HARERA
GURUGRAM

BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**442 of 2021**
Date of filing complaint:		**08.02.2021**
First date of hearing	:	**07.04.2021**
Date of decision	:	**10.11.2021**
Rectified on	:	**04.02.2022**

Smt. Sonali Saxena
R/o: T-5-1303, Sushant Estate, Sector-52, Gurgaon-122001 — **Complainant**

Versus

M/s Vatika Limited
Registered office at:-A002, INXT City Centre, Ground floor, Block-A, Sector 83, Vatika India Next, Gurugram-122012 — **Respondent**

CORAM:

Dr. K.K. Khandelwal — **Chairman**
Shri Vijay Kumar Goyal — **Member**

APPEARANCE:

Sh. Chaitanya (Advocate) — Complainant
Sh. Dhruv Dutt Sharma (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 provision 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 unit details, sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Name and location of the project	Vatika INXT City Centre
2.	Nature of the project	Commercial complex
3.	Area of the project	10.48 acres
4.	DTCP license	258 of 2007 dated 19.11.2007 and valid up to 18.11.2019
5.	Name of License Owner	Shivam Infratech Pvt. Ltd.
6.	RERA registered/not registered	**Not registered**
7.	Original unit no.	1249, 12th floor, tower A (Page no.24 of complaint),
8.	Revised unit no.	301, tower B (annexure P-3 on page no. 46 of the complaint)
9.	Unit area	500 sq. ft.
10.	Revised unit area	500 sq. ft.
11.	Allocation of new unit number	29.03.2016 (annexure P-3 on page no. 46 of the complaint)
12.	Date of execution of builder buyer's agreement	13.08.2010 (annexure P-1 on page no. 21 of the complaint)

13.	Total consideration	Rs.29,00,000/- (annexure P-1 on page no. 24 of the complaint)
14.	Total amount paid by the complainant	Rs 29,00,000/- (annexure P-1 on page no. 24 of the complaint)
15.	Due date of delivery of possession	13.08.2013 (as per clause 2 of the builder buyer agreement, annexure P-1 on page no. 24 of complaint)
16.	Provision regarding assured return	**Addendum to the agreement dated 22.08.2011** This addendum forms an integral part of builder buyer agreement dated 13.08.2010. a. Till completion of building: Rs.71.50/- per sq. ft. b. After completion of the building: Rs.65/- per sq. ft. You would be paid an assured return w.e.f. 13.08.2010 on a monthly basis before the 15th of each calendar month.
17.	Offer of possession	Not offered
18.	Occupation certificate	Not obtained
19.	Delay in handing over possession till date of decision i.e., 10.11.2021	8 years 2 months 28 days

B. Facts of the complaint

3. That the respondent is a leading real estate company having various real estate projects in Gurugram and other parts of India.
4. That through public advertisement, the respondent company boasted that it is its' endeavour to meet the expectations of the

buyers, enticing them to invest their hard-earned money in their project "Vatika Trade Centre" located in district Gurugram and made tall claims and promises of high-quality production and timely possession. It further claimed that their project is inspired by the dreams of the consumers and driven by its commitment to deliver the finest quality and set new benchmarks in the industry.

5. That on being lured by such tall claims and promises on 29.01.2010, the complainant booked a commercial unit in respondent's project "Vatika Trade Centre" and paid a sum of Rs. 1, 00,000/- as booking amount to the respondent.

6. That on 13.08.2010 the builder buyer agreement was executed between the parties. That as per the BBA, the complainant was allotted unit no. 1249 located on 12th floor, Tower- A having super area measuring approx. 500 sq. ft. for a total sales consideration of Rs. 29,00,000/-.

7. That as per "clause 2" of the builder buyer 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 13.08.2013. Miserably the respondent failed to timely construct and handover the possession of unit on time.

8. That as per annexure-A of the addendum to BBA dated 22.08.2011, the complainant was promised to pay an assured monthly return of Rs. 71.5/- per sq. ft. (till the building is ready

for possession) and thereafter Rs. 65/- per sq. ft. per (after completion of the building).

9. That from 13.08.2010 till 31.03.2016, the respondent had paid a monthly assured return of Rs. 71.5 per sq. ft. per month and thereafter from 01.04.2016 to 31.10.2018, the respondent had paid and reduced the monthly assured return from Rs. 71.5/- to Rs. 65/- per sq. ft. per month to the complainant. Thereafter from 31.10.2018 till date the respondent has not paid the assured return to the complainant as stated in the builder buyer agreement.
10. That on 29.03.2016, the respondent sent a letter to the complainant stating "completion of construction of Block-B, Vatika INXT city centre, Gurgaon". The letter stated that the construction work of block-B of Vatika INXT City Centre is completed and the building is operational and ready for occupation. The respondent further stated that they were finding prospective tenants for the property and expect to lease out the building in due course. It was further stated 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. The respondent stated that since the building got operational in the last week of March 2016, the commitment charges payable against complainant premises shall be revised to Rs. 65/- per sq. ft. per month from 1st April 2016.
11. That it is pertinent to note that the above said letter of respondent is totally wrong and baseless since 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".

12. That the respondent is liable to pay a monthly assured return of Rs. 71.5 per sq. ft. till the "offer of possession" or "till the grant of occupation certificate" and not Rs. 65/- per sq. ft per month. The respondent is liable to pay the difference of Rs 6.5 /- per sq. ft. per month from the date on which the respondent has reduced the monthly assured return i.e. 01.04.2016 to 31.10.2018 and thereafter Rs. 71.5 /- per sq. ft per month from 31.10.2018 till date along with the interest accrued upon such payment as per the rules of 2017.
13. That from 01.04.2016 to 31.10.2018, the respondent had paid a monthly assured return of Rs. 65 per sq. ft. per month to the complainant and thereafter from 01.11.2018 till date the respondent had stopped the payment of assured return.
14. That on 31.10.2018, the respondent sent an email to the complainant regarding "suspension of assured return scheme". The email stated that –

> *"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"

15. That the complainant has paid the entire sales consideration of Rs. 29, 00,000/- to the respondent at the time of execution of the BBA.

16. That on 27.07.201, the respondent sent a letter to the complainant for "Relocation of the commercial project- Vatika Trade Centre". That the letter stated that the respondent is relocating the booked unit of the complainant in it's another project "Vatika Inxt City Centre" located in Gurugram in order to avail better location and timely completion of the project, without giving any other option to choose. The complainant had no option but to give consent to the above said letter of the respondent. Thereafter on 04.10.2013 the complainant received an allotment letter from the respondent wherein the complainant was allotted unit no. 301- tower-B, measuring approx 500 sq. ft. super area in project "Vatika Inxt City Centre", Gurugram.

17. That the construction of the unit has been badly delayed which is evident from the fact that as per clause 2 of the BBA, the respondent had promised to deliver the possession of unit within a period of 36 months from the date of execution of BBA which comes to 13.08.2013, however till date the respondent has still not completed the project and has not received "occupation certificate" for its project. Therefore, the respondent is liable to pay the delayed possession interest on account of delay caused in completion of the project from the

deemed date of possession till the receipt of occupation certificate/ possession is offered by the respondent.

18. That the respondent had wrongly demanded payments on account of common area maintenance charges prior to receiving occupation certificate and without "offering possession" letter till date.

19. 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 & Dist. Gurgaon. 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 the said license of the respondent is expired as on date.

20. That the respondent had not registered its project "Vatika INXT City Centre" with RERA which contravenes the provision of Section 3 of Act of 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".*

21. 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".

22. 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 Act of 2016 which he failed to do.
23. That on the basis of the above it can be concluded that the respondent has miserably failed in completing the construction of the building and in handling over the possession of the unit of the complainant in accordance with the agreed terms and has committed grave unfair practices and breach of the agreed terms between the parties.
24. That due to non-delivery of possession of the said unit the cause of action in favor of complainant and against the respondent is a continuing cause of action and still subsisting one.
25. That no similar complaint is pending before any other authority, court of law, consumer commission or any other tribunal.
26. That this authority has jurisdiction to try and decide this complaint. That the project of the respondent is within the jurisdiction of the authority. Hence this complaint for seeking delayed possession charges at prescribed rate of interest for every month of delay on the amount paid by the complainant from deemed date of possession i.e. 13.08.2013 till the actual offer of possession.

C. Relief sought by the complainant:

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

- The respondent be directed to pay the assured return as per annexure – 'A' of the addendum to the BBA till the possession is offered to the complainant.
- The respondent be directed to pay delayed possession charges for every month of delay from deemed date of possession i.e. from 13.08.2013 till the actual offer of possession after receiving O.C.
- The respondent be directed to withdraw the common area maintenance charges and interest charges till the time occupation certificate is received and possession is offered to the complainant.

D. Reply by the respondent

28. That at the outset, the respondent humbly submits that each and every averment and contention, as made/raised in the complaint, unless specifically admitted, be taken to have been categorically denied by respondent and may be read as travesty of facts.
29. That the unit in question was booked by Ms. Sonali Saxena and Mr. Gaurav Saxena. It is, however, submitted that the present complaint has been filed by only Sonali Saxena and as such the same is liable to be dismissed on account of non-joinder of necessary party.
30. That the complaint filed by the complainant before the ld. authority, besides being misconceived and erroneous, is untenable in the eyes of law. The complainant has misdirected

herself in filing the above captioned complaint before this ld. authority as the relief being claimed by the complainant, besides being illegal, misconceived and erroneous, cannot be said to even fall within the realm of jurisdiction of this ld. Authority.

31. It would be pertinent to make reference to some of the provisions of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as '2016 Act') and the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred to as '2017 Haryana rules'), made by the Government of Haryana in exercise of powers conferred by Sub-section 1 read with sub-section 2 of section 84 of 2016 Act. section 31 of 2016 Act provides for filing of complaints with this ld. authority or the adjudicating officer. Sub-Section (1) thereof provides that any aggrieved person may file a complaint with the authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of 2016 Act or the rules and regulations made there under against any promoter, allottee or real estate agent, as the case may be. Sub section (2) provides that the form, manner and fees for filing complaint under sub-section (1) shall be such as may be prescribed. Rule 28 of 2017 Haryana rules provides for filing of complaint with this ld. authority, in reference to section 31 of 2016 Act. Sub-clause (1) *inter alia*, provides that any aggrieved person may file a complaint with the authority for any violation of the provisions of 2016 Act or the rules and regulations made thereunder, save as those provided to be adjudicated by the adjudicating officer, in Form 'CRA'.

Significantly, reference to the "authority", which is this ld. authority in the present case and to the "adjudicating officer", is separate and distinct. "adjudicating officer" has been defined under section 2(a) to mean the adjudicating officer appointed under sub-section (1) of section 71, whereas the "authority" has been defined under section 2(i) to mean the real estate regulatory authority, established under sub-section (1) of section 20.

32. That under section 71, the adjudicating officer is appointed by the authority in consultation with the appropriate Government for the purpose of adjudging compensation under sections 12, 14, 18 and 19 of the 2016 Act and for holding an enquiry in the prescribed manner. A reference may also be made to section 72, which provides for factors to be taken into account by the adjudicating officer while adjudging the quantum of compensation and interest, as the case may be, under Section 71 of 2016 Act. The domain of the Adjudicating Officer cannot be said to be restricted to adjudging only compensation in the matters which are covered under Sections 12, 14, 18 and 19 of the 2016 Act. The inquiry, as regards the compliance with the provisions of Sections 12, 14, 18 and 19, is to be made by the Adjudicating Officer. This submission find support from reading of section 71(3) which *inter alia*, provides that the adjudicating officer, while holding inquiry, shall have power to summon and enforce the attendance of any person and if on such inquiry he is satisfied that the person had failed to comply with the provisions of any of the sections specified in sub-section (1) he may direct to pay such compensation or interest,

as the case may be, as he thinks fit in accordance with the provisions of any of those sections. Suffice it is to mention that the sections specified in sub-section (1) of section 71 are sections 12, 14, 18 and 19.

33. That in the present case, the complainant is seeking reliefs which, from reading of the provisions of the 2016 Act and 2017 rules, especially those mentioned hereinabove, would be liable for adjudication, if at all, by the adjudicating officer and not this ld. authority. Thus, on this ground alone the complaint is liable to be rejected.

34. That further, without prejudice to the aforementioned, even if it was to be assumed though not admitting that the filing of the complaint is not without jurisdiction, even then the claim as raised cannot be said to be maintainable and is liable to be rejected for the reasons as ensuing.

35. That from perusal of the provisions of 2016 Act and/or the 2017 Haryana rules and conjoint reading of the same, it is evident that the 'agreement for sale' that has been referred to under the provisions of 2016 Act and 2017 Haryana rules, is the 'agreement for sale', as prescribed in annexure 'A' of 2017 Haryana rules. Apparently, in terms of section 4(1), a promoter is required to file an Application to the 'Authority' for registration of the real estate project in such form, manner, within such time and accompanied by such fee as may be prescribed. The term 'prescribed' has been defined under section 2(z)(i) to mean prescribed by Rules made under the Act. Further, section 4(2)(g) of 2016 Act provides that a promoter shall enclose, alongwith the application referred to in

sub-section 1 of section 4, a proforma of the allotment letter, agreement for sale, and conveyance deed proposed to be signed with the allottees. Section 13 (1) of 2016 Act *inter alia*, provides that a promoter shall not accept a sum more than 10% of the cost of the apartment, plot or building as the case may be, as an advance payment or an application fee, from a person, without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force. Sub-section 2 of section 13, *inter alia*, provides that the agreement for sale referred to in Sub-Section (1) shall be in such form as may be prescribed and shall specify certain particulars as mentioned in the said Sub-Section. Rule 8 of 2017 Haryana rules categorically lays down that the agreement for sale shall be as per annexure 'A'. Suffice it is to mention that annexure 'A' forms part of the 2017 Haryana rules and is not being reproduced herein for the sake of brevity, though reliance is being placed upon the same.

36. A reference may be made to rule 5 of 2017 Haryana Rules, which *inter alia*, provides that the Authority shall issue a registration certificate with a registration number in form 'REP-III' to the promoter. Clause 2(i) of form 'REP-III' provides that the promoter shall enter into agreement for sale with the allottees as prescribed by the Government. From the conjoint reading of the aforementioned sections/ rules, form and annexure 'A', it is evident that the 'agreement for sale', for the purposes of 2016 Act as well as 2017 Haryana rules, is the one as laid down in annexure 'A', which is required to be executed

inter se the promoter and the allottee. It is a matter of record and rather a conceded position that no such agreement as referred to under the provisions of 2016 Act and 2017 Haryana rules, has been executed between respondent and the complainant.

37. Thus, in view of the submissions made above, no relief much less as claimed can be granted to the complainant. It is reiterated at the risk of repetition that this is without prejudice to the submission that in any event, the complaint, as filed, is not maintainable before this ld. authority.
38. That the reliefs sought by the complainant appear to be on misconceived and erroneous basis. Hence, the complainant is estopped from raising the pleas, as raised in respect thereof, besides the said pleas being illegal, misconceived and erroneous.
39. That apparently, the complaint filed by the complainant is abuse and misuse of process of law and the reliefs claimed as sought for, are liable to be dismissed. No relief much less any interim relief, as sought for, is liable to be granted to the complainant.
40. That the complainant by way of present complaint is also seeking the relief of recovery of alleged pending assured return amount. However, it is submitted that the ld. authority does not have jurisdiction to decide upon the amount of assured return which the ld. authority has already held in its various judgments.
41. It is crystal clear that complainant is not an "allottee, but is an investor" who is only seeking assured return from the

respondent, by way of present complaint, which is not maintainable under real estate regulatory authority. The complainant after its own independent judgment has booked the said unit. The complainant has agreed for leasing arrangement wherein complainant has booked the said commercial unit for earning profit and is meant for leasing only and not for personal occupation. Therefore, the present complaint does not fall within the purview of the authority.

42. In the matter of "Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd." (Complaint No. 141 of 2018), the Hon'ble Haryana Real Estate Regulatory Authority, Gurugram has held that:

> *"8. Since RERA Act deals with the builder buyer relationship to the extent of timely delivery of possession to the buyer or deals with withdrawal from the project, as per provisions of section 18(1) of the Act.*
> *9. The buyer is directed to pursue the matter with regard to getting assured return as per the MoU by filing a case before appropriate forum/Adjudicating officer."*

43. In another matter of "Sh. Bharam Singh & Anr. Vs. Venetian LDF Projects LLP" (Complaint No. 175 of 2018) the Hon'ble Haryana Real Estate Regulatory Authority, Gurugram has held that:

> *"As already decided by the authority in complaint no.141 of 2018 titled as Brhimjeet Versus M/s Landmark Apartments Pvt. Ltd. no case is made out by the complainant. Counsel for respondent has placed on record a Supreme Court judgment dated 25.7.1997 vide which he has pleaded the doctrine of precedent. Since the authority has taken a view much earlier as stated above, the authority cannot go beyond the view already taken. In such type of assured return schemes, the authority has no jurisdiction, as such the complainant is at liberty to approach the appropriate forum to seek remedy. However, at the instance of the complainant, a*

direction is issued to the respondent/builder to complete the construction work within the time framed as per MoU and fulfil his committed liability."

44. In view of the above, it is crystal clear that the present complaint is beyond the jurisdiction and does not fall within the purview of the authority, thus, liable to be dismissed on this ground only.

45. That due to the evolving policies, regulations and legal framework governing real estate investments, the company also informed the clients of commercial Units that as per the guidelines newly promulgated Ordinance i.e. "Banning of Unregulated Deposit Scheme Ordinance 2018" and further "Banning of Unregulated Deposit Scheme Act 2019", the Government banned such assured / committed returns and schemes of such returns completely. It is submitted that the respondent duly paid the assured return till September 2018 amounting to Rs. 31,73,425/- and it was only due to the above-mentioned ordinance and Act, the respondent suspended all return-based sales and stopped making payments towards the assured returns. Thus, in view of the above-mentioned ordinance and Act, the assured return is not payable.

E. Jurisdiction of the authority

46. The respondent has raised preliminary objection regarding jurisdiction of authority to entertain the present complaint. 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

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

E. II Subject-matter jurisdiction

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

> ***Section 11(4)(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;*
>
> *The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.*
>
> ***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.*

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

F. Findings on the relief sought by the complainant:

F.I. Assured returns

47. While filing the claim petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 13.08.2010, the claimant has also sought assured returns on monthly basis as per addendum to the agreement dated 13.08.2011 at the rate of Rs 71.50/- per sq. ft. of super area per month till the completion of the building. It is pleaded by the claimant that the respondent has not complied with the terms and conditions of the agreement. Though for some time the amount of assured returns was paid but later on, the respondent refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019 (herein after referred to as the Act of 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 thougl, they paid the amount of assured return upto the year 2018 but did not pay assured return amount after coming into force of the Act of 2019 as the same was declared illegal.

48. The addendum to the agreement dated 13.08.2010 is a document was executed between both the parties on 22.08.2011and can be termed as agreement. 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. Therefore, different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral parts of this agreement is the transaction of assured return inter-se parties. The "agreement for sale" after coming into force of this Act (i.e., Act of 2016) shall be in the prescribed form as per rules but this Act of 2016 does not rewrite the "agreement" entered between promoter and allottee prior to coming into force of the Act as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.,*** (Writ Petition No. 2737 of 2017) decided on 06.12.2017. Since the agreement defines the buyer-promoter relationship therefore, it can be said that the agreement for assured return between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate regulatory authority has complete jurisdiction to deal with assured return cases as the contractual relationship arise out of agreement for sale only and between the same parties as per the provisions of section 11(4)(a)

of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the agreement for sale till the execution of conveyance deed of the unit in favour of the allottees. Now, two issues arise for consideration as to:

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

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

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

49. While taking up the cases of ***Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd. (complaint no 141 of 2018)***, and ***Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP"*** (complaint no 175 of 2018) decided on 07.08.2018 and 27.11.2018 respectively, it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the issue of assured returns was involved to be paid by the builder to an allottee but at that time, neither the full facts were brought before the authority nor it was argued on behalf of the allottee that on the basis of contractual obligations, the builder is obligated to pay that amount. However, there is no bar to take a different view from the earlier one if new facts and law have been brought before an adjudicating authority or the court. There is a doctrine of ***"prospective overruling"*** and which provides that the

law declared by the court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. A reference in this regard can be made to the case of ***Sarwan Kumar & Anr Vs. Madan Lal Aggarwal*** Appeal (civil) 1058 of 2003 decided on 06.02.2003 and wherein the hon'ble apex court observed as mentioned above. So, now a plea raised with regard to maintainability of the complaint in the face of earlier orders of the authority in not tenable. The authority can take different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. It is now well settled preposition of law that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum , memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement for sale defines the builder-buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allotee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arise out of the agreement for sale only and between the same contracting parties to agreement for sale. In the case in hand, the issue of assured returns is on the basis of contractual obligations arising between the parties. In cases of ***Anil Mahindroo & Anr. v/s Earth***

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

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

50. Section 2(4) of the above mentioned Act defines the word ' deposit' as *an amount of money received by way of an advance or loan or in any other form, by any deposit taker with a promise to return whether after a specified period* or otherwise, either in cash or in kind or in the form of a specified service, *with or without any benefit in the form of interest, bonus, profit or in any other form, but does not include:*

i. an amount received in the course of, or for the purpose of, business and bearing a genuine connection to such business including—

ii. advance received in connection with consideration of an immovable property under an agreement or arrangement subject to the condition that such advance is adjusted against such immovable property as specified in terms of the agreement or arrangement.

51. A perusal of the above-mentioned definition of the term 'deposit' shows that it has been given the same meaning as assigned to it under the Companies Act, 2013 and the same provides under section 2(31) includes any receipt by way of deposit or loan or in any other form by a company but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India. Similarly rule 2(c) of the Companies (Acceptance of Deposits) Rules, 2014 defines the meaning of deposit which includes any receipt of money by way of deposit or loan or in any other form by a company but does not include.

i. as a advance, accounted for in any manner whatsoever, received in connection with consideration for an immovable property

ii. as an advance received and as allowed by any sectoral regulator or in accordance with directions of Central or State Government;

52. So, keeping in view the above-mentioned provisions of the Act of 2019 and the Companies Act 2013, it is to be seen as to whether an allottee is entitled to assured returns in a case where he has deposited substantial amount of sale consideration against the allotment of a unit with the builder at the time of booking or immediately thereafter and as agreed upon between them.

53. The Government of India enacted the Banning of Unregulated Deposit Schemes Act, 2019 to provide for a comprehensive mechanism to ban the unregulated deposit schemes, other than deposits taken in the ordinary course of business and to protect the interest of depositors and for matters connected therewith or incidental thereto as defined in section 2 (4) of the BUDS Act 2019 mentioned above.

54. It is evident from the perusal of section 2(4)(l)(ii) of the above-mentioned Act that the advances received in connection with consideration of an immovable property under an agreement or arrangement subject to the condition that such advances are adjusted against such immovable property as specified in terms of the agreement or arrangement do not fall within the term of deposit, which have been banned by the Act of 2019.

55. Moreover, the developer is also bound by promissory estoppel. As per this doctrine, the view is that if any person has made a promise and the promisee has acted on such promise and altered his position, then the person/promisor is bound to comply with his or her promise. When the builders failed to honor their commitments, a number of cases were filed by the creditors at different forums such ***as Nikhil Mehta, Pioneer Urban Land and Infrastructure*** which ultimately led the central government to enact the Banning of Unregulated Deposit Scheme Act, 2019 on 31.07.2019 in pursuant to the Banning of Unregulated Deposit Scheme Ordinance, 2018. However, the moot question to be decided is as to whether the schemes floated earlier by the builders and promising as assured returns on the basis of allotment of units are covered by the abovementioned Act or not.

A similar issue for consideration arose before Hon'ble RERA Panchkula in case ***Baldev Gautam VS Rise Projects Private Limited*** (*RERA-PKL-2068-2019*) where in it was held on 11.03.2020 that a builder is liable to pay monthly assured returns to the complainant till possession of respective apartments stands handed over and there is no illegality in this regard.

56. The definition of term 'deposit' as given in the BUDS Act 2019, has the same meaning as assigned to it under the Companies Act 2013, as per section 2(4)(iv)(i) i.e., explanation to sub-clause (iv). In pursuant to powers conferred by clause 31 of section 2, section 73 and 76 read with sub-section 1 and 2 of section 469 of the Companies Act 2013, the Rules with regard to acceptance of deposits by the companies were framed in the year 2014 and the same came into force on 01.04.2014. The definition of deposit has been given under section 2 (c) of the above-mentioned Rules and as per clause xii (b), as advance, accounted for in any manner whatsoever received in connection with consideration for an immovable property under an agreement or arrangement, provided such advance is adjusted against such property in accordance with the terms of agreement or arrangement shall not be a deposit. Though there is proviso to this provision as well as to the amounts received under heading 'a' and 'd' and the amount becoming refundable with or without interest due to the reasons that the company accepting the money does not have necessary permission or approval whenever required to deal in the goods or properties or services for which the money is taken, then the amount received shall be deemed to be a deposit under these rules however, the same are not applicable in the case in hand.

Though it is contended that there is no necessary permission or approval to take the sale consideration as advance and would be considered as deposit as per sub-clause 2(xv)(b) but the plea advanced in this regard is devoid of merit. First of all, there is exclusion clause to section 2 (xiv)(b) which provides that unless specifically excluded under this clause. Earlier, the deposits received by the companies or the builders as advance were considered as deposits but w.e.f. 29.06.2016, it was provided that the money received as such would not be deposit unless specifically excluded under this clause. A reference in this regard may be given to clause 2 of the First schedule of Regulated Deposit Schemes framed under section 2 (xv) of the Act of 2019 which provides as under: -

> *(2)The following shall also be treated as Regulated Deposit Schemes under this Act namely:-*
>
> *(a) deposits accepted under any scheme, or an arrangement registered with any regulatory body in India constituted or established under a statute; and*
>
> *(b) any other scheme as may be notified by the Central Government under this Act.*

57. 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.

58. It is not disputed that the respondent is a real estate developer, and it had obtained registration under the Act of 2016 for the project in question. The authority under this Act has been regulating the advances received under the project and its various other aspects. So, the amount paid by the 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. If the project in which the advance has been received by the developer from an allottee is an ongoing project as per section 3(1) of the Act of 2016 then, the same would fall within the jurisdiction of the authority for giving the desired relief to the complainant besides initiating penal proceedings.

F. II Delay possession charges

59. In the present complaint, the complainant intends to continue with the project and is seeking possession of the subject unit and delay possession charges as provided under the provisions of section 18(1) of the Act which reads as under.

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

60. The builder buyer agreement dated 13.08.2010 was executed between the parties. As per clause 2 of the builder buyer agreement, the possession was to be handed over within a period

of 3 years from the date of execution of this agreement. Clause 2 of the builder buyer agreement is reproduced below:

> *"The Developer will complete the construction of the said complex within three (3) years from the date of execution of this agreement....."*

61. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions is not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottee that even a single default by him in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

62. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges. However, 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. 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]***
>
> *(1) 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.*

63. The legislature in its wisdom in the subordinate legislation under the rule 15 of the rules has determined the prescribed rate of interest.

64. 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., 10.11.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

65. 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—
(i) 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;
(ii) 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;"

Para 66, 67 and 68 of the order dated 10.11.2021 are hereby substituted with corrected/rectified paras bearing same no. 66, 67 and 68.

66. On consideration of documents available on record and submissions made by the complainant and the respondent, the authority is satisfied that the respondent is in contravention of the provisions of the Act but by virtue of clause 2 of the agreement executed between the parties on 13.08.2010, the possession of the subject unit was to be delivered within stipulated time i.e., 13.08.2013. However now, the proposition before it is as to whether an allotee 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?

67. To answer the above proposition, it is worthwhile to consider that the assured return is payable to the allottee on account of a provision in the BBA or in a MoU having reference of the BBA or an addendum to the BBA or in a MoU or allotment letter. The assured return in this case is payable from the date of making

100% of the total sale consideration till completion of the building. The rate at which assured return has been committed by the promoter is Rs. 71.50/- per sq. ft. which is more than reasonable in the present circumstance. 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 approximately Rs. 35,750/- per month whereas the delayed possession charges are payable approximately Rs. 22,475/- per month. By way of assured return, the promoter has assured the allottee that he will be entitled for this specific amount till the completion of building. Accordingly, the interest of the allottee is protected even after the due date of possession is over as the assured returns are payable till completion of the building @Rs. 71.50/- per sq. ft. per month and @ Rs. 65/- per sq. ft. per month of super area as minimum guarantee rent upto 36 months from the date of completion of the said building or the said unit is put on lease whichever is earlier. 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 his money is continued to be used by the promoter even after the promised due date and in return, he is paid either the assured return or delayed possession charges whichever is higher.

68. 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 completion of building, then the allottee

shall be entitled to assured return or delayed possession charges, whichever is higher.

The authority directs the respondent/promoter to pay assured return from the date the payment of assured return has not been paid till the completion of the building @Rs. 71.50/- per sq. ft. per month and @ Rs. 65/- per sq. ft. per month of super area as minimum guaranteed rent upto 36 months from the date of completion of the said building or the said unit is put on lease whichever is earlier and declines to order payment of any amount on account of delayed possession charges as her interest has been protected by granting assured return till the completion of the construction of the building and thereafter also upto 36 months at different rate from the date of construction of the said building or the said unit is put on lease whichever is earlier.

F. III The respondent be directed to withdraw the common area maintenance charges and interest charges till the time OC is received and possession is offered to the complainant.

69. The complainant has submitted that the respondent has wrongly demanded payments on account of common area maintenance charges prior to receiving of the OC and without offering the possession.

70. 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 the maintenance of the project by the association of the allottees. Section 19(6) of the RERA 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 the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent and other charges, if any.

71. 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 Ltd. on 16th August 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 by the 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 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;.....".

72. In yet another judgement titled as **Dr. Mudit Kumar vs Emaar MGF Land Limited on 28th January, 2020** passed by the State Commission, Punjab wherein it has been held that the promoter is not entitled to charge maintenance charges till the handing over of the possession of the plot to the allottee post receipt of the 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 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).

73. In the light of the above mentioned reasoning, the 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.

G. Directions of the authority:(Rectified vide order dated 04.02.2022)

74. Hence, the authority, hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

i. The respondent is directed to pay the amount of assured return at the agreed rate i.e. Rs.71.50/- per sq. ft. to the complainant from the date the payment of assured return has not been paid i.e. November 2018 till the date of completion of the building. After completion of the construction of the building, the respondent/builder would be liable to pay monthly assured returns @65/- per sq. ft. of the super area up to 3 years or till the unit is put on lease whichever is earlier.

ii. The respondent is directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of this order after adjustment of outstanding dues, if any, from the complainant and failing which that amount would be payable with interest @ 7.30% p.a. till the date of actual realization.

iii. The respondent shall not charge anything from the complainant which is not part of the agreement of sale.

iv. The respondent/promoter is directed to withdraw the common area maintenance charges till a valid offer of possession has been made after obtaining occupation certificate from the competent authority.

75. It is clarified that the period of appeal and period of payments of decretal amount shall be counted from the date this amended/rectified order is uploaded on the website of the Authority.

76. Complaint stands disposed of.

77. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.11.2021

Rectified vide order dated 04.02.2022

Corrected order uploaded on 16.03.2022.

BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 442 of 2021
Date of filing complaint: 08.02.2021
First date of hearing : 07.04.2021
Date of decision : 10.11.2021

Smt. Sonali Saxena
R/o: T-5-1303, Sushant Estate, Sector-52, Gurgaon-122001 **Complainant**

Versus

M/s Vatika Limited
Registered office at:-A002, INXT City Centre, Ground floor, Block-A, Sector 83, Vatika India Next, Gurugram-122012 **Respondent**

CORAM:
Dr. K.K. Khandelwal **Chairman**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Sh. Chaitanya Singhal (Advocate) Complainant
Sh. Dhruv Dutt Sharma (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 provision 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 unit details, sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Name and location of the project	Vatika INXT City Centre
2.	Nature of the project	Commercial complex
3.	Area of the project	10.48 acres
4.	DTCP license	258 of 2007 dated 19.11.2007 and valid up to 18.11.2019
5.	Name of License Owner	Shivam Infratech Pvt. Ltd.
6.	RERA registered/not registered	**Not registered**
7.	Original unit no.	1249, 12th floor, tower A (Page no.24 of complaint),
8.	Revised unit no.	301, tower B (annexure P-3 on page no. 46 of the complaint)
9.	Unit area	500 sq. ft.
10.	Revised unit area	500 sq. ft.
11.	Allocation of new unit number	29.03.2016 (annexure P-3 on page no. 46 of the complaint)
12.	Date of execution of builder buyer's agreement	13.08.2010 (annexure P-1 on page no. 21 of the complaint)

56

13.	Total consideration	Rs.29,00,000/- (annexure P-1 on page no. 24 of the complaint)
14.	Total amount paid by the complainant	Rs 29,00,000/- (annexure P-1 on page no. 24 of the complaint)
15.	Due date of delivery of possession	13.08.2013 (as per clause 2 of the builder buyer agreement, annexure P-1 on page no. 24 of complaint)
16.	Provision regarding assured return	**Addendum to the agreement dated 22.08.2011** This addendum forms an integral part of builder buyer agreement dated 13.08.2010. a. Till completion of building: Rs.71.50/- per sq. ft. b. After completion of the building: Rs.65/- per sq. ft. You would be paid an assured return w.e.f. 13.08.2010 on a monthly basis before the 15th of each calendar month.
17.	Offer of possession	Not offered
18.	Occupation certificate	Not obtained
19.	Delay in handing over possession till date of decision i.e., 10.11.2021	8 years 2 months 28 days

B. Facts of the complaint

3. That the respondent is a leading real estate company having various real estate projects in Gurugram and other parts of India.

4. That through public advertisement, the respondent company boasted that it is its' endeavour to meet the expectations of the buyers, enticing them to invest their hard-earned money in

54

their project "Vatika Trade Centre" located in district Gurugram and made tall claims and promises of high-quality production and timely possession. It further claimed that their project is inspired by the dreams of the consumers and driven by its commitment to deliver the finest quality and set new benchmarks in the industry.

5. That on being lured by such tall claims and promises on 29.01.2010, the complainant booked a commercial unit in respondent's project "Vatika Trade Centre" and paid a sum of Rs. 1, 00,000/- as booking amount to the respondent.

6. That on 13.08.2010 the builder buyer agreement was executed between the parties. That as per the BBA, the complainant was allotted unit no. 1249 located on 12th floor, Tower- A having super area measuring approx. 500 sq. ft. for a total sales consideration of Rs. 29,00,000/-.

7. That as per "clause 2" of the builder buyer 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 13.08.2013. Miserably the respondent failed to timely construct and handover the possession of unit on time.

8. That as per annexure-A of the addendum to BBA dated 22.08.2011, the complainant was promised to pay an assured monthly return of Rs. 71.5/- per sq. ft. (till the building is ready for possession) and thereafter Rs. 65/- per sq. ft. per (after completion of the building).

9. That from 13.08.2010 till 31.03.2016, the respondent had paid a monthly assured return of Rs. 71.5 per sq. ft. per month and thereafter from 01.04.2016 to 31.10.2018, the respondent had paid and reduced the monthly assured return from Rs. 71.5/- to Rs. 65/- per sq. ft. per month to the complainant. Thereafter from 31.10.2018 till date the respondent has not paid the assured return to the complainant as stated in the builder buyer agreement.
10. That on 29.03.2016, the respondent sent a letter to the complainant stating "completion of construction of Block-B, Vatika INXT city centre, Gurgaon". The letter stated that the construction work of block-B of Vatika INXT City Centre is completed and the building is operational and ready for occupation. The respondent further stated that they were finding prospective tenants for the property and expect to lease out the building in due course. It was further stated 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. The respondent stated that since the building got operational in the last week of March 2016, the commitment charges payable against complainant premises shall be revised to Rs. 65/- per sq. ft. per month from 1st April 2016.
11. That it is pertinent to note that the above said letter of respondent is totally wrong and baseless since 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

52

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".

12. That the respondent is liable to pay a monthly assured return of Rs. 71.5 per sq. ft. till the "offer of possession" or "till the grant of occupation certificate" and not Rs. 65/- per sq. ft per month. The respondent is liable to pay the difference of Rs 6.5 /- per sq. ft. per month from the date on which the respondent has reduced the monthly assured return i.e. 01.04.2016 to 31.10.2018 and thereafter Rs. 71.5 /- per sq. ft per month from 31.10.2018 till date along with the interest accrued upon such payment as per the rules of 2017.
13. That from 01.04.2016 to 31.10.2018, the respondent had paid a monthly assured return of Rs. 65 per sq. ft. per month to the complainant and thereafter from 01.11.2018 till date the respondent had stopped the payment of assured return.
14. That on 31.10.2018, the respondent sent an email to the complainant regarding "suspension of assured return scheme". The email stated that –

> *"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"*

15. That the complainant has paid the entire sales consideration of Rs. 29, 00,000/- to the respondent at the time of execution of the BBA.

16. That on 27.07.201, the respondent sent a letter to the complainant for "Relocation of the commercial project- Vatika Trade Centre". That the letter stated that the respondent is relocating the booked unit of the complainant in it's another project "Vatika Inxt City Centre" located in Gurugram in order to avail better location and timely completion of the project, without giving any other option to choose. The complainant had no option but to give consent to the above said letter of the respondent. Thereafter on 04.10.2013 the complainant received an allotment letter from the respondent wherein the complainant was allotted unit no. 301- tower-B, measuring approx 500 sq. ft. super area in project "Vatika Inxt City Centre", Gurugram.

17. That the construction of the unit has been badly delayed which is evident from the fact that as per clause 2 of the BBA, the respondent had promised to deliver the possession of unit within a period of 36 months from the date of execution of BBA which comes to 13.08.2013, however till date the respondent has still not completed the project and has not received "occupation certificate" for its project. Therefore, the respondent is liable to pay the delayed possession interest on account of delay caused in completion of the project from the deemed date of possession till the receipt of occupation certificate/ possession is offered by the respondent.

50

18. That the respondent had wrongly demanded payments on account of common area maintenance charges prior to receiving occupation certificate and without "offering possession" letter till date.

19. 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 & Dist. Gurgaon. 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 the said license of the respondent is expired as on date.

20. That the respondent had not registered its project "Vatika INXT City Centre" with RERA which contravenes the provision of Section 3 of Act of 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".*

21. 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".*

22. 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 Act of 2016 which he failed to do.

23. That on the basis of the above it can be concluded that the respondent has miserably failed in completing the construction of the building and in handling over the possession of the unit of the complainant in accordance with the agreed terms and has committed grave unfair practices and breach of the agreed terms between the parties.

24. That due to non-delivery of possession of the said unit the cause of action in favor of complainant and against the respondent is a continuing cause of action and still subsisting one.

25. That no similar complaint is pending before any other authority, court of law, consumer commission or any other tribunal.

26. That this authority has jurisdiction to try and decide this complaint. That the project of the respondent is within the jurisdiction of the authority. Hence this complaint for seeking delayed possession charges at prescribed rate of interest for every month of delay on the amount paid by the complainant from deemed date of possession i.e. 13.08.2013 till the actual offer of possession.

C. Relief sought by the complainant:

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

- The respondent be directed to pay the assured return as per annexure – 'A' of the addendum to the BBA till the possession is offered to the complainant.
- The respondent be directed to pay delayed possession charges for every month of delay from deemed date of possession i.e. from 13.08.2013 till the actual offer of possession after receiving O.C.
- The respondent be directed to withdraw the common area maintenance charges and interest charges till the time occupation certificate is received and possession is offered to the complainant.

D. Reply by the respondent

28. That at the outset, the respondent humbly submits that each and every averment and contention, as made/raised in the complaint, unless specifically admitted, be taken to have been categorically denied by respondent and may be read as travesty of facts.
29. That the unit in question was booked by Ms. Sonali Saxena and Mr. Gaurav Saxena. It is, however, submitted that the present complaint has been filed by only Sonali Saxena and as such the same is liable to be dismissed on account of non-joinder of necessary party.
30. That the complaint filed by the complainant before the ld. authority, besides being misconceived and erroneous, is untenable in the eyes of law. The complainant has misdirected herself in filing the above captioned complaint before this ld. authority as the relief being claimed by the complainant,

besides being illegal, misconceived and erroneous, cannot be said to even fall within the realm of jurisdiction of this ld. Authority.

31. It would be pertinent to make reference to some of the provisions of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as '2016 Act') and the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred to as '2017 Haryana rules'), made by the Government of Haryana in exercise of powers conferred by Sub-section 1 read with sub-section 2 of section 84 of 2016 Act. section 31 of 2016 Act provides for filing of complaints with this ld. authority or the adjudicating officer. Sub-Section (1) thereof provides that any aggrieved person may file a complaint with the authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of 2016 Act or the rules and regulations made there under against any promoter, allottee or real estate agent, as the case may be. Sub section (2) provides that the form, manner and fees for filing complaint under sub-section (1) shall be such as may be prescribed. Rule 28 of 2017 Haryana rules provides for filing of complaint with this ld. authority, in reference to section 31 of 2016 Act. Sub-clause (1) *inter alia*, provides that any aggrieved person may file a complaint with the authority for any violation of the provisions of 2016 Act or the rules and regulations made thereunder, save as those provided to be adjudicated by the adjudicating officer, in Form 'CRA'. Significantly, reference to the "authority", which is this ld. authority in the present case and to the "adjudicating officer", is

46

separate and distinct. "adjudicating officer" has been defined under section 2(a) to mean the adjudicating officer appointed under sub-section (1) of section 71, whereas the "authority" has been defined under section 2(i) to mean the real estate regulatory authority, established under sub-section (1) of section 20.

32. That under section 71, the adjudicating officer is appointed by the authority in consultation with the appropriate Government for the purpose of adjudging compensation under sections 12, 14, 18 and 19 of the 2016 Act and for holding an enquiry in the prescribed manner. A reference may also be made to section 72, which provides for factors to be taken into account by the adjudicating officer while adjudging the quantum of compensation and interest, as the case may be, under Section 71 of 2016 Act. The domain of the Adjudicating Officer cannot be said to be restricted to adjudging only compensation in the matters which are covered under Sections 12, 14, 18 and 19 of the 2016 Act. The inquiry, as regards the compliance with the provisions of Sections 12, 14, 18 and 19, is to be made by the Adjudicating Officer. This submission find support from reading of section 71(3) which *inter alia*, provides that the adjudicating officer, while holding inquiry, shall have power to summon and enforce the attendance of any person and if on such inquiry he is satisfied that the person had failed to comply with the provisions of any of the sections specified in sub-section (1) he may direct to pay such compensation or interest, as the case may be, as he thinks fit in accordance with the provisions of any of those sections. Suffice it is to mention that

HS

the sections specified in sub-section (1) of section 71 are sections 12, 14, 18 and 19.

33. That in the present case, the complainant is seeking reliefs which, from reading of the provisions of the 2016 Act and 2017 rules, especially those mentioned hereinabove, would be liable for adjudication, if at all, by the adjudicating officer and not this ld. authority. Thus, on this ground alone the complaint is liable to be rejected.

34. That further, without prejudice to the aforementioned, even if it was to be assumed though not admitting that the filing of the complaint is not without jurisdiction, even then the claim as raised cannot be said to be maintainable and is liable to be rejected for the reasons as ensuing.

35. That from perusal of the provisions of 2016 Act and/or the 2017 Haryana rules and conjoint reading of the same, it is evident that the 'agreement for sale' that has been referred to under the provisions of 2016 Act and 2017 Haryana rules, is the 'agreement for sale', as prescribed in annexure 'A' of 2017 Haryana rules. Apparently, in terms of section 4(1), a promoter is required to file an Application to the 'Authority' for registration of the real estate project in such form, manner, within such time and accompanied by such fee as may be prescribed. The term 'prescribed' has been defined under section 2(z)(i) to mean prescribed by Rules made under the Act. Further, section 4(2)(g) of 2016 Act provides that a promoter shall enclose, alongwith the application referred to in sub-section 1 of section 4, a proforma of the allotment letter, agreement for sale, and conveyance deed proposed to be

44

signed with the allottees. Section 13 (1) of 2016 Act *inter alia*, provides that a promoter shall not accept a sum more than 10% of the cost of the apartment, plot or building as the case may be, as an advance payment or an application fee, from a person, without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force. Sub-section 2 of section 13, *inter alia*, provides that the agreement for sale referred to in Sub-Section (1) shall be in such form as may be prescribed and shall specify certain particulars as mentioned in the said Sub-Section. Rule 8 of 2017 Haryana rules categorically lays down that the agreement for sale shall be as per annexure 'A'. Suffice it is to mention that annexure 'A' forms part of the 2017 Haryana rules and is not being reproduced herein for the sake of brevity, though reliance is being placed upon the same.

36. A reference may be made to rule 5 of 2017 Haryana Rules, which *inter alia*, provides that the Authority shall issue a registration certificate with a registration number in form 'REP-III' to the promoter. Clause 2(i) of form 'REP-III' provides that the promoter shall enter into agreement for sale with the allottees as prescribed by the Government. From the conjoint reading of the aforementioned sections/ rules, form and annexure 'A', it is evident that the 'agreement for sale', for the purposes of 2016 Act as well as 2017 Haryana rules, is the one as laid down in annexure 'A', which is required to be executed *inter se* the promoter and the allottee. It is a matter of record and rather a conceded position that no such agreement as

referred to under the provisions of 2016 Act and 2017 Haryana rules, has been executed between respondent and the complainant.

37. Thus, in view of the submissions made above, no relief much less as claimed can be granted to the complainant. It is reiterated at the risk of repetition that this is without prejudice to the submission that in any event, the complaint, as filed, is not maintainable before this ld. authority.

38. That the reliefs sought by the complainant appear to be on misconceived and erroneous basis. Hence, the complainant is estopped from raising the pleas, as raised in respect thereof, besides the said pleas being illegal, misconceived and erroneous.

39. That apparently, the complaint filed by the complainant is abuse and misuse of process of law and the reliefs claimed as sought for, are liable to be dismissed. No relief much less any interim relief, as sought for, is liable to be granted to the complainant.

40. That the complainant by way of present complaint is also seeking the relief of recovery of alleged pending assured return amount. However, it is submitted that the ld. authority does not have jurisdiction to decide upon the amount of assured return which the ld. authority has already held in its various judgments.

41. It is crystal clear that complainant is not an "allottee, but is an investor" who is only seeking assured return from the respondent, by way of present complaint, which is not maintainable under real estate regulatory authority. The

42

complainant after its own independent judgment has booked the said unit. The complainant has agreed for leasing arrangement wherein complainant has booked the said commercial unit for earning profit and is meant for leasing only and not for personal occupation. Therefore, the present complaint does not fall within the purview of the authority.

42. In the matter of "Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd." (Complaint No. 141 of 2018), the Hon'ble Haryana Real Estate Regulatory Authority, Gurugram has held that:

> *"8. Since RERA Act deals with the builder buyer relationship to the extent of timely delivery of possession to the buyer or deals with withdrawal from the project, as per provisions of section 18(1) of the Act.*
> *9. The buyer is directed to pursue the matter with regard to getting assured return as per the MoU by filing a case before appropriate forum/Adjudicating officer."*

43. In another matter of "Sh. Bharam Singh & Anr. Vs. Venetian LDF Projects LLP" (Complaint No. 175 of 2018) the Hon'ble Haryana Real Estate Regulatory Authority, Gurugram has held that:

> *"As already decided by the authority in complaint no.141 of 2018 titled as Brhimjeet Versus M/s Landmark Apartments Pvt. Ltd. no case is made out by the complainant. Counsel for respondent has placed on record a Supreme Court judgment dated 25.7.1997 vide which he has pleaded the doctrine of precedent. Since the authority has taken a view much earlier as stated above, the authority cannot go beyond the view already taken. In such type of assured return schemes, the authority has no jurisdiction, as such the complainant is at liberty to approach the appropriate forum to seek remedy. However, at the instance of the complainant, a direction is issued to the respondent/builder to complete the construction work within the time framed as per MoU and fulfil his committed liability."*

44. In view of the above, it is crystal clear that the present complaint is beyond the jurisdiction and does not fall within the purview of the authority, thus, liable to be dismissed on this ground only.

45. That due to the evolving policies, regulations and legal framework governing real estate investments, the company also informed the clients of commercial Units that as per the guidelines newly promulgated Ordinance i.e. "Banning of Unregulated Deposit Scheme Ordinance 2018" and further "Banning of Unregulated Deposit Scheme Act 2019", the Government banned such assured / committed returns and schemes of such returns completely. It is submitted that the respondent duly paid the assured return till September 2018 amounting to Rs. 31,73,425/- and it was only due to the above-mentioned ordinance and Act, the respondent suspended all return-based sales and stopped making payments towards the assured returns. Thus, in view of the above-mentioned ordinance and Act, the assured return is not payable.

E. Jurisdiction of the authority

46. The respondent has raised preliminary objection regarding jurisdiction of authority to entertain the present complaint. 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

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the

40

jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject-matter jurisdiction

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

> ***Section 11(4)(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;*
>
> *The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.*
>
> ***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.*

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside

compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the relief sought by the complainant:

F.I. Assured returns

47. While filing the claim petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 13.08.2010, the claimant has also sought assured returns on monthly basis as per addendum to the agreement dated 13.08.2011 at the rate of Rs 71.50/- per sq. ft. of super area per month till the completion of the building. It is pleaded by the claimant that the respondent has not complied with the terms and conditions of the agreement. Though for some time the amount of assured returns was paid but later on, the respondent refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019 (herein after referred to as the Act of 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 they paid the amount of assured return upto the year 2018 but did not pay assured return amount after coming into force of the Act of 2019 as the same was declared illegal.

48. The addendum to the agreement dated 13.08.2010 is a document was executed between both the parties on 22.08.2011and can be termed as agreement. 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

38

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

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

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

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

49. While taking up the cases of ***Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd. (complaint no 141 of 2018)***, and ***Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP"*** (complaint no 175 of 2018) decided on 07.08.2018 and 27.11.2018 respectively, it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the issue of assured returns was involved to be paid by the builder to an allottee but at that time, neither the full facts were brought before the authority nor it was argued on behalf of the allottee that on the basis of contractual obligations, the builder is obligated to pay that amount. However, there is no bar to take a different view from the earlier one if new facts and law have been brought before an adjudicating authority or the court. There is a doctrine of ***"prospective overruling"*** and which provides that the law declared by the court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. A reference in this regard can be made to the case of ***Sarwan Kumar & Anr Vs. Madan Lal Aggarwal*** Appeal (civil) 1058 of 2003 decided on 06.02.2003 and

36

wherein the hon'ble apex court observed as mentioned above. So, now a plea raised with regard to maintainability of the complaint in the face of earlier orders of the authority in not tenable. The authority can take different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. It is now well settled preposition of law that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum , memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement for sale defines the builder-buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allotee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arise out of the agreement for sale only and between the same contracting parties to agreement for sale. In the case in hand, the issue of assured returns is on the basis of contractual obligations arising between the parties. In cases of ***Anil Mahindroo & Anr. v/s Earth Iconic Infrastructure Pvt. Ltd.*** (Company Appeal (AT) (Insolvency) No. 74 of 2017) and ***Nikhil Mehta and Sons (HUF) and Ors. vs. AMR Infrastructure Ltd.*** (CA NO. 811 (PB)/2018 in (IB)-02(PB)/2017) decided on 02.08.2017 and 29.09.2018 respectively, it was held that the allottees are investors and have chosen committed return plans. The builder in turn agreed to pay

35

monthly committed return to the investors. Thus, the amount due to the allottee comes within the meaning of 'debt' defined in Section 3(11) of the I&B Code. Then in case of ***Pioneer Urban Land and Infrastructure Limited & Anr. v/s Union of India & Ors.*** (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019, it was observed by the Hon'ble Apex Court of the land that *"...allottees who had entered into "assured return/committed returns' agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of agreement till the date of handing over of possession to the allottees".* It was further held that 'amounts raised by developers under assured return schemes had the "commercial effect of a borrowing' which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code" including its treatment in books of accounts of the promoter and for the purposes of income tax. Then, in the latest pronouncement on this aspect in case ***Jaypee Kensington Boulevard Apartments Welfare Association and Ors. vs. NBCC (India) Ltd. and Ors.*** (24.03.2021-SC): MANU/ SC/0206 /2021, the same view was followed as taken earlier in the case of ***Pioneer Urban Land Infrastructure Ld & Anr.*** with regard to the allottees of assured returns to be financial creditors within the meaning of section 5(7) of the Code. Then after coming into force the Act of 2016 w.e.f 01.05.2017, the builder is obligated

34

to register the project with the authority being an ongoing project as per proviso to section 3(1) of the Act of 2017 read with rule 2(o) of the Rules, 2017. The Act of 2016 has no provision for re-writing of contractual obligations between the parties as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.,*** (supra) as quoted earlier. So, the respondent/builder can't take a plea that there was no contractual obligation to pay the amount of assured returns to the allottee after the Act of 2016 came into force or that a new agreement is being executed with regard to that fact. When there is an obligation of the promoter against an allottee to pay the amount of assured returns, then he can't wriggle out from that situation by taking a plea of the enforcement of Act of 2016, BUDS Act 2019 or any other law.

50. Section 2(4) of the above mentioned Act defines the word ' deposit' as *an amount of money received by way of an advance or loan or in any other form, by any deposit taker with a promise to return whether after a specified period* or otherwise, either in cash or in kind or in the form of a specified service, *with or without any benefit in the form of interest, bonus, profit or in any other form, but does not include:*

> *i. an amount received in the course of, or for the purpose of, business and bearing a genuine connection to such business including—*
> *ii. advance received in connection with consideration of an immovable property under an agreement or arrangement subject to the condition that such advance is adjusted against such immovable property as specified in terms of the agreement or arrangement.*

51. A perusal of the above-mentioned definition of the term 'deposit' shows that it has been given the same meaning as assigned to it under the Companies Act, 2013 and the same provides under section 2(31) includes any receipt by way of deposit or loan or in any other form by a company but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India. Similarly rule 2(c) of the Companies (Acceptance of Deposits) Rules, 2014 defines the meaning of deposit which includes any receipt of money by way of deposit or loan or in any other form by a company but does not include.

> *i. as a advance, accounted for in any manner whatsoever, received in connection with consideration for an immovable property*
> *ii. as an advance received and as allowed by any sectoral regulator or in accordance with directions of Central or State Government;*

52. So, keeping in view the above-mentioned provisions of the Act of 2019 and the Companies Act 2013, it is to be seen as to whether an allottee is entitled to assured returns in a case where he has deposited substantial amount of sale consideration against the allotment of a unit with the builder at the time of booking or immediately thereafter and as agreed upon between them.

53. The Government of India enacted the Banning of Unregulated Deposit Schemes Act, 2019 to provide for a comprehensive mechanism to ban the unregulated deposit schemes, other than deposits taken in the ordinary course of business and to protect the interest of depositors and for matters connected therewith or incidental thereto as defined in section 2 (4) of the BUDS Act 2019 mentioned above.

32

54. It is evident from the perusal of section 2(4)(l)(ii) of the above-mentioned Act that the advances received in connection with consideration of an immovable property under an agreement or arrangement subject to the condition that such advances are adjusted against such immovable property as specified in terms of the agreement or arrangement do not fall within the term of deposit, which have been banned by the Act of 2019.

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

3)

56. The definition of term 'deposit' as given in the BUDS Act 2019, has the same meaning as assigned to it under the Companies Act 2013, as per section 2(4)(iv)(i) i.e., explanation to sub-clause (iv). In pursuant to powers conferred by clause 31 of section 2, section 73 and 76 read with sub-section 1 and 2 of section 469 of the Companies Act 2013, the Rules with regard to acceptance of deposits by the companies were framed in the year 2014 and the same came into force on 01.04.2014. The definition of deposit has been given under section 2 (c) of the above-mentioned Rules and as per clause xii (b), as advance, accounted for in any manner whatsoever received in connection with consideration for an immovable property under an agreement or arrangement, provided such advance is adjusted against such property in accordance with the terms of agreement or arrangement shall not be a deposit. Though there is proviso to this provision as well as to the amounts received under heading 'a' and 'd' and the amount becoming refundable with or without interest due to the reasons that the company accepting the money does not have necessary permission or approval whenever required to deal in the goods or properties or services for which the money is taken, then the amount received shall be deemed to be a deposit under these rules however, the same are not applicable in the case in hand. Though it is contended that there is no necessary permission or approval to take the sale consideration as advance and would be considered as deposit as per sub-clause 2(xv)(b) but the plea advanced in this regard is devoid of merit. First of all, there is exclusion clause to section 2 (xiv)(b) which provides that unless specifically excluded under this clause. Earlier, the deposits

received by the companies or the builders as advance were considered as deposits but w.e.f. 29.06.2016, it was provided that the money received as such would not be deposit unless specifically excluded under this clause. A reference in this regard may be given to clause 2 of the First schedule of Regulated Deposit Schemes framed under section 2 (xv) of the Act of 2019 which provides as under: -

> *(2)The following shall also be treated as Regulated Deposit Schemes under this Act namely:-*
>
> *(a) deposits accepted under any scheme, or an arrangement registered with any regulatory body in India constituted or established under a statute; and*
>
> *(b) any other scheme as may be notified by the Central Government under this Act.*

57. 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.

58. It is not disputed that the respondent is a real estate developer, and it had obtained registration under the Act of 2016 for the project in question. The authority under this Act has been regulating the advances received under the project and its various other aspects. So, the amount paid by the 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. If the project in which the advance has been received by the developer from an allottee is an ongoing project as per section 3(1) of the Act of 2016 then, the same would fall within the jurisdiction of the authority for giving the desired relief to the complainant besides initiating penal proceedings.

F. II Delay possession charges

59. In the present complaint, the complainant intends to continue with the project and is seeking possession of the subject unit and delay possession charges as provided under the provisions of section 18(1) of the Act which reads as under.

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

60. The builder buyer agreement dated 13.08.2010 was executed between the parties. As per clause 2 of the builder buyer agreement, the possession was to be handed over within a period of 3 years from the date of execution of this agreement. Clause 2 of the builder buyer agreement is reproduced below:

> *"The Developer will complete the construction of the said complex within three (3) years from the date of execution of this agreement....."*

61. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement,

and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions is not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottee that even a single default by him in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

62. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges. However, 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. 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]***
> *(1) 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.

63. The legislature in its wisdom in the subordinate legislation under the rule 15 of the rules has determined the prescribed rate of interest.

64. 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., 10.11.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

65. 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—
(i) 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;
(ii) 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;"

96

66. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.

67. On consideration of documents available on record and submissions made by the complainant and the respondent, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 2 of the agreement executed between the parties on 13.08.2010, the possession of the subject unit was to be delivered within stipulated time i.e. 13.08.2013. Accordingly, it is the failure of the respondent/promoter to fulfil their obligations and responsibilities as per the agreement and to hand over the possession within the stipulated period.

68. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such, the complainant is entitled to delayed possession charges at prescribed rate of interest i.e. **9.30%** p.a. w.e.f. 13.08.2013 till the handing over possession as per provisions of section 18(1) of the Act read with rule 15 of the rules.

F. III The respondent be directed to withdraw the common area maintenance charges and interest charges till the time OC is received and possession is offered to the complainant.

69. The complainant has submitted that the respondent has wrongly demanded payments on account of common area maintenance

25

charges prior to receiving of the OC and without offering the possession.

70. 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 the maintenance of the project by the association of the allottees. Section 19(6) of the RERA 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 the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent and other charges, if any.

71. 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 Ltd. on 16th August 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 by the 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 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;.....".

72. In yet another judgement titled as **Dr. Mudit Kumar vs Emaar MGF Land Limited on 28th January, 2020** passed by the State Commission, Punjab wherein it has been held that the promoter is not entitled to charge maintenance charges till the handing over of the possession of the plot to the allottee post receipt of the OC only. However, the amount accredited towards maintenance charges should be maintained in a corpus and the builder cannot

23

transfer the proceeds or maintenance charges received from 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).

73. In the light of the above mentioned reasoning, the 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.

G. Directions of the authority.

74. Hence, the authority, hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

i. The respondents are directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e. 13.08.2013 till the date of handing over possession of the allotted unit to the complainant.

ii. The respondents are also directed to pay the amount of assured return as agreed upon with the complainant from November 2018 till the date of handing over possession.

iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period as well as amount of assured returns.

92

iv. The respondent is directed to pay interest accrued from 13.08.2013 till the date of this order to the complainant within 90 days and subsequent interest to be paid till the date of handing over possession on or before the 10th of each succeeding month.

v. Interest on the delayed payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.

vi. The respondent/promoter is directed to withdraw the common area maintenance charges till a valid offer of possession has been made after obtaining occupation certificate from the competent authority.

vii. The respondent shall not charge anything from the complainant which is not part of the agreement of sale.

75. Complaint stands disposed of.

76. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.11.2021