the respondent company. That it is a matter of record that the respondent duly paid the assured return to the complainant till September, 2018. That due to external circumstance which were not in control of the respondent, construction got deferred. That even though the respondents suffered from setback due to external circumstances, yet the respondents managed to complete the construction.
25. The present complaint of the complainant has been filed on the basis of incorrect understanding of the object and reasons of enactment of the

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

26. That the Complainant are attempting to seek an advantage of the slowdown in the real estate sector and it is apparent from the facts of the present case that the main purpose of the present complaint is to harass the Respondent by engaging and igniting frivolous issues with ulterior motives to pressurize the Respondent Company. Thus, the present complaint is without any basis and no cause of action has arisen till date in favour of the Complainant and against the Respondent and hence, the complaint deserves to be dismissed.

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

28. That the various contentions raised by the Complainant are fictitious, baseless, vague, wrong, and created to misrepresent and mislead this Hon'ble Authority, for the reasons stated above. That it is further submitted that none of the relief as prayed for by the Complainant are sustainable, in the eyes of law. Hence, the complaint is liable to be dismissed with imposition of exemplary cost for wasting the precious time and efforts of this Hon'ble Authority. That the present complaint is an utter abuse of the process of law, And hence deserves to be dismissed.

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

E. Jurisdiction of the authority

30. 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

31. 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 entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E.II Subject matter jurisdiction

32. 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.*

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

F. Findings on the relief sought by the complainant.

I. Direct the respondent to pay assured monthly return to the complainant from October, 2018, onwards to be calculated at Rs. 71.5/- per sq. ft. per month for the period for which the project/tower where the unit of the complainant is located did not receive the completion/occupation certificate from the competent authority and thereafter @ 65/- per sq. ft. per month as per the terms of Annexure A to BBA.

34. The complainant has sought assured return on monthly basis as per

addendum to agreement dated 15.07.2010. The complainant paid the full consideration amount of ₹20,00,000/- at the time of agreement only with a promise to get the monthly return from 15.07.2010 till offer of possession @ of ₹71.50 per sq. ft. and thereafter @ ₹65 per sq. ft. till completion of the building. The respondent has not complied with the terms and conditions of the agreement dated 15.07.2010 and paid the assured return of an amount of ₹14,52,750/-till September, 2018 but later on, the respondent refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019. But that Act does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act. However, the plea of respondent is otherwise and who took a stand that though it paid the amount of assured return upto the November 2019 but did not pay assured return amount after coming into force of the Act of 2019 as the same was declared illegal.

35. The promoter and allottee would be bound by the obligations contained in the buyer's agreement and the promoter shall be responsible for all obligations, responsibilities, and functions to the allottee as per the agreement for sale executed inter se them under section 11(4)(a) of the Act. An agreement defines the rights and liabilities of both the parties i.e., promoter and the allottee and marks the start of new contractual relationship between them. This contractual relationship gives rise to future agreements and transactions between them. Therefore, different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral parts of this agreement is the transaction of assured return inter-se parties. The "agreement for sale" after coming into force of this Act (i.e., Act of 2016) shall be in the prescribed

form as per rules but this Act of 2016 does not rewrite the "agreement" entered between promoter and allottee prior to coming into force of the Act as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.,*** (Writ Petition No. 2737 of 2017) decided on 06.12.2017. Since the agreement defines the buyer-promoter relationship therefore, it can be said that the agreement for assured return between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate regulatory authority has complete jurisdiction to deal with assured return cases as the contractual relationship arise out of agreement for sale only and between the same parties as per the provisions of section 11(4)(a) of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the agreement for sale till the execution of conveyance deed of the unit in favour of the allottees. Now, two issues arise for consideration as to:

i. Whether authority is within the jurisdiction to vary its earlier stand regarding assured return due to changed facts and circumstances.
ii. Whether the authority is competent to allow assured returns to the allottees in pre-RERA cases, after the Act of 2016 came into operation,
iii. Whether the Act of 2019 bars payment of assured returns to the allottees in pre-RERA cases

36. While taking up the cases of ***Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd. (complaint no 141 of 2018)***, and ***Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP"*** (complaint no 175 of 2018) decided on 07.08.2018 and 27.11.2018 respectively, it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the issue of assured returns was involved to be paid by the

builder to an allottee but at that time, neither the full facts were brought before the authority nor it was argued on behalf of the allottee that on the basis of contractual obligations, the builder is obligated to pay that amount. However, there is no bar to take a different view from the earlier one if new facts and law have been brought before an adjudicating authority or the court. There is a doctrine of ***"prospective overruling"*** and which provides that the law declared by the court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. A reference in this regard can be made to the case of ***Sarwan Kumar & Anr Vs. Madan Lal Aggarwal*** Appeal (civil) 1058 of 2003 decided on 06.02.2003 and wherein the hon'ble apex court observed as mentioned above. So, now a plea raised with regard to maintainability of the complaint in the face of earlier orders of the authority in not tenable. The authority can take different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. It is now well settled preposition of law that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum , memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement for sale defines the builder-buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allotee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arise out of

the agreement for sale only and between the same contracting parties to agreement for sale. In the case in hand, the issue of assured returns is on the basis of contractual obligations arising between the parties. In cases of ***Anil Mahindroo & Anr. v/s Earth Iconic Infrastructure Pvt. Ltd.*** (Company Appeal (AT) (Insolvency) No. 74 of 2017) and ***Nikhil Mehta and Sons (HUF) and Ors. vs. AMR Infrastructure Ltd.*** (CA NO. 811 (PB)/2018 in (IB)-02(PB)/2017) decided on 02.08.2017 and 29.09.2018 respectively, it was held that the allottees are investors and have chosen committed return plans. The builder in turn agreed to pay monthly committed return to the investors. Thus, the amount due to the allottee comes within the meaning of 'debt' defined in Section 3(11) of the I&B Code. Then in case of ***Pioneer Urban Land and Infrastructure Limited & Anr. v/s Union of India & Ors.*** (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019, it was observed by the Hon'ble Apex Court of the land that "*...allottees who had entered into "assured return/committed returns' agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of agreement till the date of handing over of possession to the allottees*". It was further held that 'amounts raised by developers under assured return schemes had the "commercial effect of a borrowing' which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code" including its treatment in books of accounts of the promoter and for the purposes of income tax. Then, in the latest pronouncement on this aspect in case ***Jaypee Kensington Boulevard***

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

37. 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.*

38. 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.*

39. 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.

40. 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.

41. 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.

42. Moreover, the developer is also bound by promissory estoppel. As per this doctrine, the view is that if any person has made a promise and the promisee has acted on such promise and altered his position, then the person/promisor is bound to comply with his or her promise. When the builders failed to honour their commitments, a number of cases were filed by the creditors at different forums such *as* ***Nikhil Mehta, Pioneer Urban Land and Infrastructure*** which ultimately led the central government to enact the Banning of Unregulated Deposit Scheme Act, 2019 on 31.07.2019 in pursuant to the Banning of Unregulated Deposit Scheme Ordinance, 2018. However, the moot question to be decided is as to whether the schemes floated earlier by the builders and promising as assured returns on the basis of allotment of units are covered by the abovementioned Act or not. A similar issue for consideration arose before Hon'ble RERA Panchkula in case ***Baldev Gautam VS Rise Projects Private Limited*** (*RERA-PKL-2068-2019*) where in it was held on 11.03.2020 that a builder is liable to pay monthly assured returns to the complainant till possession of respective apartments stands handed over and there is no illegality in this regard.

43. 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.*

44. 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.

45. It is not disputed that the respondent is a real estate developer, and it had obtained registration under the Act of 2016 for the project in question. The authority under this Act has been regulating the advances received under the project and its various other aspects. So, the amount paid by the complainants to the builder is a regulated deposit accepted by the later from the former against the immovable property to be transferred to the allottee later on.

46. 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.

47. On consideration of documents available on record and submissions made by parties, the complainants have sought assured return on monthly basis as per the addendum agreement dated 15.07.2010. 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.

48. Accordingly, the promoter is liable to pay assured return from 15.07.2010 till offer of possession @ of ₹71.50 per sq. ft. and thereafter @ ₹65 per sq. ft. till completion of the building. As per the statement of account on page no. 35 of reply, an amount of Rs. 14,52,750/- was already paid by the respondent to the complainant may be adjusted while making the payment of assured return.

49. The respondent in CR/1365/2023 has raised an objection that the said complaint was filed/signed by the SPA holder and the SPA was given only for instituting the certain litigations in the Courts & Tribunals at New Delhi. The authority observes that the SPA dated 06.08.2019 annexed at page 45 of complaint was given by complainant i.e., Prakrit Arora to SPA holder i.e., Rajan Arora. Moreover, the para A of the SPA covers all judicial/quasi-judicial/tribunals/administrative authority in India. So, the said objection of the respondent is not maintainable.

G. Directions of the authority

50. 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 respondent is directed to pay the arrears of amount of assured return at agreed rate to the complainant(s) from October 2018. The respondent/promoter is directed to adjust the amount of assured return as already paid.

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

51. This decision shall mutatis mutandis apply to cases mentioned in para 3 of this order.

52. The complaints stand disposed of.

53. Files be consigned to registry.

(Sanjeev Kumar Arora)
Member
Haryana Real Estate Regulatory Authority, Gurugram
Dated: 19.04.2024