BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 4371 of 2020
Date of filing complaint: 10.12.2020
First date of hearing : 11.02.2021
Date of decision : 09.11.2021
Rectified on : 04.02.2022

1.	Harshit Nagpal R/o: Unit no.101, tower no-8, Emaar, The Palm Terrace Select, Golf course Extn. Road, Sector 66, Gurugaon-122018	**Complainant**
	Versus	
1.	M/s Vatika One on One Pvt. ltd. R/o: Flat no. 621-a, 6th floor, Devika towers 6, Nehru Place, New Delhi-110019.	**Respondents**
2.	M/s Vatika Limited R/o 4th Floor, Vatika Triangle, Block-A, Sushant Lok, Phase I, Gurgaon 1220022.	

CORAM:	
Dr. K.K. Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Lavish Bhola (Advocate)	Complainant
Sh. Dhruv Dutt Sharma (Advocate)	Respondents

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 One on One,Sector 16, Gurugram
2.	Nature of the project	Commercial complex
3.	Area of the project	12.12125 acres
4.	DTCP license	05 of 2015 dated 06.08.2015
	License validity/ renewal period	05.08.2020
5.	RERA registered/not registered	RERA registered vide registration certificate no. 237 of 2017 dated 20.09.2017
	HRERA registration valid up to	19.09.2022
6.	Unit no.	421, 4th floor, block 4 (Page no 25 of BBA),
7.	Unit measuring	500 sq. ft.
8.	Allotment letter	03.08.2015 (Page 21 annexure P-2)
9.	New unit allotted	182, 4th floor, block 4 (page 21 annexure P-2 of complaint)
10	Date of execution of apartment buyer's agreement	10.02.2016 (Page 23 of BBA)

11.	Payment plan	Down payment plan (Page no 20 annexure P-1)
12.	Total sale consideration	Rs 41,25,000/- as per clause 2 of BBA (page 26 annexure P-1 of complaint being sale consideration)
13.	Total amount actually paid by the complainant	Rs 42,77,955/- as per clause 2 of BBA (page 26 annexure P-1 of complaint being sale consideration)
14.	Due date of delivery of possession	10.02.2020 as per clause 17 of the builder buyer agreement: 10.02.2016[Page 43 & 44 of BBA]
15.	Provision regarding assured return clause 15 of builder buyer agreement	The developer may, where the buyer has paid 100% of the total sale consideration and other charges for the commercial unit, upon signing of this agreement pay Rs 151.65/- per sq.ft. super area per month by way of assured return to the buyer, of certain category of commercial unit as per its policy, from the date of execution of this agreement till the construction of the said commercial unit is complete. Such policy of the developer may change from time to time where the developer may withdraw the assured return scheme.
16.	Offer of possession	Not offered
17.	Occupation certificate	Not obtained
18.	Delay in handing over possession till date of decision i.e., 09.11.2021	1 year 8 months 30 days

B. Facts of the complaint

3. It is submitted that in the month of June-July 2014, respondents approached the complainant regarding purchase of a unit in its

upcoming project. After that the complainant purchased the said unit and received an allotment letter dated 03.08.2015 (herein referred as "the said letter'). The said letter acknowledged that vide application dated 03.08.2015, the complainant was allotted with priority no 182 of unit no 421, 4th floor, block 4 measuring 500 sq. ft in the project known as "Vatika one on one" situated at sector-16, Gurugram. The said unit is a commercial space measuring 500 sq. ft. super area & which was agreed to be bought for a basic sale consideration of Rs 38,04,500/- and external development charges & infrastructure development charges of Rs 3,20,500/- which comes to total amount of Rs 41,25,000/-. However, it is pertinent to mention here that the total amount paid by the complainant as per the builder buyer agreement is Rs 42,77,955/-. The difference between the amount paid by the complainant and the amount for basic sale consideration is Rs 1,52,955/, which is the excess amount paid by the complainant.

4. The complainant has submitted that the respondents have charged an excess amount of Rs 1,52,955/- from him, which is clearly reflected from the builder buyer agreement.

5. It is submitted that the different payments were made by the complainant for the said unit which are detailed as under:

Cheque No.	Bank	Dated	Amount
080994	ICICI Bank	18/07/2014	Rs. 28,50,000/-
080992	ICICI Bank	18/07/2014	Rs. 5,00,000/-
080993	ICICI Bank	22/07/2014	Rs. 9,27,955/-

Total amount paid by the complainant	Rs 42,77,955/-

The receipts for the above-mentioned payments were duly issued by the respondents.

6. It is submitted that on 03.08.2015 final allotment with priority no. 182 of unit no 421, 4th floor, block 4 admeasuring 500 sq. ft. super area in "Vatika one-on-one", situated at sector-16, Gurugram was issued by the respondents. The respondents have assured the complainant that they would soon construct the said unit and handover the possession of the same with period of 48 months from the date of signing of the agreement dated 10.02.2016.

7. The complainant has submitted that the entire payment with respect to the said unit was made by him on 18.07.2014 and 22.07.2014 respectively but the builder buyers' agreement was signed and executed on 10.02.2016 after a gap of almost one and half years. It is pertinent to mention here that the respondents started paying the monthly assured returns to the complainant from 2014 itself, after he paid the entire basic sale consideration amount to them.

8. The complainant has submitted that as per the agreement, the possession of the said unit was to be delivered maximum in 48 months from the date of agreement. It was agreed upon between the parties that in case of delay in construction of the said unit, the respondents would continue to pay to the allottee assured returns till the time the said unit is offered by the developer for possession. If the developer fails to handover the possession of the said commercial unit within the stipulated period as stated hereinabove, then it would pay the buyer compensation up to a

maximum of Rs 10/- per sq. ft. of the super area per month for the period of such delay after expiry of the initial period of 60 days from the stipulated date for delivery of possession.

9. The complainant submitted that as per the builder buyer agreement, it was agreed upon between the parties that the unit was sold to him with an assured monthly return of Rs 151.65/per sq. ft. till such time the building in which the unit is situated is ready for possession. If the said unit is put on lease, then the developer would pay an amount of Rs. 130/-p sq. ft. to the complainant. But the respondents have failed to pay the complainant the assured monthly return of Rs 151.65/- per sq. ft. from the month of September 2018 till date. The possession of the said unit has not been delivered till date and with this act, the respondents failed to comply with the terms and condition of the agreement.

10. It is further submitted by complainant that there is a clear unfair trade practice and breach of contract and deficiency in the services of the respondents' and much more a smell of playing fraud with the complainant and others and is prima facie clear on the part of the respondents' party which makes it liable to answer this hon'ble authority.

11. That there is an apprehension in the mind of the complainant that the respondents party have been playing fraud and there is something fishy which the respondents party are not disclosing to him just to embezzle his hard-earned money and other co-owners. The complainant has neither political nor any business jealousy with the opposite party and rather is a common man.

12. The complainant has submitted that the cause of action for the present complaint arose on 18.07.2014 when he made two payments of Rs 28,50,000/- and Rs 5,00,000/- respectively to the respondents and again arose on 22.07.2014 when he made the last payment of Rs 9,27,955/-.The cause of action again arose on various occasion, including on 10.02.2016 when the builder buyer agreement was signed by both the parties which includes the possession date as 10.02.2020 of the said unit but failed to handover the physical possession of the said unit to the complainant. The cause of action is alive and continuing and would continue to subsist till such time as this hon'ble authority passes the necessary orders.

13. The complainant has submitted that he has requested the respondents several times by making telephonic calls and also personally visiting its office to deliver possession of the said unit in question along with interest on the amount deposited by him and also to pay the monthly assured returns, but the respondents have flatly refused to do so. Thus, the respondents in a pre-planned manner defrauded the complainant with his hard-earned huge amount and wrongful gained to itself and caused wrongful loss to the complainant.

C. Relief sought by the complainant:

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

    i. Direct the respondents to pay monthly assured return @Rs. 151.65/- along with interest @18% from September 2018-till date.

ii. Direct the respondents to pay interest at the rate of 18% per annum for every month of delay on the amount paid by the complainant from the due date of possession i.e., 10.02.2020 till the actual date of handing over the possession.

iii. Direct the respondents to pay interest at the rate of 18% per annum for every month of delay on the excess amount paid by the complainant i.e., Rs 1,52,955/-.

D. Reply by the respondent

Though both the respondents put in appearance through counsel, but reply was filed only on behalf of respondent no 1. No reply was received from respondent no. 2.

The respondent has contested the complaint on the following grounds.

15. 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 himself in filing the above captioned complaint before this ld. authority as the relief being claimed by the complainant is from Vatika Limited and not from Vatika One on One Pvt. Ltd. It is submitted here that the project in question is being developed by Vatika One on One Pvt. Ltd. and Vatika Limited has no concern with the project. Thus, the relief claimed as such is illegal, misconceived, erroneous and cannot be said to even fall within the realm of jurisdiction of this ld. authority. The complainant is seeking interest which, from reading of the 2016 Act and 2017 rules, especially those mentioned hereinabove, would be liable for adjudication, if all, by the

adjudicating officer and not this ld. authority. Thus, on this ground alone, the complaint is liable to be rejected.

16. That from perusal of the provisions of 2016 Act and/or the 2017 Haryana rules, 2017 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,2017 is the 'agreement for sale', as prescribed in annexure 'A' of 2017 Haryana rules, 2017. 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, along with 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, 2017categorically 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.

17. Besides the aforementioned sections, a reference may be made to rule 5 of Haryana rules, 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 an 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 Act of 2016 as well as Haryana rules,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.

18. It is a matter of record and rather a conceded position that no such agreement, as referred to under the provisions Act of 2016 and Haryana rules 2017, has been executed between respondents and the complainant. Rather, the agreement that has been referred to, for the purpose of getting the adjudication of the complaint, though without jurisdiction, is the builder buyer's agreement, executed much prior to coming into force Act of 2016.

    The adjudication of the complaint for interest, as provided under sections 12, 14, 18 and 19 of 2016 Act, if any, has to be in reference to the agreement for sale executed in terms Act of 2016 and rules, 2017 Haryana rules and no other agreement. This submission of the respondents *inter alia,* finds support from reading of the provisions

Act of 2016 as well as 2017, including the aforementioned submissions.

19. 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 submissions that in any event, the complaint, as filed, is not maintainable before this ld. authority.
20. That the relief sought by the complainant appears 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.
21. 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.
22. That the complainant by way of present complaint is seeking the relief of recovery of pending assured return amount under interim relief and main relief. 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 judgements.
23. It is crystal clear that complainant is not "allottee but is an investor" who is only seeking assured return from the respondents, by way of present complaint which is not maintainable under RERA. The complainant after his own independent judgment and after going through the clauses of the agreement has booked the said unit and executed the builder buyer agreement dated 10.02.2016

(hereinafter referred as "agreement"). As per clause 16 of the agreement, the complainant has agreed for leasing arrangement wherein he 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 hon'ble authority.

In a 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."*

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."*

In the 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 hon'ble authority and thus, liable to be dismissed on this ground only.

24. 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 an admitted fact that the respondents have paid the assured returns till September 2018. Thus, in view of the above-mentioned ordinance and Act, the assured return is not payable.

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

E. Jurisdiction of the authority

26. The respondent no. 1 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

27. 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 of 2016 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.

E. Findings on the objections raised by the respondents

E.I Objection regarding Vatika limited not liable for the relief claimed as Vatika One on One is the developer.

28. An objection has been taken by respondent no.2 with regard to its joining as one of the parties by taking a plea that it has no concern with the project being developed by respondent no. 1. But the plea advanced in this regard is untenable. A perusal of BBA dated 10.02.2016 shows that it was executed between the complainant and both the respondents i.e. Vatika One on One and Vatika Limited with regard to the allotted unit, setting out the terms and conditions of allotment, timeline for payments, specification of the project as well as allotted unit and the due date of possession. Moreover, respondent no 2 is a confirming party to that document and is bound by the terms and conditions embodied in it. So, it cannot be said that respondent no 2 has neither any interest in the matter in dispute nor it is a necessary party. So, the plea taken in this regard on behalf of respondent no 2 is untenable and therefore the authority had allowed the application for implement by the complainant.

F. Findings on the relief sought by the complainant:

F.I. Assured returns

20. While filing the claim petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 10.02.2016, the claimant has also sought assured returns on monthly basis as per clause 15 of builder buyer agreement at the rate of Rs 151.65/- per sq. ft. of super area per month till the construction of the said commercial unit is complete. It is pleaded by the claimant that the respondents have 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 respondents 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 respondents 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.

21. 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

22. While taking up the cases of ***Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd. (complaint no 141 of 2018)***, and ***Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP"*** (complaint no 175 of 2018) decided on 07.08.2018 and 27.11.2018 respectively, it was held by the authority that it has no jurisdiction

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

for assured returns between the promoter and allotee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arise out of the agreement for sale only and between the same contracting parties to agreement for sale. In the case in hand, the issue of assured returns is on the basis of contractual obligations arising between the parties. In cases of ***Anil Mahindroo & Anr. v/s Earth Iconic Infrastructure Pvt. Ltd.*** (Company Appeal (AT) (Insolvency) No. 74 of 2017) and ***Nikhil Mehta and Sons (HUF) and Ors. vs. AMR Infrastructure Ltd.*** (CA NO. 811 (PB)/2018 in (IB)-02(PB)/2017) decided on 02.08.2017 and 29.09.2018 respectively, it was held that the allottees are investors and have chosen committed return plans. The builder in turn agreed to pay monthly committed return to the investors. Thus, the amount due to the allottee comes within the meaning of 'debt' defined in Section 3(11) of the I&B Code. Then in case of ***Pioneer Urban Land and Infrastructure Limited & Anr. v/s Union of India & Ors.*** (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019, it was observed by the Hon'ble Apex Court of the land that *"...allottees who had entered into "assured return/committed returns' agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of agreement till the date of handing over of possession to the allottees"*. It was further held that 'amounts raised by developers under assured return schemes had the "commercial

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

23. It is pleaded on behalf of respondent/builder that after the Banning of Unregulated Deposit Schems Act of 2019 came into force, there is bar for payment of assured returns to an allottee. But again, the plea taken in this regard is devoid of merit. Section 2(4) of the above mentioned Act defines the word ' deposit' as *an amount of money received by way of an advance or loan or in any other form, by any deposit taker with a promise to return whether after a specified period* or otherwise, either in cash or in kind or in the form of a specified service, *with or without any benefit in the form of interest, bonus, profit or in any other form, but does not include*

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

24. 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;

25. 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.

26. 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.

27. 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.

28. Moreover, the developer is also bound by promissory estoppel. As per this doctrine, the view is that if any person has made a promise and the promisee has acted on such promise and altered his

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

29. 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.

30. 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.

31. 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

32. 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."

33. The builder buyer agreement dated 10.02.2016 was executed between the parties. As per clause 17 of the builder buyer agreement, the possession was to be handed over within a period of 48 months from the date of execution of this agreement. Clause 17 of the builder buyer agreement is reproduced below:

> *The developer based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said building/said commercial unit within a period of 48 months from the date of execution of this agreement unless there shall be delay or there shall be failure due to reasons mentioned in this agreement or due to failure of buyer(s) to pay in time the price of the said commercial unit along with all other charges and dues in accordance with the schedule of payments.*

34. 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 favour 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.

35. **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.*

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

37. 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., 09.11.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

38. 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 39, 40 and 41 of the order dated 10.11.2021 are hereby substituted with corrected/rectified paras bearing same no. 39, 40 and 41.

39. 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 17 of the agreement executed between the parties on 10.02.2016, the possession of the subject unit was to be delivered within stipulated time i.e., 10.02.2020. 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?

40. 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. 151.65/- 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. 75,825/- per month whereas the delayed possession charges are payable approximately Rs. 33,154/- per month. By way of assured return, the promoter has assured the allottee that he will be entitled for this specific amount till construction of the said commercial building is complete. Accordingly, the interest of the allottee is protected even after the due date of possession is over as the assured returns are payable

till construction of the said commercial building is complete. 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.

41. 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 construction of the said commercial building is complete and declines to order payment of any amount on account of delayed possession charges as his interest has been protected by granting assured return till construction of the said commercial building is complete.

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

42. 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 the amount of assured return at the agreed rate i.e. Rs.151.65/- per sq. ft. to the

complainant from the date the payment of assured return has not been paid i.e. March 2018 till the construction of the said commercial unit is complete.

ii. The respondents are 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 respondents shall not charge anything from the complainant which is not part of the agreement of sale.

43. 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.

44. Complaint stands disposed of.

45. File be consigned to registry.

(Dr. K.K. Khandelwal)
Chairman

(Vijay Kumar Goyal)
Member

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. : 4371 of 2020
Date of filing complaint: 10.12.2020
First date of hearing : 11.02.2021
Date of decision : 10.11.2021

1.	Harshit Nagpal R/o: Unit no.101, tower no-8, Emaar, The Palm Terrace Select, Golf course Extn. Road, Sector 66, Gurugaon-122018	**Complainant**
	Versus	
1.	M/s Vatika One on One Pvt. ltd. R/o: Flat no. 621-a, 6th floor, Devika towers 6, Nehru Place, New Delhi-110019.	**Respondents**
2.	M/s Vatika Limited R/o 4th Floor, Vatika Triangle, Block-A, Sushant Lok, Phase I, Gurgaon 1220022.	

CORAM:	
Dr. K.K. Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Lavish Bhola (Advocate)	Complainant
Sh. Dhruv Dutt Sharma (Advocate)	Respondents

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 One on One,Sector 16, Gurugram
2.	Nature of the project	Commercial complex
3.	Area of the project	12.12125 acres
4.	DTCP license	05 of 2015 dated 06.08.2015
	License validity/ renewal period	05.08.2020
5.	RERA registered/not registered	RERA registered vide registration certificate no. 237 of 2017 dated 20.09.2017
	HRERA registration valid up to	19.09.2022
6.	Unit no.	421, 4th floor, block 4 (Page no 25 of BBA),
7.	Unit measuring	500 sq. ft.
8.	Allotment letter	03.08.2015 (Page 21 annexure P-2)
9.	New unit allotted	182, 4th floor, block 4 (page 21 annexure P-2 of complaint)
10	Date of execution of apartment buyer's agreement	10.02.2016 (Page 23 of BBA)

11.	Payment plan	Down payment plan (Page no 20 annexure P-1)
12.	Total sale consideration	Rs 41,25,000/- as per clause 2 of BBA (page 26 annexure P-1 of complaint being sale consideration)
13.	Total amount actually paid by the complainant	Rs 42,77,955/- as per clause 2 of BBA (page 26 annexure P-1 of complaint being sale consideration)
14.	Due date of delivery of possession	10.02.2020 as per clause 17 of the builder buyer agreement: 10.02.2016[Page 43 & 44 of BBA]
15.	Provision regarding assured return clause 15 of builder buyer agreement	The developer may, where the buyer has paid 100% of the total sale consideration and other charges for the commercial unit, upon signing of this agreement pay Rs 151.65/- per sq.ft. super area per month by way of assured return to the buyer, of certain category of commercial unit as per its policy, from the date of execution of this agreement till the construction of the said commercial unit is complete. Such policy of the developer may change from time to time where the developer may withdraw the assured return scheme.
16.	Offer of possession	Not offered
17.	Occupation certificate	Not obtained
18.	Delay in handing over possession till date of decision i.e., 09.11.2021	1 year 8 months 30 days

B. Facts of the complaint

3. It is submitted that in the month of June-July 2014, respondents approached the complainant regarding purchase of a unit in its

upcoming project. After that the complainant purchased the said unit and received an allotment letter dated 03.08.2015 (herein referred as "the said letter'). The said letter acknowledged that vide application dated 03.08.2015, the complainant was allotted with priority no 182 of unit no 421, 4th floor, block 4 measuring 500 sq. ft in the project known as "Vatika one on one" situated at sector-16, Gurugram. The said unit is a commercial space measuring 500 sq. ft. super area & which was agreed to be bought for a basic sale consideration of Rs 38,04,500/- and external development charges & infrastructure development charges of Rs 3,20,500/- which comes to total amount of Rs 41,25,000/-. However, it is pertinent to mention here that the total amount paid by the complainant as per the builder buyer agreement is Rs 42,77,955/-. The difference between the amount paid by the complainant and the amount for basic sale consideration is Rs 1,52,955/, which is the excess amount paid by the complainant.

4. The complainant has submitted that the respondents have charged an excess amount of Rs 1,52,955/- from him, which is clearly reflected from the builder buyer agreement.

5. It is submitted that the different payments were made by the complainant for the said unit which are detailed as under:

Cheque No.	Bank	Dated	Amount
080994	ICICI Bank	18/07/2014	Rs. 28,50,000/-
080992	ICICI Bank	18/07/2014	Rs. 5,00,000/-
080993	ICICI Bank	22/07/2014	Rs. 9,27,955/-

Total amount paid by the complainant	Rs 42,77,955/-

The receipts for the above-mentioned payments were duly issued by the respondents.

6. It is submitted that on 03.08.2015 final allotment with priority no. 182 of unit no 421, 4th floor, block 4 admeasuring 500 sq. ft. super area in "Vatika one-on-one", situated at sector-16, Gurugram was issued by the respondents. The respondents have assured the complainant that they would soon construct the said unit and handover the possession of the same with period of 48 months from the date of signing of the agreement dated 10.02.2016.

7. The complainant has submitted that the entire payment with respect to the said unit was made by him on 18.07.2014 and 22.07.2014 respectively but the builder buyers' agreement was signed and executed on 10.02.2016 after a gap of almost one and half years. It is pertinent to mention here that the respondents started paying the monthly assured returns to the complainant from 2014 itself, after he paid the entire basic sale consideration amount to them.

8. The complainant has submitted that as per the agreement, the possession of the said unit was to be delivered maximum in 48 months from the date of agreement. It was agreed upon between the parties that in case of delay in construction of the said unit, the respondents would continue to pay to the allottee assured returns till the time the said unit is offered by the developer for possession. If the developer fails to handover the possession of the said commercial unit within the stipulated period as stated hereinabove, then it would pay the buyer compensation up to a

maximum of Rs 10/- per sq. ft. of the super area per month for the period of such delay after expiry of the initial period of 60 days from the stipulated date for delivery of possession.

9. The complainant submitted that as per the builder buyer agreement, it was agreed upon between the parties that the unit was sold to him with an assured monthly return of Rs 151.65/per sq. ft. till such time the building in which the unit is situated is ready for possession. If the said unit is put on lease, then the developer would pay an amount of Rs. 130/-p sq. ft. to the complainant. But the respondents have failed to pay the complainant the assured monthly return of Rs 151.65/- per sq. ft. from the month of September 2018 till date. The possession of the said unit has not been delivered till date and with this act, the respondents failed to comply with the terms and condition of the agreement.

10. It is further submitted by complainant that there is a clear unfair trade practice and breach of contract and deficiency in the services of the respondents' and much more a smell of playing fraud with the complainant and others and is prima facie clear on the part of the respondents' party which makes it liable to answer this hon'ble authority.

11. That there is an apprehension in the mind of the complainant that the respondents party have been playing fraud and there is something fishy which the respondents party are not disclosing to him just to embezzle his hard-earned money and other co-owners. The complainant has neither political nor any business jealousy with the opposite party and rather is a common man.

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12. The complainant has submitted that the cause of action for the present complaint arose on 18.07.2014 when he made two payments of Rs 28,50,000/- and Rs 5,00,000/- respectively to the respondents and again arose on 22.07.2014 when he made the last payment of Rs 9,27,955/-.The cause of action again arose on various occasion, including on 10.02.2016 when the builder buyer agreement was signed by both the parties which includes the possession date as 10.02.2020 of the said unit but failed to handover the physical possession of the said unit to the complainant. The cause of action is alive and continuing and would continue to subsist till such time as this hon'ble authority passes the necessary orders.

13. The complainant has submitted that he has requested the respondents several times by making telephonic calls and also personally visiting its office to deliver possession of the said unit in question along with interest on the amount deposited by him and also to pay the monthly assured returns, but the respondents have flatly refused to do so. Thus, the respondents in a pre-planned manner defrauded the complainant with his hard-earned huge amount and wrongful gained to itself and caused wrongful loss to the complainant.

C. Relief sought by the complainant:

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

    i. Direct the respondents to pay monthly assured return @Rs. 151.65/- along with interest @18% from September 2018-till date.

ii. Direct the respondents to pay interest at the rate of 18% per annum for every month of delay on the amount paid by the complainant from the due date of possession i.e., 10.02.2020 till the actual date of handing over the possession.

iii. Direct the respondents to pay interest at the rate of 18% per annum for every month of delay on the excess amount paid by the complainant i.e., Rs 1,52,955/-.

D. Reply by the respondent

Though both the respondents put in appearance through counsel, but reply was filed only on behalf of respondent no 1. No reply was received from respondent no. 2.

The respondent has contested the complaint on the following grounds.

15. 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 himself in filing the above captioned complaint before this ld. authority as the relief being claimed by the complainant is from Vatika Limited and not from Vatika One on One Pvt. Ltd. It is submitted here that the project in question is being developed by Vatika One on One Pvt. Ltd. and Vatika Limited has no concern with the project. Thus, the relief claimed as such is illegal, misconceived, erroneous and cannot be said to even fall within the realm of jurisdiction of this ld. authority. The complainant is seeking interest which, from reading of the 2016 Act and 2017 rules, especially those mentioned hereinabove, would be liable for adjudication, if all, by the

adjudicating officer and not this ld. authority. Thus, on this ground alone, the complaint is liable to be rejected.

16. That from perusal of the provisions of 2016 Act and/or the 2017 Haryana rules, 2017 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,2017 is the 'agreement for sale', as prescribed in annexure 'A' of 2017 Haryana rules, 2017. 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 a. 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, along with 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 fc" 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, 2017categorically 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.

17. Besides the aforementioned sections, a reference may be made to rule 5 of Haryana rules, 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 an 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 Act of 2016 as well as Haryana rules,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.

18. It is a matter of record and rather a conceded position that no such agreement, as referred to under the provisions Act of 2016 and Haryana rules 2017, has been executed between respondents and the complainant. Rather, the agreement that has been referred to, for the purpose of getting the adjudication of the complaint, though without jurisdiction, is the builder buyer's agreement, executed much prior to coming into force Act of 2016.

The adjudication of the complaint for interest, as provided under sections 12, 14, 18 and 19 of 2016 Act, if any, has to be in reference to the agreement for sale executed in terms Act of 2016 and rules, 2017 Haryana rules and no other agreement. This submission of the respondents *inter alia*, finds support from reading of the provisions

Act of 2016 as well as 2017, including the aforementioned submissions.

19. 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 submissions that in any event, the complaint, as filed, is not maintainable before this ld. authority.
20. That the relief sought by the complainant appears 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.
21. 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.
22. That the complainant by way of present complaint is seeking the relief of recovery of pending assured return amount under interim relief and main relief. 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 judgements.
23. It is crystal clear that complainant is not "allottee but is an investor" who is only seeking assured return from the respondents, by way of present complaint which is not maintainable under RERA. The complainant after his own independent judgment and after going through the clauses of the agreement has booked the said unit and executed the builder buyer agreement dated 10.02.2016

(hereinafter referred as "agreement"). As per clause 16 of the agreement, the complainant has agreed for leasing arrangement wherein he 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 hon'ble authority.

In a 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."*

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."*

In the 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 hon'ble authority and thus, liable to be dismissed on this ground only.

24. 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 an admitted fact that the respondents have paid the assured returns till September 2018. Thus, in view of the above-mentioned ordinance and Act, the assured return is not payable.

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

E. Jurisdiction of the authority

26. The respondent no. 1 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

27. 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 of 2016 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.

E. Findings on the objections raised by the respondents

E.I Objection regarding Vatika limited not liable for the relief claimed as Vatika One on One is the developer.

28. An objection has been taken by respondent no.2 with regard to its joining as one of the parties by taking a plea that it has no concern with the project being developed by respondent no. 1. But the plea advanced in this regard is untenable. A perusal of BBA dated 10.02.2016 shows that it was executed between the complainant and both the respondents i.e. Vatika One on One and Vatika Limited with regard to the allotted unit, setting out the terms and conditions of allotment, timeline for payments, specification of the project as well as allotted unit and the due date of possession. Moreover, respondent no 2 is a confirming party to that document and is bound by the terms and conditions embodied in it. So, it cannot be said that respondent no 2 has neither any interest in the matter in dispute nor it is a necessary party. So, the plea taken in this regard on behalf of respondent no 2 is untenable and therefore the authority had allowed the application for implement by the complainant.

F. Findings on the relief sought by the complainant:

F.I. Assured returns

20. While filing the claim petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 10.02.2016, the claimant has also sought assured returns on monthly basis as per clause 15 of builder buyer agreement at the rate of Rs 151.65/- per sq. ft. of super area per month till the construction of the said commercial unit is complete. It is pleaded by the claimant that the respondents have 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 respondents 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 respondents 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.

21. 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 Suburbcn 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

22. 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 dec'ded on 06.02.2003 and wherein the hon'ble apex court observed as mentioned above. So, now a plea raised with regard to maintainability of the complaint in the face of earlier orders of the authority in not tenable. The authority can take different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. It is now well settled preposition of law that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum , memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement for sale defines the builder-buyer relationship. So, it can be said that the agreement

for assured returns between the promoter and allotee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arise out of the agreement for sale only and between the same contracting parties to agreement for sale. In the case in hand, the issue of assured returns is on the basis of contractual obligations arising between the parties. In cases of ***Anil Mahindroo & Anr. v/s Earth Iconic Infrastructure Pvt. Ltd.*** (Company Appeal (AT) (Insolvency) No. 74 of 2017) and ***Nikhil Mehta and Sons (HUF) and Ors. vs. AMR Infrastructure Ltd.*** (CA NO. 811 (PB)/2018 in (IB)-02(PB)/2017) decided on 02.08.2017 and 29.09.2018 respectively, it was held that the allottees are investors and have chosen committed return plans. The builder in turn agreed to pay monthly committed return to the investors. Thus, the amount due to the allottee comes within the meaning of 'debt' defined in Section 3(11) of the I&B Code. Then in case of ***Pioneer Urban Land and Infrastructure Limited & Anr. v/s Union of India & Ors.*** (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019, it was observed by the Hon'ble Apex Court of the land that *"...allottees who had entered into "assured return/committed returns' agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of agreement till the date of handing over of possession to the allottees"*. It was further held that 'amounts raised by developers under assured return schemes had the "commercial

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

23. It is pleaded on behalf of respondent/builder that after the Banning of Unregulated Deposit Schems Act of 2019 came into force, there is bar for payment of assured returns to an allottee. But again, the plea taken in this regard is devoid of merit. Section 2(4) of the above mentioned Act defines the word ' deposit' as *an amount of money received by way of an advance or loan or in any other form, by any deposit taker with a promise to return whether after a specified period* or otherwise, either in cash or in kind or in the form of a specified service, *with or without any benefit in the form of interest, bonus, profit or in any other form, but does not include*

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

24. 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;

25. 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.

26. 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.

27. 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.

28. Moreover, the developer is also bound by promissory estoppel. As per this doctrine, the view is that if any person has made a promise and the promisee has acted on such promise and altered his

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

29. 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.

30. 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.

31. 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

32. 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."

33. The builder buyer agreement dated 10.02.2016 was executed between the parties. As per clause 17 of the builder buyer agreement, the possession was to be handed over within a period of 48 months from the date of execution of this agreement. Clause 17 of the builder buyer agreement is reproduced below:

> *The developer based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said building/said commercial unit within a period of 48 months from the date of execution of this agreement unless there shall be delay or there shall be failure due to reasons mentioned in this agreement or due to failure of buyer(s) to pay in time the price of the said commercial unit along with all other charges and dues in accorda..ce with the schedule of payments.*

34. 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 favour 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.

35. **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.*

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

37. 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., 09.11.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

38. 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;"*

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

40. On consideration of documents available on record and submissions made by the complainant and the respondents, the authority is satisfied that the respondents are in contravention of the provisions of the Act. By virtue of clause 17 of the agreement executed between the parties on 10.02.2016, the possession of the subject unit was to be delivered within stipulated time i.e. 10.02.2020. Accordingly, it is the failure of the respondents/promoters to fulfil their obligations and responsibilities as per the agreement and to hand over the possession within the stipulated period.

41. 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 respondents 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. 10.02.2020 till the handing over possession as per provisions of section 18(1) of the Act read with rule 15 of the rules.

G. Directions of the authority

42. 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. 10.02.2020 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 March 2018 till the date of handing over possession.

iii. The respondents are directed to pay interest accrued from 10.02.2020 till the date of order to the complainant within 90 days from the date of order and subsequent interest to be paid till the date of handing over possession on or before the 10th of each succeeding month.

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

v. The respondents shall not charge anything from the complainant which is not part of the agreement of sale.

43. Complaint stands disposed of.

44. File be consigned to registry.

(Dr. K.K. Khandelwal)
Chairman

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.11.2021