BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**3606 of 2023**
Date of filing complaint	**21.08.2023**
First date of hearing	**22.11.2023**
Date of decision	**24.07.2024**

1. Kajal Kumar Datta Gupta
2. Sanjay Datta Gupta

Resident of: B-2, Gulmohar Park, New Delhi-110049 — **Complainants**

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) — Complainants
Ms. Ankur Berry (Advocate) — Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees under Section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with Rule 28 of the Haryana Real -Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of Section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities, and functions under the provisions of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project-related details

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

Sr. No.	Particulars	Details
1.	Name and location of the project	"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 27.07.2011, 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	08.06.2011 (Page 20 of complaint)
8.	Addendum to BBA (Provision as to payment of Assured returns added)	08.06.2011 (Page 40 of complaint)
9.	Addendum to BBA (Relocation from Vatika Trade Centre to INXT City Centre)	27.07.2011 (Page 43 of complaint)
10.	Unit no.	93, 9th floor, Block F (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*

		return of Rs.6.50/- er sq. ft. Therefore, the return payable to you shall be as follows: *This addendum forms an integral part of the builder buyer agreement dated 08.06.2011.* ***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. 08.06.2011 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 applicable:* *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.* *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."* (Addendum to BBA at page 40 of complaint)
13.	Assured Returns received till September, 2018	Rs. 31,14,908/- (As alleged by respondent at page 5 of reply)
14.	Total sale consideration	Rs.25,00,000/- (As per clause 2 of BBA at page 23 of complaint)

15.	Amount paid by the complainants	Rs.25,00,000/- (As per clause 2 of BBA at page 23 of complaint)
16.	Occupation certificate	Not obtained
17.	Letter as to completion of construction sent by respondent to complainant	27.03.2018 (Page 49 of reply)
18.	Legal notice sent by complainant for recovering assured returns	08.10.2021 (Page 48 of complaint)

B. Facts of the complaint:

3. The complainant has made the following submissions:
   a) That based on representations and assurances of the respondent, the complainant booked a unit in the project "One on One", Sector 16, Gurugram on 30.04.2015 by way of an application for allotment.
   b) That the respondent through public advertisement enticed the complainants 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.
   c) That being lured by such tall claims and promises of the respondent, the complainants booked a commercial unit in the respondent's project "Vatika Trade Centre" on 05.06.2011.
   d) That a builder buyer agreement was executed between the parties on 08.06.2011. That the complainants were allotted unit no. 366A, located on 3rd floor, tower-A, having super area admeasuring 500 sq. ft. for a total sales consideration of Rs.25,00,000/-.
   e) That the complainants had paid the entire sales consideration of Rs.25,00,000/- to the respondent on the date of execution of builder buyer agreement by cheque no. 270089 dated 06.06.2011 drawn on Axis Bank which was duly cleared upon presentation by the respondent.
   f) 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 08.06.2014. However, the respondent failed to construct and handover the possession of unit on time.

g) That as per "ANNEXURE-A" of the agreement titled as "Addendum to the Agreement" dated 08.06.2011, the complainants were 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).

h) That on 27.07.2011 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. 931 on the 9th floor, block-F admeasuring 500 sq. ft. in project "Vatika INXT City Centre." instead of previous allotment on 31.07.2013.

j) That from June 2011 till February 2018 the respondent paid a monthly assured return of Rs. 71.5 per sq. ft. per month to the complainants.

k) That from March 2018 to September 2018 the respondent paid "reduced monthly assured return" from Rs. 71.5/- to Rs. 65/- per sq. ft. per month to the complainants.

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

m) 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.

n) 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.

o) 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."*

p) That on 09.10.2021, the complainants had sent a legal notice to the respondent for recovery of assured return along with accrued interest upon it. That the said notice was duly received by the respondent on 12.10.2021. However, the respondent failed to reply to the said legal notice of the complainants.

q) That the construction of the unit has been badly delayed which is 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 08.06.2014, 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 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 complainants:**

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

   i. Direct the respondent to pay a delayed possession interest at prescribed rate as per HRERA Rules 2017 from deemed date of possession till the actual handing over of possession after receipt of occupation certificate.

   ii. Direct the respondent to pay the monthly assured return @ Rs.71.5/- per sq. ft. per month and interest accrued upon it from October 2018 up till date.

   iii. 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 February 2018 till September 2018 and interest upon it.

   iv. Direct the respondent to pay monthly assured rental of Rs. 65/- per sq. ft. per month or the actual rented rate per sq. ft., whichever is higher after offer of possession and receipt of occupation certificate.

   v. Direct the respondent to pay interest upon the unpaid amount of assured return due since 2018 up till date.

   vi. 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.

vii. 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.

viii. Any other relief which the authority deems fit in the favor of the complainants.

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 22.11.2023 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 08.06.2011.

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.31,14,908/- till September 2018.

d) That the complainants paid an amount of Rs.25,00,000/-, however, till now, the complainants have already received an amount of Rs.31,14,908/- as assured return from the respondent. That complainants herein have already received / have been returned the complete consideration amount by means of bifurcated monthly assured returns that were paid since 2011 to 2018. Therefore, the respondent pleads the Authority to deduct the amount already paid as assured return, while awarding delay possession charges or any other monetary relief to the complainants.

e) 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.

f) 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.

g) 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.

h) 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 on 28.12.2018, the respondent sent another clarificatory email stating that assured returns and other committed returns would stop altogether and alternatively gave the allottees an option to shift to a project of the respondent in the vicinity, further the allottees who were keen to receive quarterly returns, the respondent had a SEBI registered product which offered quarterly returns with a fixed tenure. 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. 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."

i) That complainants have instituted the present false and vexatious complaint against the respondent who has already fulfilled its obligation as defined under the BBA dated 08.06.2011 and issued completion of construction letter on 27.03.2018. 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.

j) 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 27.03.2018.

k) That regarding the issue of maintenance, in-terms of the allotment letter dated 08.06.2011 and BBA dated 08.06.2011, 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.

l) 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 the complainant.

E. Jurisdiction of the authority:

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

E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

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

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

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

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

F. Findings on the objections raised by the respondent:

F.I Objection regarding maintainability of complaint on account of complainants being the investors.

12. The respondent took a stand that the complainants are the investors and not the consumers and therefore, they are 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 complainants are the buyers, and have 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 complainants are the allottees as the subject unit was allotted to them 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 allottees being the investors are 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 complainants.

G.I Direct the respondent to pay a delayed possession interest at prescribed rate as per HRERA Rules 2017 from deemed date of possession till the actual handing over of possession after receipt of occupation certificate.

G.II Direct the respondent to pay the monthly assured return @ Rs.71.5/- per sq. ft. per month and interest accrued upon it from October 2018 up till date.

G.III Direct the respondent 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 February 2018 till September 2018 and interest upon it.

G.IV Direct the respondent to pay monthly assured rental of Rs. 65/- per sq. ft. per month or the actual rented rate per sq. ft., whichever is higher after offer of possession and receipt of occupation certificate.

G.V Direct the respondent to pay interest upon the unpaid amount of assured return due since 2018 up till date.

G.VI 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.

17. The common issues with regard to assured return, delay possession charges and withdrawal of common area maintenance charges are involved in the aforesaid complaint.

I. Assured returns

18. The complainants are seeking unpaid assured returns on monthly basis as per addendum to builder buyer agreement dated 08.06.2011 at the rates mentioned therein. It is pleaded that the respondent has not complied with the terms and conditions of the said addendum to builder buyer agreement. Though for some time, the amount of assured returns was paid but later on, the respondent refused to pay the same by taking a plea that the same is not payable in view of enactment of the Banning of Unregulated Deposit Schemes Act, 2019 (hereinafter referred to as the Act of 2019), citing earlier decision of the authority (*Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd., complaint no 141 of 2018*) whereby relief of assured return was declined by the authority. The authority has rejected the aforesaid

objections raised by the respondent in ***CR/8001/2022 titled as Gaurav Kaushik and anr. Vs. Vatika Ltd.*** wherein the authority while reiterating the principle of prospective ruling, has held that the authority can take different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land and it was held that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum, memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and the Act of 2019 does not create a bar for payment of assured returns even after coming into operation as the payments made in this regard are protected as per Section 2(4)(l)(iii) of the Act of 2019. Thus, the plea advanced by the respondent is not sustainable in view of the aforesaid reasoning and case cited above.

19. The money was taken by the builder as a 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.

20. 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.

21. 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 complainants besides initiating penal proceedings. So, the amount paid by the complainants to the builder is a regulated deposit accepted by the latter from the former against the immovable property to be transferred to the allottees later. In view of the above, the respondent is liable to pay assured return to the complainant-allottees in terms of the addendum to builder buyer agreement dated 08.06.2011.

II. Delay possession charges.

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

> *"Section 18: - Return of amount and compensation*
>
> *18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —*
>
> *........................*
>
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

23. The subject unit was allotted to the complainants vide builder buyer agreement dated 08.06.2011. The due date of possession had to be calculated from the date of execution of the builder buyer agreement in view of "***Fortune Infrastructure and Ors. vs. Trevor D'Lima and Ors. (12.03.2018 - SC); MANU/SC/0253/2018.***" Accordingly, the due date of possession comes out to be 08.06.2014. As per the builder buyer agreement, the respondent developer was under an obligation to further lease out the unit of the complainants post completion.

24. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges. Proviso

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

> ***"Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
> *For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public."*

25. The legislature in its wisdom in the subordinate legislation under the Rule 15 of the Rules, ibid has determined the prescribed rate of interest. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 24.07.2024 is 8.95%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.95%.

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

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

the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

27. 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 possession of the subject unit was to be completed within a stipulated time i.e., by 08.06.2014.

28. However now, the proposition before it is as to whether the allottee who is getting/entitled for assured return even after expiry of due date of possession, can claim both the assured return as well as delayed possession charges?

29. To answer the above proposition, it is worthwhile to consider that the assured return is payable to the allottees on account of provisions in the BBA or an addendum to the BBA. The assured return in this case is payable as per "Addendum to builder buyer agreement". The rate at which assured return has been committed by the promoter is Rs.71.50/- per sq. ft. of the super area per month till the completion of the building which is more than reasonable in the present circumstances. If we compare this assured return with delayed possession charges payable under proviso to Section 18(1) of the Act, 2016, the assured return is much better i.e., assured return in this case is payable at Rs.35,750/- per month till completion of building whereas the delayed possession charges are payable approximately Rs.22,812.50/- per month. By way of assured return, the promoter has assured the allottee that they would be entitled for this specific amount till completion of construction of the said building. Moreover, the interest of the allottee is protected even after the completion of the building as the assured returns are payable even after completion of the building. The purpose of delayed possession charges after due date of possession is served on payment of assured return after due date of possession as the same is to safeguard the

interest of the allottee as their money is continued to be used by the promoter even after the promised due date and in return, they are to be paid either the assured return or delayed possession charges whichever is higher.

30. Accordingly, the authority decides that in cases where assured return is reasonable and comparable with the delayed possession charges under Section 18 and assured return is payable even after due date of possession till the date of completion of the project, then the allottees shall be entitled to assured return or delayed possession charges, whichever is higher without prejudice to any other remedy including compensation.

31. 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 addendum to builder buyer agreement. As per the addendum to builder buyer agreement dated 08.06.2011, the promoter had agreed to pay to the complainant allottee Rs.71.50/- per sq. ft. on monthly basis till completion of the building. The said clause further provides that it is the obligation of the respondent promoter to lease the premises. It is matter of record that the assured return was paid by the respondent-promoter till September 2018 at the rate of Rs.71.50/- per sq. ft., but later on after September 2018, the respondent refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019. But that Act of 2019 does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per Section 2(4)(iii) of the above-mentioned Act.

32. In the present complaint, OC/CC for the block in which unit of complainant is situated 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 dependant 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.** Further, the Authority declines to order payment of any amount on account of delayed possession charges as their interest has been protected by granting assured returns till completion of construction of the unit and thereafter also up to 36 months at different rate from date of completion of the said building or the said unit is put on lease, whichever is earlier.

33. 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.

34. Further, it is observed that the respondent had paid assured returns @ Rs.65/- per sq. ft. per month from March, 2018 till September, 2018 to the complainants as evident from Annexure R2 annexed by respondent at page 33 of the reply. However, the respondent was duty bound to pay assured returns @ Rs.71.50/- till the date of valid offer of possession as per Addendum to BBA dated 08.06.2011. Therefore, the respondent is directed to pay the difference of assured return amount of Rs.6.5/- per sq. ft. per

month from March, 2018 to September, 2018 along with interest @ 9% per annum.

III. Common Area Maintenance Charges

35. 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.

36. 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.

37. 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;

.."

38. 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).

39. 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-allottees after receipt of the occupation certificate.

G.VII 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.

40. 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:

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

I. The respondent is directed 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 further directed to pay difference of assured return amount of Rs.6.5/- per sq. ft. per month from March, 2018 to September, 2018.

N

III. The respondent is directed to pay the above outstanding accrued assured return amounts till date along with interest at the rate of 9% p.a. within 90 days from date of this order after adjustment of outstanding dues, if any, from the complainants and failing which that amount would become payable with interest @ 9% p.a. till the date of actual realization.

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

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

42. Complaint stands disposed of.

43. File be consigned to the Registry.

Dated: 24.07.2024

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