Rectified vide order dated 04.02.2022

HARERA
GURUGRAM

Complaint No. 2331 of 2021

BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : **2331 of 2021**
Date of filing complaint: **22.06.2021**
First date of hearing : **11.08.2021**
Date of decision : **10.11.2021**
Rectified on : **04.02.2022**

1.	Anu Mehta R/o: Flat no. 6451, Sector B-9, Vasant Kunj, New Delhi-110070	**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 A-002, INXT City centre, Ground floor, Block A, Sector 83, Vatika India Next, Gurugram	
3.	Mr. Gautam Bhalla R/o A-002, INXT City centre, Ground floor, Block A, Sector 83, Vatika India Next, Gurugram	

CORAM:	
Dr. K.K. Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Virat Tomar (Advocate)	Complainant
Ms. Ankur Berry (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 Pvt. Ltd. Sector 16, Gurugram
2.	Nature of the project	Commercial complex
3.	Area of the project	12.123125 acres
4.	DTCP License	05 of 2015 dated 06.08.2015
	License validity/ renewal period	05.08.2020
5.	RERA registered/not registered	237 of 2017 dated 20.09.2017
	HRERA registration valid up to	19.09.2022
6.	Unit no.	Unit no. 415, 4th floor, block 4 admeasuring 500 sq. ft. (page 43 of complaint)
7.	New unit no.	Unit no. 172, 4th floor, block 4 admeasuring 500 sq.ft. (page 34 annexure P-3 of complaint)
8.	Date of execution of apartment buyer's agreement	14.01.2016 (page 41 of complaint)
9.	Allotment letter	13.08.2014 (page 34 annexure P-3 of complaint)

10.	Total consideration	Rs. 41,48,320/- as per application form (page 27 of complaint)
11.	Total amount paid up upto 25.03.2019	Rs. 41,48,320/- as per application form (page 27 of complaint)
12.	Due date of delivery of possession	14.01.2020
13.	Provision regarding assured return clause 15	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 and pay Rs. 151.65/- per sq.ft. super area per month by way of assured return to the buyer of certain category(ies) 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 schemes. (page 57 of complaint).
14.	Offer of possession	Not offered
15.	Occupation certificate	Not obtained
16.	Delay in handing over possession till date of this order 09.11.2021	1 year 9 months 26 days

B. Facts of the complaint

3. That the applicant/complainant is a bonafide purchaser of a commercial space bearing unit No. 415, 4th Floor, Block - 4 of the

project named as "One on One", Sector – 16, Gurgaon, Haryana of the opposite Party No.1 i.e., Vatika One on One Private Limited.

4. The complainant acting on the representations of the opposite parties agreed to purchase a shop/commercial space in the aforesaid commercial complex project named as "One on One" and accordingly submitted an application dated 08.07.2014 seeking allotment of a shop/commercial enclosing therewith a cheque of Rs. 41,48,320/- bearing no. 163908 dated 08.07.2014 drawn on HDFC bank favouring opposite parties towards the entire sale consideration inclusive of taxes.

5. That the opposite party no.2 vide its letter dated 01.08.2014 provided a copy of receipt dated 23.07.2014 of the aforesaid payment of Rs. 41,48,320/- to the complainant.

6. That in furtherance of the above application of the complainant, the opposite party No. 2 confirmed the allotment of a shop/commercial space admeasuring 500 sq. ft. (super area) being priority no P-172 in project namely" One on One", Sector 16, District – Gurugram vide letter dated 13.08.2014 and acknowledged to pay assured monthly return of Rs. 151.65 per sq. ft. super area till the completion of the building and committed monthly rental return of Rs. 130.00 per sq. ft. super area for up to three years from the date of completion of construction of the said commercial unit or till the same is put on lease whichever is earlier.

7. Subsequently, the final allocation of area in the project was completed and the unit no of the complainant was confirmed as being Unit no. 415 on 4th Floor of Block–4 in the building namely" One on One", Sector 16, District – Gurugram vide letter dated 03.08.2015. Thereafter, both the parties executed and signed the

builder buyer agreement (hereinafter referred as BBA) dated 14.01.2016. As per the BBA, the unit under reference was to be constructed within 4 years from the date of execution of BBA and the agreed total sale price inclusive of taxes for the said Unit was Rs. 41,48,320/-

8. That the complainant had paid the entire sale consideration inclusive of taxes amounting to Rs. 41,48,320/- vide cheque bearing no. 163908 dated 08.07.2014 drawn on HDFC bank favouring opposite parties at the time of submitting the application for allotment of the unit under reference. Thus, entire sale consideration including taxes amounting to Rs. 41,48,320/- of the said unit stood paid even before of the signing of the BBA and the said detail was mentioned and acknowledged in clause 2(b)(i) of the BBA itself.

9. That as per clause 17 of the BBA, the construction of the said Unit was to be completed within a period of 48 months from the date of execution of BBA i. e. 14.01.2016 and further as per clause 15 of the BBA the opposite parties were and are under an obligation to pay Rs. 151.65 per sq. ft. super area per month by way of assured return to the complainant from the date of execution of BBA till the Unit under reference is complete.

10. That it is pertinent to mention here that complainant had paid the entire sale consideration agreed between the parties even before the execution of the BBA but there is intentional and wilful default on the part of opposite parties in performance of the agreement on their part in completing the construction of the unit within 48 months from the date of execution of the BBA i.e. by 13.01.2020 & delivering the possession of unit in question to the complainant and

in non-leasing arrangement in terms of clause 17 of the BBA as well as pay the due amount of assured return in terms of clause 15 of the BBA.

11. That from the above, it is evident that the opposite parties were and are under an obligation to pay the assured and committed rental return to the complainant in terms of clause 15, 16.1 read with annexure I of the BBA and the letter dated 13.08.2014 as under:

(a) Assured return @ Rs.151.65 per sq. ft. per month till the construction of the commercial unit is complete.

(b) Committed rental return after completion of building @ Rs. 130/- per sq. ft. per month subject to the following conditions.

In case of lease rent being less than Rs.130/- per sq. ft. per month, the Opposite Parties would be liable to pay @ Rs.133 per sq. ft. for everyone Rs. drop.

In case of lease rent being between Rs 130/- sq. ft. and Rs. 150/- sq. ft., the complainant will be liable to pay the Opposite Parties additional sale consideration @ Rs.66.5/- per sq. ft. for every rupee of additional rental achieved.

In case of lease rent being above Rs. 150/- sq. ft., the complainant will be liable to pay the Opposite Parties additional sale consideration @1330/- per sq. ft. plus Rs. 86.50/- per sq. ft. for every rupee of additional rent above Rs. 150 sq. ft.

12. That the opposite parties neither completed the construction of the Unit of the complainant on time as per clause 17 of the BBA i.e., by 13.01.2020 nor till date any intimation of completion thereof has been received by the complainant from the opposite parties, thus

opposite parties are liable to pay assured return @ Rs. 151.65 per sq. ft. per month to the complainant till the date of completion of construction.

13. That the opposite parties continued to pay due assured returns @ Rs.151.65 per sq. ft. per month to the complainant till September, 2018 only and thereafter suddenly stopped making payment of due assured return from 01.10.2018 onwards to the complainant without any justification or assigning any reason.

14. That in view of the non-receipt of the payment towards assured return with effect from 01.10.2018, the complainant contacted the concerned officials of the opposite parties time and again for release of the due amount, however to no avail. As a result of the said breach of the BBA and evasive approach of the opposite parties, the complainant was constrained to send 04 representations dated 26.12.2019, 06.07.2020, 09.11.2020 and 06.05.2021 to the opposite parties requesting for payment of the outstanding due amount to be paid by the opposite Parties and for delivery of possession in terms of clause 17 of the BBA as well as execution/registration of conveyance deed of the unit in terms of clause 9 of the BBA.

15. That the details of outstanding due amount to be paid by the opposite parties towards assured returns till 31.05.2021 are as under:

S.N.	Particulars	Rate of return	Outstanding amount (Rs.)
1	Till construction of the unit is completed (calculated till 31.05.2021)	@Rs. 151.65 per sq. ft. per month	24,26,400/-

2	Simple interest on the outstanding amount as per Sl. No. 1	@18% per annum	5,64.138/-
5	Total outstanding amount till 31.05.2021		29,90,538/-

16. That it is submitted that the opposite parties have unjustly enriched themselves by denying the payment of the due amount of the complainant and undue advantage taken by the opposite parties of the complainant's situation. It is submitted that as per the principles of natural justice and it is equitable and lawful that the outstanding due money amounting to Rs. 29,90,538/- of the complainant should be paid to her. The act of the opposite parties has caused hardship, harassment, frustration, distress, agony and inconvenience to complainant and by such act the complainant have been defrauded by the opposite parties. The laws of the land including the Indian Contract Act, 1872 and RERA - Real Estate (Regulation and Development) Act, 2016 entitles the complainant to seek payment of outstanding due amount from the opposite parties.

17. That the present case of the complainant squarely falls within the ambit of the Doctrine of Promissory Estoppel. That the complainant had invested her savings in the project of the opposite Parties relying on the promise of the opposite Parties to pay assured/committed rental return to the complainant, however the act of the opposite party of not paying the said due amount from 01.10.2018 had caused loss to the complainant.

C. Relief sought by the complainant:

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

i. Direct the opposite parties to pay assured return @ Rs.151.65 per sq. ft. per month for the period from 01.10.2018 till date and continue to pay due amounts in future as per terms of BBA dated 14.01.2016.

ii. Direct the opposite parties to pay simple interest @18% per annum upon total outstanding amount due towards assured return till date as per the provisions of the RERA

iii. Direct the opposite parties to execute/register the conveyance deed of the unit under reference as soon as construction is completed

D. Reply by the respondents

The respondents have contested the complaint on the following ground.

19. 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 relied 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, and erroneous 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.

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

Haryana rules and is not being reproduced herein for the sake of brevity, though reliance is being placed upon the same.

21. Besides the aforementioned sections, a reference may be made to rule 5 of 2017 Haryana rules, which *inter alia*, provides that the authority shall issue a registration certificate with a registration number in form 'REP-III' to the promoter. Clause 2(i) of form 'REP-III' provides that the promoter shall enter into agreement for sale with the allottees as prescribed by the government.

From the conjoint reading of the aforementioned sections/ rules, form and annexure 'A', it is evident that the 'agreement for sale', for the purposes of 2016 Act as well as 2017 Haryana rules, is the one as laid down in annexure 'A', which is required to be executed *inter se* the promoter and the allottee.

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

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 of 2016 Act and 2017 Haryana rules and no other agreement. This submission of the respondents *inter alia*, finds support from reading of the provisions

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

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

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

25. 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.

26. 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.

27. It is crystal clear that complainant is not "allottees 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 its 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, thus, liable to be dismissed on this ground only.

28. 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" (Copy attached as Annexure R-2), 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 return till September 2018. Thus, in view of the above-mentioned ordinance and Act, the assured return is not payable.

29. 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 submission made by the parties.

G. Jurisdiction of the authority

30. The respondents have raised preliminary objection regarding jurisdiction of authority to entertain the present complaint. The authority observed that it has territorial as well as subject matter

jurisdiction to adjudicate the present complaint for the reasons given below.

G. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete7 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.

F. Findings on the relief sought by the complainant

F.I. Assured returns

31. While filing the claim petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 14.01.2016, 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 are 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.

32. 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

33. 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 respondents/builders 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.

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

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

35. 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;

36. 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.

37. 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.

38. 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.

39. 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.

40. 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.

41. 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.

42. It is not disputed that the respondents are 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. Directions of the authority: (Rectified vide order dated 04.02.2022)

43. 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

complainants from the date the payment of assured return has not been paid i.e. October 2018 till the date of completion of the building.

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 the part of the agreement.

iv. The respondents shall execute the conveyance deed within the 3 months from the offer of possession upon payment of requisite stamp duty as per norms of the state government.

44. 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.

45. Complaint stands disposed of.

46. File be consigned to registry.

Vijay Kumar Goyal
Member

Dr. KK Khandelwal
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.11.2021

Rectified vide order dated 04.02.2022

Corrected order uploaded on 16.03.2022.

BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 2331 of 2021
Date of filing complaint: 22.06.2021
First date of hearing : 11.08.2021
Date of decision : 10.11.2021

1.	Anu Mehta R/o: Flat no. 6451, Sector B-9, Vasant Kunj, New Delhi-110070	**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 A-002, INXT City centre, Ground floor, Block A, Sector 83, Vatika India Next, Gurugram	
3.	Mr. Gautam Bhalla R/o A-002, INXT City centre, Ground floor, Block A, Sector 83, Vatika India Next, Gurugram	

CORAM:	
Dr. K.K. Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Virat Tomar(Advocate)	Complainant
Ms. Ankur Berry (Advocate)	Respondents

BRIEF

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

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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 Pvt. Ltd. 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	237 of 2017 dated 20.09.2017
	HRERA registration valid up to	19.09.2022
6.	Unit no.	Unit no. 415, 4th floor, block 4 admeasuring 500 sq. ft. (page 43 of complaint)
7.	New unit no:	Unit no. 172, 4th floor, block 4 admeasuring 500 sq.ft. (page 34 annexure P-3 of complaint)
8.	Date of execution of apartment buyer's agreement	14.01.2016 (page 41 of complaint)
9.	Allotment letter	13.08.2014 (page 34 annexure P-3 of complaint)

10.	Total consideration	Rs. 41,48,320/- as per application form (page 27 of complaint)
11.	Total amount paid up upto 25.03.2019	Rs. 41,48,320/- as per application form (page 27 of complaint)
12.	Due date of delivery of possession	14.01.2020
13.	Provision regarding assured return clause 15	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 and pay Rs. 151.65/- per sq.ft. super area per month by way of assured return to the buyer of certain category(ies) 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 schemes. (page 57 of complaint).
14.	Offer of possession	Not offered
15.	Occupation certificate	Not obtained
16.	Delay in handing over possession till date of this order 10.11.2021	1 years 9 months 27 days

B. Facts of the complaint

3. That the applicant/complainant is a bonafide purchaser of a commercial space bearing unit No. 415, 4th Floor, Block - 4 of the

project named as "One on One", Sector – 16, Gurgaon, Haryana of the opposite Party No.1 i.e., Vatika One on One Private Limited.

4. The complainant acting on the representations of the opposite parties agreed to purchase a shop/commercial space in the aforesaid commercial complex project named as "One on One" and accordingly submitted an application dated 08.07.2014 seeking allotment of a shop/commercial enclosing therewith a cheque of Rs. 41,48,320/- bearing no. 163908 dated 08.07.2014 drawn on HDFC bank favouring opposite parties towards the entire sale consideration inclusive of taxes.

5. That the opposite party no.2 vide its letter dated 01.08.2014 provided a copy of receipt dated 23.07.2014 of the aforesaid payment of Rs. 41,48,320/- to the complainant.

6. That in furtherance of the above application of the complainant, the opposite party No. 2 confirmed the allotment of a shop/commercial space admeasuring 500 sq. ft. (super area) being priority no P-172 in project namely" One on One", Sector 16, District – Gurugram vide letter dated 13.08.2014 and acknowledged to pay assured monthly return of Rs. 151.65 per sq. ft. super area till the completion of the building and committed monthly rental return of Rs. 130.00 per sq. ft. super area for up to three years from the date of completion of construction of the said commercial unit or till the same is put on lease whichever is earlier.

7. Subsequently, the final allocation of area in the project was completed and the unit no of the complainant was confirmed as being Unit no. 415 on 4th Floor of Block–4 in the building namely" One on One", Sector 16, District – Gurugram vide letter dated 03.08.2015. Thereafter, both the parties executed and signed the

builder buyer agreement (hereinafter referred as BBA) dated 14.01.2016. As per the BBA, the unit under reference was to be constructed within 4 years from the date of execution of BBA and the agreed total sale price inclusive of taxes for the said Unit was Rs. 41,48,320/-

8. That the complainant had paid the entire sale consideration inclusive of taxes amounting to Rs. 41,48,320/- vide cheque bearing no. 163908 dated 08.07.2014 drawn on HDFC bank favouring opposite parties at the time of submitting the application for allotment of the unit under reference. Thus, entire sale consideration including taxes amounting to Rs. 41,48,320/- of the said unit stood paid even before of the signing of the BBA and the said detail was mentioned and acknowledged in clause 2(b)(i) of the BBA itself.

9. That as per clause 17 of the BBA, the construction of the said Unit was to be completed within a period of 48 months from the date of execution of BBA i. e. 14.01.2016 and further as per clause 15 of the BBA the opposite parties were and are under an obligation to pay Rs. 151.65 per sq. ft. super area per month by way of assured return to the complainant from the date of execution of BBA till the Unit under reference is complete.

10. That it is pertinent to mention here that complainant had paid the entire sale consideration agreed between the parties even before the execution of the BBA but there is intentional and wilful default on the part of opposite parties in performance of the agreement on their part in completing the construction of the unit within 48 months from the date of execution of the BBA i.e. by 13.01.2020 & delivering the possession of unit in question to the complainant and

in non-leasing arrangement in terms of clause 17 of the BBA as well as pay the due amount of assured return in terms of clause 15 of the BBA.

11. That from the above, it is evident that the opposite parties were and are under an obligation to pay the assured and committed rental return to the complainant in terms of clause 15, 16.1 read with annexure I of the BBA and the letter dated 13.08.2014 as under:

(a) Assured return @ Rs.151.65 per sq. ft. per month till the construction of the commercial unit is complete.

(b) Committed rental return after completion of building @ Rs. 130/- per sq. ft. per month subject to the following conditions.

In case of lease rent being less than Rs.130/- per sq. ft. per month, the Opposite Parties would be liable to pay @ Rs.133 per sq. ft. for everyone Rs. drop.

In case of lease rent being between Rs 130/- sq. ft. and Rs. 150/- sq. ft., the complainant will be liable to pay the Opposite Parties additional sale consideration @ Rs.66.5/- per sq. ft. for every rupee of additional rental achieved.

In case of lease rent being above Rs. 150/- sq. ft., the complainant will be liable to pay the Opposite Parties additional sale consideration @1330/- per sq. ft. plus Rs. 86.50/- per sq. ft. for every rupee of additional rent above Rs. 150 sq. ft.

12. That the opposite parties neither completed the construction of the Unit of the complainant on time as per clause 17 of the BBA i.e., by 13.01.2020 nor till date any intimation of completion thereof has been received by the complainant from the opposite parties, thus

opposite parties are liable to pay assured return @ Rs. 151.65 per sq. ft. per month to the complainant till the date of completion of construction.

13. That the opposite parties continued to pay due assured returns @ Rs.151.65 per sq. ft. per month to the complainant till September, 2018 only and thereafter suddenly stopped making payment of due assured return from 01.10.2018 onwards to the complainant without any justification or assigning any reason.

14. That in view of the non-receipt of the payment towards assured return with effect from 01.10.2018, the complainant contacted the concerned officials of the opposite parties time and again for release of the due amount, however to no avail. As a result of the said breach of the BBA and evasive approach of the opposite parties, the complainant was constrained to send 04 representations dated 26.12.2019, 06.07.2020, 09.11.2020 and 06.05.2021 to the opposite parties requesting for payment of the outstanding due amount to be paid by the opposite Parties and for delivery of possession in terms of clause 17 of the BBA as well as execution/registration of conveyance deed of the unit in terms of clause 9 of the BBA.

15. That the details of outstanding due amount to be paid by the opposite parties towards assured returns till 31.05.2021 are as under:

S.N.	Particulars	Rate of return	Outstanding amount (Rs.)
1	Till construction of the unit is completed (calculated till 31.05.2021)	@Rs. 151.65 per sq. ft. per month	24,26,400/-

2	Simple interest on the outstanding amount as per Sl. No. 1	@18% per annum	5,64.138/-
5	Total outstanding amount till 31.05.2021		29,90,538/-

16. That it is submitted that the opposite parties have unjustly enriched themselves by denying the payment of the due amount of the complainant and undue advantage taken by the opposite parties of the complainant's situation. It is submitted that as per the principles of natural justice and it is equitable and lawful that the outstanding due money amounting to Rs. 29,90,538/- of the complainant should be paid to her. The act of the opposite parties has caused hardship, harassment, frustration, distress, agony and inconvenience to complainant and by such act the complainant have been defrauded by the opposite parties. The laws of the land including the Indian Contract Act, 1872 and RERA - Real Estate (Regulation and Development) Act, 2016 entitles the complainant to seek payment of outstanding due amount from the opposite parties.

17. That the present case of the complainant squarely falls within the ambit of the Doctrine of Promissory Estoppel. That the complainant had invested her savings in the project of the opposite Parties relying on the promise of the opposite Parties to pay assured/committed rental return to the complainant, however the act of the opposite party of not paying the said due amount from 01.10.2018 had caused loss to the complainant.

C. Relief sought by the complainant:

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

i. Direct the opposite parties to pay assured return @ Rs.151.65 per sq. ft. per month for the period from 01.10.2018 till date and continue to pay due amounts in future as per terms of BBA dated 14.01.2016.

ii. Direct the opposite parties to pay simple interest @18% per annum upon total outstanding amount due towards assured return till date as per the provisions of the RERA

iii. Direct the opposite parties to execute/register the conveyance deed of the unit under reference as soon as construction is completed

D. Reply by the respondents

The respondents have contested the complaint on the following ground.

19. 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 relied 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, and erroneous 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.

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

Haryana rules and is not being reproduced herein for the sake of brevity, though reliance is being placed upon the same.

21. Besides the aforementioned sections, a reference may be made to rule 5 of 2017 Haryana rules, which *inter alia,* provides that the authority shall issue a registration certificate with a registration number in form 'REP-III' to the promoter. Clause 2(i) of form 'REP-III' provides that the promoter shall enter into agreement for sale with the allottees as prescribed by the government.

    From the conjoint reading of the aforementioned sections/ rules, form and annexure 'A', it is evident that the 'agreement for sale', for the purposes of 2016 Act as well as 2017 Haryana rules, is the one as laid down in annexure 'A', which is required to be executed *inter se* the promoter and the allottee.

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

    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 of 2016 Act and 2017 Haryana rules and no other agreement. This submission of the respondents *inter alia,* finds support from reading of the provisions

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

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

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

25. 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.

26. 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.

27. It is crystal clear that complainant is not "allottees but is an investor" who is only seeking assured return from the respondents, by way of present complaint, which is not maintainable under

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RERA. The complainant after its 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, thus, liable to be dismissed on this ground only.

28. 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" (Copy attached as Annexure R-2), 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 return till September 2018. Thus, in view of the above-mentioned ordinance and Act, the assured return is not payable.

29. 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 submission made by the parties.

G. Jurisdiction of the authority

30. The respondents have raised preliminary objection regarding jurisdiction of authority to entertain the present complaint. The authority observed that it has territorial as well as subject matter

jurisdiction to adjudicate the present complaint for the reasons given below.

G. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete7 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.

F. Findings on the relief sought by the complainant

F.I. Assured returns

31. While filing the claim petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 14.01.2016, 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 are 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.

32. 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

33. 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

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earlier. So, the respondents/builders 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.

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

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

35. 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;

36. 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.

37. 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.

38. 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.

39. 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.

40. 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.

41. 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.

42. It is not disputed that the respondents are 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. Directions of the authority

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

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

iii. 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.

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

v. The respondents shall execute the conveyance deed within the 3 months from the offer of possession upon payment of requisite stamp duty as per norms of the state government.

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

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