# BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

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| **Complaint no.** | **4639 of 2023** |
| **Date of filing complaint** | **25.10.2023** |
| **First date of hearing** | **31.01.2024** |
| **Date of decision** | **24.07.2024** |

Rishi Muni Bhardwaj
**Resident of**: B-354A, 1st floor, Sushant Lok-1, Gurugram, Haryana-122022 — **Complainant**

Versus

Vatika Limited
**Regd. office:** Flat no. 621A, 6th Floor, Devika Towers, 6, Nehru Place, New Delhi – 110019
Corporate office: Vatika Triangle, Block A, Sushant Lok, Gurgaon-1220022 — **Respondent**

**CORAM:**

Shri Ashok Sangwan — **Member**

**APPEARANCE:**

Mr. Chaitanya Singhal (Advocate) — Complainant
Ms. Ankur Berry (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 |
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| 1. | Name and location of the project | "Vatika INXT City Center", village Sihi, Shikohpur, Sikanderpur Badha, and Kherkidaula, Sector 81-85, Gurugram (Relocated from Vatika Trade Centre vide addendum to BBA dated 30.11.2011, annexed at page 43 of complaint) |
| 2. | Project area | 10.72 acres |
| 3. | Nature of the project | Commercial complex |
| 4. | DTCP license no. and validity status | 122 of 2008 dated 14.06.2008 valid upto 13.06.2018 |
| 5. | Name of the Licensee | M/s Trishul Industries |
| 6. | RERA registered/ not registered and validity status | **Not Registered** |
| 7. | Date of buyer's agreement | 13.11.2010 (Page 19 of complaint) |
| 8. | Addendum to BBA (Provision as to payment of Assured returns added) | 13.11.2010 (Page 40 of complaint) |
| 9. | Addendum to BBA (Relocation from Vatika Trade Centre to INXT City Centre) | 30.11.2011 (Page 43 of complaint) |
| 10. | Unit no. | 101, 1st floor, Block B (Page 46 of complaint) |
| 11. | Unit area admeasuring | 500 sq. ft. (Page 46 of complaint) |
| 12. | Assured return and lease rentals clause | *"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 offered for possession you will be paid an additional* |

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| | | *return of Rs.6.50/- er sq. ft. Therefore, the return payable to you shall be as follows:*<br>*This addendum forms an integral part of the builder buyer agreement dated 13.11.2010.*<br>***a) Till offer of possession Rs.71.50/- per sq. ft.***<br>***b) After completion of the building Rs.65/- per sq. ft.***<br>*You would be paid an assured return **w.e.f. 13.11.2010 on a monthly basis before the 15th of each calendar month.***<br>*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 applicable:*<br>*1) **If the rental is less than Rs.65/- per sq. ft.,** then you shall be refunded @Rs.120/- per sq. ft. for every Rs.1/- by which the achieved rental is less than Rs.65/- per sq. ft.*<br>*2) **If the achieved rental is higher than Rs.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. for every rupee of additional rental achieved in the case of balance 50% of the increased rentals."*<br>(Addendum to BBA at page 40 of complaint) |
| 13. | Assured Returns received till September, 2018 | Rs. 15,11,250/-<br>(As alleged by respondent at page 5 of reply) |
| 14. | Total sale consideration | Rs.22,50,000/-<br>(As per clause 2 of BBA at page 22 of complaint) |

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| 15. | Amount paid by the complainants | Rs.22,50,000/-<br>(As per clause 2 of BBA at page 22 of complaint) |
| 16. | Occupation certificate | Not obtained |
| 17. | Letter as to completion of construction sent by respondent to complainant | 29.03.2016<br>(Page 47 of reply) |

**B. Facts of the complaint:**

3. The complainant has made the following submissions:
   a) That the respondent through public advertisement enticed the complainant to invest their hard-earned money in its project "Vatika Trade Centre" and made tall claims and promises of high quality production and timely possession.
   b) That being lured by such tall claims and promises of the respondent, the complainant booked a commercial unit in the respondent's project "Vatika Trade Centre" on 11.11.2010.
   c) That a builder buyer agreement was executed between the parties on 13.11.2010. That the complainant was allotted unit no. 204, located on 2nd floor, tower-A, having super area admeasuring 500 sq. ft. for a total sales consideration of Rs.22,50,000/-.
   d) That the complainant had paid the entire sales consideration of Rs.22,50,000/- to the respondent on the date of execution of builder buyer agreement by cheque no. 631318 dated 11.11.2010 drawn on OBC Bank which was duly cleared upon presentation by the respondent.
   e) That as per clause 2 of the agreement, the respondent had committed to construct and deliver the possession of the unit within a period of 3 years from the date of execution of the builder buyer agreement which comes to 13.11.2013. However, the respondent failed to construct and handover the possession of unit on time.
   f) That as per "ANNEXURE-A" of the agreement titled as "Addendum to the Agreement" dated 13.11.2010, the complainant was promised to get an

assured monthly return of Rs.71.5/- per sq. ft. (till offer of possession) and thereafter Rs. 65/- per sq. ft. per (after Completion of the building).

g) That on 27.07.2011, the respondent sent a letter to the complainant regarding "Relocation of Commercial Project- Vatika Trade Centre."

h) That on 17.08.2011 the complainant entered into an "Addendum to the Builder Builder Agreement" with the respondent according to which the originally booked unit of the complainant in project "Vatika Trade Centre" was relocated in respondent's another project "Vatika INXT City Centre." In terms of the addendum most of the terms of the builder buyer agreement remained the same except for a few changes in the recital clause.

i) That the respondent informed the complainant that they were now allocated unit no. 101 on the 1st floor, block-B admeasuring 500 sq. ft. in project "Vatika INXT City Centre."

j) That on 29.03.2016, the respondent sent a letter to the complainant regarding "Completion of construction work of block B of Vatika INXT City Centre." The letter said that the building is complete and is operational and ready for occupation. It was further stated that the respondent is in active discussions with a number of prospective tenants for the property and expect to lease out substantial area in the building in due course.

k) That the respondent told the complainants that their building is complete and further stated that that as per the terms and conditions of the builder buyer agreement (Annexure), the commitment charges shall be revised to Rs. 65/- per sq. ft. per month from the date of building getting operational.

l) That the respondent has not obtained the occupation certificate of the said tower till date. The respondent cannot offer possession or say that the building is operational without obtaining the occupation certificate.

That in the lieu of the above stated letter the respondent had wrongly reduced the monthly assured return payable to complainant from Rs.71.5 /- to Rs.65/- per sq. ft. per month without getting the occupation certificate and without offering possession of unit to the complainants. The respondent is liable to pay a monthly assured return of Rs.71.5 per sq. ft. till the offer of possession after receipt of occupation certificate and not Rs.65/- per sq. ft per month. The respondent is also liable to pay the difference of Rs.6.5/- per sq. ft. per month along with the interest accrued upon such payment as per the HARERA Rules, 2017.

m) That from 01.11.2010 till 31.03.2016 the respondent paid a monthly assured return of Rs. 71.5 per sq. ft. per month to the complainants.

n) That from 01.04.2016 to 31.08.2018 the respondent paid "reduced monthly assured return" from Rs. 71.5/- to Rs. 65/- per sq. ft. per month to the complainants.

o) That from September 2018 till date the respondent has not paid any amount towards assured return to the complainants.

p) That on 31.10.2018, respondent sent an email to complainants regarding the "Suspension of Assured Return Scheme". The email stated:

> *"In light of the introduction of RERA Act 2016 which not only regulates the sector but also stipulates conditions attached to marketing, selling and delivering properties based on carpet area as defined under the Act and after the coming of Banning of Unregulated deposit schemes Act 2019; the Respondent will not be selling any properties with commitment of assured returns or that pays returns of any kind.*
>
> *All properties will be sold on a down payment basis, possession linked basis or construction linked basis."*

q) That the construction of the unit has been badly delayed which is the evident from the fact that as per clause 2 of the agreement, the respondent had promised to deliver the possession of unit within a period of 36 months from the date of execution of builder buyer agreement which comes to 13.11.2013, however till date the

respondent has still not completed the project and has not received "Occupation Certificate" for its project.

r) That the respondent had also wrongly demanded payments on account of common area maintenance charges on 07.01.2023 by sending a demand notice of Rs.5,90,335/, prior to receiving occupation certificate and without offering possession to the complainants till date.

s) That as per the details of license obtained by respondent from Director General, Town and Country Planning Department, Government of Haryana (DTCP), the respondent had purchased land measuring 10.718 Acres at village Sikhopur, Tehsil Sohna and District Gurugram. License bearing no. 122 of 2008 dated 14.06.2008 valid up to 14.06.2016 for setting up commercial complex and to develop/construct the commercial complex on the said land. That as on date the said license of the respondent stands expired.

t) That the respondent had not registered its project "Vatika INXT City Centre" with RERA which contravenes the provision of Section 3 of RERA Act, 2016. Section 3(1) of the Haryana Real Estate (Regulation and Development) Act, 2016 provides as under:

> *"Provided that projects that are ongoing on the date of the commencement of the Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of 3 months from the date of commencement of this Act".*

Section 3(2) (b) of the Haryana Real Estate (Regulation and Development) Act, 2016 provides as under:

> *"No registration of the real estate project shall be required where the promoter has received completion certificate for a real estate project prior to commencement of the Act".*

Thus, the project of the respondent is an on-going project since the respondent did not have completion certificate and is liable to get the project registered under RERA Act, 2016 which the respondent failed to do.

u) That based on the above it can be concluded that the respondent miserably failed in completing the construction of the building and in handling over the possession of the unit of the complainants in accordance with the agreed terms and has committed grave unfair practices and breach of the agreed terms.

v) That the facts and issues of the present complaint are completely identical to judgment dated 04.02.2022 titled "Mahesh Chandra Saxena versus Vatika Limited" in Complaint no. 443 of 2021 passed by Hon'ble RERA Authority, Gurugram wherein the Authority passed an order directing the respondent to pay assured returns along with interest upon it.

C. **Relief sought by the complainant:**

4. The complainant has sought the following relief(s):
   i. Direct the respondent to pay the monthly assured return @ Rs.71.5/- per sq. ft. per month from September 2018 till date.
   ii. Direct the respondent to to pay the difference of the assured return amount of Rs.6.5 per sq. ft. per month i.e. {-Rs.71.5/- minus Rs.65/-} from April 2016 till August 2018.
   iii. Direct the respondent to pay interest upon the unpaid amount of assured return.
   iv. Direct the respondent to pay monthly assured rental of Rs. 65/- per sq. ft. per month after receipt of occupation certificate and making valid offer of possession to the complainant.
   v. Direct the respondent to withdraw the common area maintenance charges and interest charges upon it till the time occupation certificate is received and possession is offered to the complainants.
   vi. Initiate penal proceedings under section 59 of RERA Act and impose 10% penalty of the over-all cost of the project for non-registration of project under RERA.

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 vide its reply dated 05.02.2024 and written submissions dated 20.06.2024:
   a) That the complainants have got no locus standi or cause of action to file the present complaint, same being based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the BBA dated 13.11.2010.
   b) That the present complaint is not maintainable or tenable in the eyes of the law as the reliefs being claimed by the complainants cannot be said to fall within the realm of jurisdiction of this Authority. Upon the enactment of the Banning of Unregulated Deposit Schemes Act, 2019, the 'Assured Return' or any 'Committed Returns' on the deposit schemes have been banned. The respondent company having taken no registration from the SEBI board cannot run, operate, and continue an assured return scheme. Further, the enactment of BUDS read with the companies Act, 2013 and the Companies (Acceptance of Deposits) Rules, 2014, resulted in making the assured return/committed return and similar schemes as unregulated schemes as being taken within the definition of 'Deposit.'
   c) That the assured return scheme proposed and floated by the respondent has become infructuous due to operation of law, thus the relief prayed for in the present complaint cannot survive due to the operation of law. As a matter of fact, the respondent duly paid an amount of Rs.15,11,250/- till September 2018.
   d) That the commercial unit of the complainants was not meant for physical possession as the said unit was only meant for leasing purposes (Clause 32 – Leasing Arrangements) (Clause 32.1 (d) 'Deemed Possession') for return of investment. Furthermore, the said commercial space shall be deemed to be legally possessed by the complainants. Hence, the unit

booked by complainants is not meant for physical possession and rather for commercial gain only.

e) That the complainants are seeking the relief of assured returns, and this Authority has no jurisdiction to entertain the present complaint as has been decided in the complaint case no. 175 of 2018, titled as "Sh. Bharam Singh and Ors. Vs. Venetian LDF Projects LLP" by the Authority itself.

f) That the Hon'ble High Court of Punjab and Haryana in CWP No. 26740 of 2022 titled as "Vatika Limited Vs. Union of India & Ors.", took cognizance in respect of the 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.

g) That the respondent promoter has always been devoted towards its customer and have over the years kept all its allottees updated regarding amendments in law, judgments passed by Hon'ble High Courts and status of development activities in and around the project. Vide e-mail dated 31.10.2018, the respondent sent a communication to all its allottees qua the suspension of all return-based sales and further promised to bring the detailed information to all the investors of assured return-based projects. In furtherance to the said email, the respondent sent another e-mail dated 30.11.2018 further detailing therein the amendments in law regarding the SEBI Act, Bill No. 85 (Regarding the BUDS Act) and other statutory changes which led to stoppage of all the return based/ assured / committed return based sales. The e-mail communication of 29.02.2016 also confirmed to the allottees that the project was ready and available for leasing. That the issue regarding stoppage of assured returns/committed return and reconciliation of all accounts as of July 2019 was also communicated with all the allottees of the concerned project. Further the respondent intimated to all its allottees that in view of the legal changes

and formation of new laws the amendment to BBA vide Addendum would be shared with all the allottees to safeguard their interest. That on 30.12.2018 the allottees in the project were sent email regarding stoppage of assured rentals and option was given that the allottee could choose to shift to another project registered for getting the committed returns benefit, that the complainant chose to sit over his right for last 6 years cannot pray for relief of assured return as the relief is time barred. Thereafter on 25.02.2020, the respondent issued communication to all its allottees regarding ongoing transaction and possible leasing of block A, B, D, E and F in the project "Vatika INXT City Centre."

h) That complainant has instituted the present false and vexatious complaint against the respondent who has already fulfilled its obligation as defined under the BBA dated 13.11.2010 and issued completion of construction letter on 29.03.2016. Further for the fair adjudication of grievance as alleged by the complainants, detailed deliberation by leading the evidence as well as cross-examination is required, thus only the Civil Court has jurisdiction to deal with the cases requiring detailed evidence for proper and fair adjudication.

i) That it is a matter of record and admitted by the complainants that the respondent duly paid the assured return to the complainants till September 2018. Further due to external circumstances which were not in control of the respondent, construction got deferred. That 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 of construction on 29.03.2016.

j) That regarding the issue of maintenance, in-terms of the allotment letter and BBA dated 13.11.2010, the respondent was well within its rights to engage appropriate agency for maintenance of the project and liability of

payment of the maintenance charges would rest upon the allottee in absence of tenant. Thus, the complainants are bound to pay all such charges agreed upon at the time of executing the BBA. That admittedly the construction of the building, where the unit of complainants is located completed in 2018 and thereafter maintenance agency was duly appointed for regular upkeep of the project.

k) That even though the assured return scheme was stopped in the year 2018, yet the complainants chose to sit till 2023, i.e., till the filing of the present complaint. The delay in claiming the relief of recovery of dues on account of assured return non-payment, suffered from severe delay of 5 years. That the onus is upon the complainants to show that the alleged cause of action, i.e., non-payment of assured returns arose in 2018 and yet the complainants did not file any such claim. That the inaction of the complainants is a patent acquiescence, and they cannot demand recovery of arrears after a massive delay of 5 years.

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 both the parties.

**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.I 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 the 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 buyer's agreement, it is revealed that the complainant is a buyer, and has 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 buyer's agreement executed between the parties, 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 an "investor". Thus, the contention of the promoter that the allottee being an 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 some force majeure circumstances. However, the respondent has failed to give details as to what force majeure circumstances surfaced before it. Otherwise too, the respondent should have foreseen any such situations. Thus, the promoter respondent cannot be given any leniency based on aforesaid reason, as it is a well-settled principle that a person cannot take benefit of his own wrong.

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

15. 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.

16. 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 complainant.**

**G.I Direct the respondent to pay the monthly assured return @ Rs.71.5/- per sq. ft. per month from September 2018 till date.**

**G.II Direct the respondent to to pay the difference of the assured return amount of Rs.6.5 per sq. ft. per month i.e. {-Rs.71.5/- minus Rs.65/-} from April 2016 till August 2018.**

**G.III Direct the respondent to pay interest upon the unpaid amount of assured return.**

**G.IV Direct the respondent to pay monthly assured rental of Rs. 65/- per sq. ft. per month after receipt of occupation certificate and making valid offer of possession to the complainant.**

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

18. The complainant is 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 assured returns were 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.

19. 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.

20. 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.

21. 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.

22. 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

23. 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.

24. 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 13.11.2010, the possession of the subject unit was to be delivered within stipulated time i.e., 13.11.2013.

25. 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 13.11.2010". 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.

26. 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 13.11.2010, the promoter had agreed to pay to the complainant-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 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 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.

27. In the present complaint, vide letter dated 29.03.2016, the respondent has intimated the complainants that the construction of subject tower is complete wherein the subject unit is located. However, OC/CC for that block has not been received by the promoter till this date. Perusal of assured return clause mentioned in Addendum to BBA reveals that the stage of offer of possession by respondent is not dependent upon the receipt of occupation certificate. However, 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.71.50/- per sq. ft. per month from the date the payment of assured return has not been made i.e. from October 2018 till date of valid offer of possession (post receipt of occupation certificate after completion of the building) and thereafter, Rs. 65/- per sq. ft. per month as minimum guaranteed return up to 36 months from the date of receipt of occupation certificate after the completion of the said building or till the date the said unit is put on lease, whichever is earlier.** 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 @ 9% p.a. till the date of actual realization.

28. Further, it is observed that the respondent had paid assured returns @ Rs.65/- per sq. ft. per month from April, 2016 till September, 2018 to the complainants as evident from Annexure R2 annexed by respondent at page 31 of the reply. However, the respondent was duty bound to pay assured returns @ Rs.71.5/- till the date of valid offer of possession as per Addendum to BBA dated 13.11.2010. Therefore, the respondent is directed to pay the difference of assured return amount of Rs.6.5/- per sq. ft. per month from April, 2016 to September, 2018 along with interest @ 9% per annum.

**G.V Direct the respondent to withdraw the common area maintenance charges and interest charges upon it till the time occupation certificate is received and possession is offered to the complainant.**

29. The complainants have raised an issue that the respondent has wrongly demanded payments on account of common area maintenance charges prior to receiving occupation certificate and without offering the possession to the complainants.

30. The Real Estate (Regulation and Development) Act, 2016 mandates under Section 11(4)(d) that the developer will be responsible for providing and maintaining the essential services on reasonable charges till the taking over of maintenance of the project by the association of the allottees. Section 19(6) of the RERA Act also states that every allottee, who has entered into an agreement for sale, to take an apartment, plot or building as the case may be, under Section 13 shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale/BBA and shall pay within stipulated time and appointed place, the share of registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent and other charges, if any.

31. The next question arises herein as to from which date the maintenance charges can be charged or made applicable. In this regard, the authority places reference to the ***State Consumer Disputes Redressal Forum***

decision in ***Shri Anil Kumar Chowdhury Vs. DLF Limited on 16.08.2018***, wherein it has been held as under:

> "***Maintenance Charge and Holding Charge: -***
> *According to Clause 10 or Clause 14.3 of the Agreement, the apartment allottee shall be liable to pay the maintenance charge on and from the date on which actual physical possession is taken or on the expiry of thirty (30) days from the date of issuance of the Notice of Possession, whichever is earlier. As per terms of the Agreement, the OP/developer has no authority to demand maintenance for any period prior to actual physical possession being handed over. Equally the OP/developer shall have no authority to demand any holding charge as the delay in giving possession is on their own part and they are wrongfully withholding possession till date. However, the complainant will be liable to make payment on account of government charges only upon receiving physical possession of the flat and car parking space from the OP.*
> *So far as claim of the complainant for common facilities or benefit like - swimming pool, tennis court etc. are concerned, the same cannot be entertained because prior to lodging complaint, no permission was sought for in accordance with Section 12(1)(c) of the Act to file the complaint in a representative capacity. Therefore, there is hardly any reason to discuss about the common areas and facilities of the complex, as alleged complainant....................................................... In view of the discussion above, the complaint is allowed on contest with the following directions: -*
> *The Opposite Party is directed to deliver possession and to execute the Sale Deed in favour of the complainant on payment of stamp duty and registration charges within 90 days from the date after obtaining Completion Certificate from the competent authority.*
> ..........................................
> *The Opposite Party is directed not to claim any amount under the head of*
> *(a) cost of increased in area.*
> *(b) pro-rate charges for arranging supply of electrical energy and*
> *(c) Other costs including government charges from final statement of accounts,*
> *(d) maintenance for any period till handing over possession and*
> *(e) any holding charge whatsoever for withholding possession;*
> .........................................."

32. In yet another judgement titled as ***Dr. Mudit Kumar Vs Emaar MGF Land Limited on 28.01.2020 passed by the State Commission, Punjab*** wherein it has been held that the promoter is not entitled to charge any maintenance

charges till the handing over of the possession of the plot to the allottee post receipt of OC only. However, the amount accredited towards maintenance charges should be maintained in a corpus and the builder cannot transfer the proceeds or maintenance charges received from the allottees to his company's account, because such money received for maintenance is not his income in any way. The logic behind it, is that a builder is only a facilitator for a limited amount of time and the onus of taking up the responsibility of maintenance of the flat and its premises is on the residents' welfare association (RWA).

33. In light of the above-mentioned reasoning, the complainant-allottees shall be liable to pay the common area maintenance charges on and from the date on which valid possession is offered to the complainant-allottee post receipt of occupation certificate.

**G.VI Initiate penal proceedings under section 59 of RERA Act and impose 10% penalty of the over-all cost of the project for non-registration of project under RERA.**

34. The planning branch of the authority is directed to take necessary action under the provision of the Act of 2016 for violation of proviso to Section 3(1) of the Act.

**H. Directions issued by the Authority:**

35. 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 to pay the amount of assured return at the agreed rate i.e., @ Rs.71.50/- per sq. ft. per month from the date the payment of assured return has not been made i.e. from October 2018 till the date of a valid offer of possession (post receipt of the occupation certificate after completion of the building) and thereafter, Rs. 65/- per sq. ft. per month as minimum guaranteed return up to 36

months from date of receipt of occupation certificate after the completion of the said building or till the date the said unit is put on lease, whichever is earlier.

II. The respondent is directed to pay the difference of assured return amount of Rs.6.5/- per sq. ft. per month from April, 2016 to September, 2018.

III. The respondent is directed to pay the above outstanding accrued assured return amounts till date along with interest rate of 9% 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 become payable with interest @ 9% p.a. till the date of actual realization.

IV. The complainant-allottee shall be liable to pay the common area maintenance charges on and from the date on which valid possession is offered to the complainant-allottee post receipt of occupation certificate.

V. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement.

36. Complaint stands disposed of.

37. File be consigned to the Registry.

**Dated: 24.07.2024**

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