Rectified vide order dated 04.02.2022

HARERA
GURUGRAM

Complaint No. 633 of 2021

BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**633 of 2021**
Date of filing complaint:		**09.02.2021**
First date of hearing	:	**07.04.2021**
Date of decision	:	**10.11.2021**
Rectified on	:	**04.02.2022**

1. Prateek Srivastava
2. Namita Mehta — **Complainants**

Both R/O: B-191, The Lion, DLF Phase-5, Sector-43, Gurugram -122009

Versus

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

CORAM:

Dr. K.K. Khandelwal — **Chairman**

Shri Vijay Kumar Goyal — **Member**

APPEARANCE:

Sh. Sukhbir Yadav (Advocate) — Complainants

Sh. Dhruv Dutt Sharma (Advocate) — Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the

Rules) for violation of section 11(4)(a) of the Act wherein it is inter-alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the 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 complainants, 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 of the project	Vatika INXT City Centre
2.	Nature of the project	Commercial complex
3.	Area of the project	10.48 acres
4.	DTCP license	258 of 2007 dated 19.11.2007 and valid up to 18.11.2019
5.	Name of License Owner	Shivam Infratech Pvt. Ltd.
6.	RERA registered/not registered	**Not registered**
7.	Unit no.	D-006, Ground floor (annexure P-3 on page no. 48 of the complaint)
8.	Unit area	980 sq. ft.
9.	Date of execution of builder buyer's agreement	16.12.2016 (annexure P-3 on page no. 46 of the complaint)
10.	Total consideration	Rs. 78,40,000/- (annexure P-3 on page no. 48 of the complaint)

11.	Total amount paid by the complainants	Rs 40,57,200/- (annexure P-3 on page no. 48 of the complaint)
12.	Due date of delivery of possession	16.12.2019 (Possession clause: - "The Developer will complete the construction of the said complex within three (3) years from the date of execution of this agreement.....") (Possession clause is not mentioned in the BBA, possession clause taken from similar case file of the same project CR/443/2021)
13.	Provision regarding assured return	According to **clause no. 12** of the BBA, i.e., assured return and leasing arrangement: The developer has agreed to pay Rs. 75/- per sq. ft. super area of the said commercial unit per month by the way of assured return to the buyer from the date of execution of this agreement till the completion of the construction of the said building. (b.) As per clause 12(i) of BBA the developer will pay to the buyer Rs. 100/- per sq. ft. super area of the said commercial unit as committed return for up to three years from the date of completion of the construction of the said building or till the said commercial unit is put on lease, whichever is earlier.

		After the said commercial unit is put on lease in the above manner, the payment of the aforesaid committed return will come to an end and the buyer will start receiving lease rental in respect of the said commercial unit in accordance with the lease document as may be executed and as described hereinafter. (annexure P-3 on page no. 60 of the complaint)
14.	Offer of possession	Not offered
15.	Occupation certificate	Not obtained
16.	Delay in handing over possession till date of decision i.e., 10.11.2021	1 year 10 months 25 days.

B. Facts of the complaint

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

4. That the respondent party Vatika Ltd. is a company incorporated under the Companies Act, 1956 having its registered office at unit no. A-002, INXT city centre, ground floor, block – A, sector – 83, Vatika India Next, Gurugram - 122002, and corporate office at vatika triangle, 4th floor, sushant lok – I, phase – I, block – A, Mehrauli, Gurugram- 122002 (hereinafter called the developer/promoter/builder/ respondent), and the project in question is known as "INXT city centre", at sector – 83, Gurugram (hereinafter referred as the 'said project').

5. That in the first week of November 2016 the complainants received a marketing call from the office of the respondent, the caller represented himself as the sales manager of the respondent and marketed commercial project namely "INXT city centre" situated at sector – 83, Gurugram. The respondent asked to book a commercial unit in the said project. The respondent allured the complainants with proposed specifications and assured that committed assured return will be paid by the respondent to the complainants at Rs. 75/ per sq. ft. on the super area from the date of execution of buyer's agreement till the completion of construction and thereafter Rs.100/- per sq. ft. super area of the said commercial unit for up to 3 years from the date of completion of construction of the said building or till the commercial unit is put on the lease. The respondent assured that possession of the unit will be handed over by March 2018, since the construction of the project is at an advanced stage. The respondent gave them a brochure and a pre-printed application form.
6. That, believing on the representation and assurance of respondent, the complainants booked a commercial unit. The respondent allotted a unit bearing no. D – 0-006 on ground floor tower-D having a super area of 980 sq. Ft. in the said project. The commercial unit was booked for a total sale consideration of Rs. 78,40,000/- under a special payment plan (5% at the time of booking, 45% within 60 days of booking & 50% on offer of possession). Payment plan and Price included Basic Price, EDC, IDC, IFMS, Club Membership & Car Parking.

7. That on 16.11.2016, the respondent issued a letter of allotment in name of the complainants, confirming to the allotment of commercial unit no. D-0-006 of tower no. – D for size admeasuring 980 sq. ft.

8. That on 16.12.2016, a pre-printed, unilateral, arbitrary builder buyer's agreement was executed inter-se the respondent and the complainants. That according to clause no. 12 of the BBA, i.e., assured return and leasing arrangement:

- The developer has agreed to pay Rs. 75/- per sq. ft. super area of the said commercial unit per month by the way of assured return to the buyer from the date of execution of this agreement till the completion of the construction of the said building.
- As per clause 12(i) of BBA, the developer will pay to the buyer Rs. 100/- per sq. ft. super area of the said commercial unit as committed return for up to three years from the date of completion of the construction of the said building or till the said commercial unit is put on lease, whichever is earlier. After the said commercial unit is put on lease in the above manner, the payment of the aforesaid committed return will come to an end and the buyer will start receiving lease rental in respect of the said commercial unit in accordance with the lease document as may be executed and as described hereinafter.

9. That on 26.03.2018, the respondent sent a letter to the complainants with subject titled "completion of construction for block D, INXT city centre, Gurugram". and stated that "*We are pleased to inform you that construction work of Block D of INXT City Centre is completed, and the building is operational and ready*

for occupation. Further, we are in active discussion with a number of prospective tenants for the property and expect to lease our substantial area in the building in due course. Please note that as per the terms and conditions of the Builder Buyer Agreement/Annexure/Allotment Letter executed w.r.t your unit no COM-012-Tower-D-0-006 admeasuring area 980 sq. ft. the commitment charges shall be revised to Rs. 75/- per sq. ft. per month from the date of building getting operational. As the building got operational in the last week of February 2018, the commitment charges payable against your premise shall be revised to Rs. 75 sq. ft. per month from 1st March 2018".

10. That on 04.04.2018, the complainants sent an email and alleged that block – D is not ready for occupation and operation and asked for a joint inspection.
11. That on 29.09.2018, the respondent sent a tax invoice for payment on milestone "offer of Possession" and asked the complainants to pay Rs. 43,90,400/-.
12. That on 12.10.2018, the complainants sent a grievance email and alleged regarding not sending timely payment demands to the complainants which lead to delayed payments, and that too is not adjusted by the respondent and asked to share a copy of occupation certificate for the tower.
13. That on 15.10.2018, the complainants sent another email and stated that DD of Rs. 43,51,200/- towards the full payment as per of your invoice no. I/306/1819/00062 for commercial unit no. COM-012-tower-D-0-006 is ready and we are awaiting your

confirmation on receipt of OC of tower D and tower – E of the project.

14. That on 19.08.2020, the respondent sent a letter for cancellation of builder buyer agreement cum refund letter and cancelled the unit. On 27.08.2020, the complainants replied to the letter of the respondent dated 19.08.2020, regarding the cancellation of the builder buyer agreement cum refund letter.
15. That on 15.01.2021, the complainants downloaded the information from the website of DTCP, which states that till now the respondent has not received an occupation certificate from the authority, and the license has also expired.
16. That, since October 2018 the complainants are regularly requesting the respondent to pay the committed assured return and also to provide a copy of the occupation certificate. Despite several visits and requests by the complainants, the respondent did not pay the committed assured returns from October 2018.
17. That it is highly germane to mention here that the respondent has assured to give committed assured returns to the complainants as per clause no. 12 of the builder buyer agreement, but the respondent has paid assured returns to the complainants only till September 2018 and thereafter the respondent has stopped paying assured returns. The respondent has made misuse of his highly dominant position to harass the complainants and has sent a unit cancellation letter and asked to hand over all the original documents to the respondent. Despite paying more than 50% of the consideration amount i.e., Rs. 40,57,200/- the respondent has failed to offer possession on

time. Moreover, till today i.e., 20.01.2020, the respondent did not procure the OC from the concerned department.

18. That the main grievance of the complainants in the present complaint is that despite the complainants have paid more than 50% of the actual cost of the unit and ready and willing to pay the remaining amount (justified) (if any), the respondent party has failed to deliver the possession of unit on promised time and till date project is without amenities and stopped paying assured return.

19. That the facts and circumstances as enumerated above would lead to the only conclusion that there is a deficiency of service on the part of the respondent party and as such, he is liable to be punished and compensate the complainants.

20. That due to the acts of the above and the terms and conditions of the builder buyer agreement, the complainants have been unnecessarily harassed mentally as well as financially, therefore the opposite party is liable to compensate the complainants on account of the aforesaid act of unfair trade practice.

21. That the cause of action for the present complaint arose in September 2018, when the respondent party stopped paying committed assured returns to the complainants as per the buyer agreement. The cause of action again arose on various occasions, including on a) October 2018; b) December 2018; c) January 2019, d) May 2019; e) April 2020, f) December 2020, and on many times till date, when the protests were lodged with the respondent party about its failure to pay committed assured returns. The cause of action is alive and continuing and will

continue to subsist till such time as this authority restrains the respondent party by an order of injunction and/or passes the necessary orders.

22. That the complainant(s) being an aggrieved person filing the present complaint under section 31 with the Authority for violation/contravention of provisions of this Act. That as per section 11 (4) of the Act of 2016, the promoter is under obligation towards allottees.

23. That as per section 12 of the Act of 2016, the promoter is liable to return the entire investment along with interest to the allottees of an apartment, building, or project for giving any incorrect, false statement, etc.

24. That as per section 18 of the Act of 2016, the promoter is liable to pay the interest or return of amount and to pay compensation to the allottees of a unit, building, or project for a delay or failure in handing over of such possession as per the terms and agreement of the sale.

25. That as per section 19 (4) of the Act of 2016, the promoter is entitled to a refund of the amount paid along with interest.

26. That the complainants do not want to withdraw from the project. The promoter has not fulfilled his obligation therefore as per obligations on the promoter under section 18(1) proviso, the promoter is obligated to pay the interest at the prescribed rate for every month of delay till the handing over of the possession.

27. That the present complaint is not for seeking compensation, without prejudice, complainants reserve the right to file a complaint to adjudicating officer for compensation.

C. Relief sought by the complainants:

28. The complainants have sought following relief(s):

- Direct the respondent party to refrain from cancelling the builder buyer agreement/ cancellation of the unit of the complainants.
- Direct the respondent party to pay the committed assured returns as per builder buyer agreement from October 2018 to till the 3 years/the first lease from the date of completion of the project (after obtaining OC).

D. Reply by the respondent

29. That at the outset, the respondent humbly submits that each and every averment and contention, as made/raised in the complaint, unless specifically admitted, be taken to have been categorically denied by respondent and may be read as travesty of facts.
30. That the complaint filed by the complainants before the ld. authority, besides being misconceived and erroneous, is untenable in the eyes of law. The complainants have misdirected herself in filing the above captioned complaint before this ld. authority as the relief being claimed by the complainants, besides being illegal, misconceived and erroneous, cannot be said to even fall within the realm of jurisdiction of this ld. authority.
31. It would be pertinent to make reference to some of the provisions of the Real Estate (Regulation and Development) Act,

2016 (hereinafter referred to as '2016 Act') and the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred to as '2017 Haryana Rules'), made by the Government of Haryana in exercise of powers conferred by Sub-section 1 read with sub-section 2 of section 84 of 2016 Act. section 31 of 2016 Act provides for filing of complaints with this ld. authority or the adjudicating officer. Sub-Section (1) thereof provides that any aggrieved person may file a complaint with the authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of 2016 Act or the rules and regulations made there under against any promoter, allottee or real estate agent, as the case may be. Sub section (2) provides that the form, manner and fees for filing complaint under sub-section (1) shall be such as may be prescribed. Rule 28 of 2017 Haryana rules provides for filing of complaint with this ld. authority, in reference to section 31 of 2016 Act. Sub-clause (1) *inter alia*, provides that any aggrieved person may file a complaint with the authority for any violation of the provisions of 2016 Act or the rules and regulations made thereunder, save as those provided to be adjudicated by the adjudicating officer, in Form 'CRA'. Significantly, reference to the "authority", which is this ld. authority in the present case and to the "adjudicating officer", is separate and distinct. "adjudicating officer" has been defined under section 2(a) to mean the adjudicating officer appointed under sub-section (1) of section 71, whereas the "authority" has been defined under section 2(i)

to mean the real estate regulatory authority, established under sub-section (1) of section 20.

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

33. That in the present case, the complainants are seeking reliefs which, from reading of the provisions of the 2016 Act and 2017

Rules, especially those mentioned hereinabove, would be liable for adjudication, if at all, by the adjudicating officer and not this ld. authority. Thus, on this ground alone the complaint is liable to be rejected.

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

35. That from perusal of the provisions of 2016 Act and/or the 2017 Haryana rules and conjoint reading of the same, it is evident that the 'agreement for sale' that has been referred to under the provisions of 2016 Act and 2017 Haryana rules, is the 'agreement for sale', as prescribed in annexure 'A' of 2017 Haryana rules. Apparently, in terms of section 4(1), a promoter is required to file an application to the 'authority' for registration of the real estate project in such form, manner, within such time and accompanied by such fee as may be prescribed. The term 'prescribed' has been defined under section 2(z)(i) to mean prescribed by Rules made under the Act. Further, section 4(2)(g) of 2016 Act provides that a promoter shall enclose, alongwith the application referred to in sub-section 1 of section 4, a proforma of the allotment letter, agreement for sale, and conveyance deed proposed to be signed with the allottees. Section 13 (1) of 2016 Act *inter alia*, provides that a promoter shall not accept a sum more than 10% of the cost of the apartment, plot or building as the case may be, as an

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

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

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

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

39. That apparently, the complaint filed by the complainants are 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 complainants.

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

41. It is crystal clear that complainants are not an "allottee but is an investor" who is only seeking assured return from the respondent, by way of present complaint, which is not maintainable under real estate regulatory authority. The complainants after its own independent judgment have booked the said unit. The complainants have agreed for leasing arrangement wherein complainants have booked the said commercial unit for earning profit and is meant for leasing only

and not for personal occupation. Therefore, the present complaint does not fall within the purview of the authority.

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

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

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

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

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

45. That due to the evolving policies, regulations and legal framework governing real estate investments, the company also informed the clients of commercial Units that as per the guidelines newly promulgated ordinance i.e., "Banning of Unregulated Deposit Scheme Ordinance 2018" and further "Banning of Unregulated Deposit Scheme Act 2019", the Government banned such assured / committed returns and schemes of such returns completely. It is submitted that the respondent duly paid the assured return till September 2018 amounting to Rs. 16,70,900/- and it was only due to the above-mentioned ordinance and Act, the respondent suspended all return-based sales and stopped making payments towards the assured returns. Thus, in view of the above-mentioned ordinance and Act, the assured return is not payable.

46. That the complainants are not "allottees" within the meaning of the Act of 2016. It is submitted that the complainants are real estate investors who have made the booking with the respondent only with an intention to earn assured return from the respondent. As per clause 3(iv) r.w. 12 of the builder buyer agreement, the complainants have agreed for leasing arrangement wherein the complainants have booked the said commercial unit for earning profit and is meant for leasing only and not for personal physical occupation or use. Therefore, the present complaint does not fall within the purview of the authority.

47. That the respondent had already cancelled the Unit of the complainants vide letter dated 19.08.2020. It is submitted that

before cancellation the respondent offered various options to the complainants for swapping their investment, but the complainants did not accept the alternate options and thus the respondent was constrained to cancel the unit of the complainants. It is pertinent to mention here that the respondent informed the complainants that the refund shall be processed within 6 months and further requested the complainants to return all the original documents at the earliest. However, it was the complainants who did not return the original documents and the refund could not be processed.

E. Jurisdiction of the authority

48. The respondent has raised preliminary objection regarding jurisdiction of authority to entertain the present complaint. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

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

E. II Subject-matter jurisdiction

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

> ***Section 11(4)(a)***
>
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
>
> *The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.*
>
> ***Section 34-Functions of the Authority:***
>
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

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

F. Findings on the relief sought by the complainants:

F.I. Assured returns

49. The complainants have sought assured returns on monthly basis as per clause 12 of the agreement dated 16.12.2016 at the rate of Rs

75/- per sq. ft. of super area of the said commercial unit per month by way of assured return to the buyer from the date of execution of this agreement till the completion of construction of the said building, also the developer will pay to the buyer Rs. 100/- per sq. ft. super area of the said commercial unit as committed return for up to 3 years from the date of completion of construction of the said building or till the said commercial unit is put on lease, whichever is earlier. Though for some time the amount of assured returns was paid but later on, the respondent refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019 (herein after referred to as the Act of 2019). But that Act does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act. However, the plea of respondent is otherwise and who took a stand that though they paid the amount of assured return up to 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.

50. The allotment letter dated 16.11.2016 is a document which was issued by the respondent and can be termed as agreement. The Act of 2016 defines "agreement for sale" means an agreement entered into between the promoter and the allottee [Section 2(c)]. An agreement for sale is defined as an arrangement entered between the promoter and allottee with freewill and consent of both the parties. An agreement defines the rights and liabilities of both the parties i.e., promoter and the allottee and marks the start of new contractual relationship between them. This contractual

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

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

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

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

51. 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.

52. It is pleaded on behalf of respondent/builder that after the Act of 2019 came into force, there is bar for payment of assured returns to an allottee. 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.

53. 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;

54. 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.

55. 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.

56. 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.

57. 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 complainants till possession of respective apartments stands handed over and there is no illegality in this regard.

58. 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.*

59. 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.

60. 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 complainants 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 complainants besides initiating penal proceedings.

F . II Cancellation of the unit

61. While applying for that unit in the project of respondent known as Vatika INXT City Centre to be developed and constructed by them. The respondent/builder issued a letter of allotment of unit no. 006 on ground floor, block D, in Vatika INXT city centre dated 16.11.2016 was issuing the terms and condition of allotment of the unit its area basic sale price and location etc. It was also provided in that letter at page 42 of the complaint. That the rate of allotted unit per sq. ft. would be Rs 8,000/- the booking amount of the unit was to be 5% of the total sale consideration. Secondly 45% the TSC was to be deposited within 60 days from the date of booking. Thirdly, 50% of the total consideration was to be paid on offer of possession. There is also a clause in that letter of allotment which for a ready reference may be reproduced as under:

> ***"In the event the allottees does not ay the instalment amount within seven (7) days of the stipulated time mentioned in this letter of allotment/payable as per payment***

plan/Schedule of payments/terms and conditions mentioned below then penal interest @18% per annum shall be payable along with the amount due. If the default continues beyond 90 days from the stipulated time then developr/vatika limited, shall have the right to cancel/withdraw this letter of allotment and refund the amount paid by the allottee, till date, after deducting 10% of the total sales consideration as earnest money along with other non refundable amounts"

62. It is not disputed that on the date of the allotment the allottees paid a sum of Rs. 5,00,000/- and Rs. 35,57,200/- on 16.11.2016 (Page 48 of the complaint) out of total sale consideration of Rs. 78,40,000/- i.e., more than 50% of the total sale consideration within 60 days of the booking of the unit as per the payment plan. So, in such a situation whether the respondent/builder could have cancelled the unit and order a refund of the amount deposited with it vide letter dated 27.08.2020. The answer is in the negative. There are only two situations an envisaging cancellation of allotted unit as per the condition detailed above and embodied in the letter of allotment dated 16.11.2016. Neither the allottees defaulted in payment of amount as agreed upon as per the letter of the allotment nor failed to pay the same beyond 90 days. So, the cancellation of the allotted unit alleged made by the respondent/builder is not as per terms and conditions of the allotment. Secondly, there was correspondence exchanged between the parties through email and which was not replied satisfactorily by the

respondent/builder. Thirdly, the letter of cancellation of the allotted unit was issued by the respondent/builder on 27.08.2020 i.e., after coming into force the Act of 2016 and the same is violated of the provisions of regulation framed by the authority on 05.12.2018 which provides that only a reasonable amount can be deducted from the deposited amount and the remaining amount has to be sent to the allottee a cancellation. So, taking into consideration all these facts the respondent/builder was not justified in cancelling the allotted unit of the complainants on their refusal to accept any of the options given to them by the builder and ordering process of refund of the deposited amount within a period of 6 months vide letter dated 27.08.2020.

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

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

    i. The respondent is directed to pay the amount of assured return at the agreed rate i.e. Rs.75/- 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. After completion of the construction of the building, the respondent/builder would be liable to pay monthly assured returns @100/-

per sq. ft. of the super area up to 3 years or till the unit is put on lease whichever is earlier.

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

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

64. 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.

65. Complaint stands disposed of.

66. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.11.2021

Rectified vide order dated 04.02.2022
Corrected order uploaded on 16.03.2022.

BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**633 of 2021**
Date of filing complaint:		**09.02.2021**
First date of hearing	:	**07.04.2021**
Date of decision	:	**10.11.2021**

1. Prateek Srivastava
2. Namita Mehta — **Complainants**

Both R/O: B-191, The Lion, DLF Phase-5, Sector-43, Gurugram -122009

Versus

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

CORAM:

Dr. K.K. Khandelwal — **Chairman**

Shri Vijay Kumar Goyal — **Member**

APPEARANCE:

Sh. Sukhbir Yadav (Advocate) — Complainants

Sh. Dhruv Dutt Sharma (Advocate) — Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the

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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 complainants, 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 of the project	Vatika INXT City Centre
2.	Nature of the project	Commercial complex
3.	Area of the project	10.48 acres
4.	DTCP license	258 of 2007 dated 19.11.2007 and valid up to 18.11.2019
5.	Name of License Owner	Shivam Infratech Pvt. Ltd.
6.	RERA registered/not registered	**Not registered**
7.	Unit no.	D-006, Ground floor (annexure P-3 on page no. 48 of the complaint)
8.	Unit area	980 sq. ft.
9.	Date of execution of builder buyer's agreement	16.12.2016 (annexure P-3 on page no. 46 of the complaint)
10.	Total consideration	Rs. 78,40,000/- (annexure P-3 on page no. 48 of the complaint)

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11.	Total amount paid by the complainants	Rs 40,57,200/- (annexure P-3 on page no. 48 of the complaint)
12.	Due date of delivery of possession	16.12.2019 (Possession clause: - "The Developer will complete the construction of the said complex within three (3) years from the date of execution of this agreement.....") (Possession clause is not mentioned in the BBA, possession clause taken from similar case file of the same project CR/443/2021)
13.	Provision regarding assured return	According to **clause no. 12** of the BBA, i.e., assured return and leasing arrangement: The developer has agreed to pay Rs. 75/- per sq. ft. super area of the said commercial unit per month by the way of assured return to the buyer from the date of execution of this agreement till the completion of the construction of the said building. (b.) As per clause 12(i) of BBA, the developer will pay to the buyer Rs. 100/- per sq. ft. super area of the said commercial unit as committed return for up to three years from the date of completion of the construction of the said building or till the said commercial unit is put on lease, whichever is earlier.

		After the said commercial unit is put on lease in the above manner, the payment of the aforesaid committed return will come to an end and the buyer will start receiving lease rental in respect of the said commercial unit in accordance with the lease document as may be executed and as described hereinafter. (annexure P-3 on page no. 60 of the complaint)
14.	Offer of possession	Not offered
15.	Occupation certificate	Not obtained
16.	Delay in handing over possession till date of decision i.e., 10.11.2021	1 year 10 months 25 days.

B. Facts of the complaint

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

4. That the respondent party Vatika Ltd. is a company incorporated under the Companies Act, 1956 having its registered office at unit no. A-002, INXT city centre, ground floor, block – A, sector – 83, Vatika India Next, Gurugram - 122002, and corporate office at vatika triangle, 4th floor, sushant lok – I, phase – I, block – A, Mehrauli, Gurugram- 122002 (hereinafter called the developer/promoter/builder/ respondent), and the project in question is known as "INXT city centre", at sector – 83, Gurugram (hereinafter referred as the 'said project').

5. That in the first week of November 2016 the complainants received a marketing call from the office of the respondent, the caller represented himself as the sales manager of the respondent and marketed commercial project namely "INXT city centre" situated at sector – 83, Gurugram. The respondent asked to book a commercial unit in the said project. The respondent allured the complainant with proposed specifications and assured that committed assured return will be paid by the respondent to the complainants at Rs. 75/ per sq. ft. on the super area from the date of execution of buyer's agreement till the completion of construction and thereafter Rs.100/- per sq. ft. super area of the said commercial unit for up to 3 years from the date of completion of construction of the said building or till the commercial unit is put on the lease. The respondent assured that possession of the unit will be handed over by March 2018, since the construction of the project is at an advanced stage. The respondent gave them a brochure and a pre-printed application form.
6. That, believing on the representation and assurance of respondent, the complainants booked a commercial unit. The respondent allotted a unit bearing no. D – 0-006 on ground floor tower-D having a super area of 980 sq. Ft. in the said project. The commercial unit was booked for a total sale consideration of Rs. 78,40,000/- under a special payment plan (5% at the time of booking, 45% within 60 days of booking & 50% on offer of possession). Payment plan and Price included Basic Price, EDC, IDC, IFMS, Club Membership & Car Parking.

7. That on 16.11.2016, the respondent issued a letter of allotment in name of the complainants, confirming to the allotment of commercial unit no. D-0-006 of tower no. – D for size admeasuring 980 sq. ft.
8. That on 16.12.2016, a pre-printed, unilateral, arbitrary builder buyer's agreement was executed inter-se the respondent and the complainants. That according to clause no. 12 of the BBA, i.e., assured return and leasing arrangement:

- The developer has agreed to pay Rs. 75/- per sq. ft. super area of the said commercial unit per month by the way of assured return to the buyer from the date of execution of this agreement till the completion of the construction of the said building.
- As per clause 12(i) of BBA, the developer will pay to the buyer Rs. 100/- per sq. ft. super area of the said commercial unit as committed return for up to three years from the date of completion of the construction of the said building or till the said commercial unit is put on lease, whichever is earlier. After the said commercial unit is put on lease in the above manner, the payment of the aforesaid committed return will come to an end and the buyer will start receiving lease rental in respect of the said commercial unit in accordance with the lease document as may be executed and as described hereinafter.

9. That on 26.03.2018, the respondent sent a letter to the complainants with subject titled "completion of construction for block D, INXT city centre, Gurugram". and stated that "*We are pleased to inform you that construction work of Block D of INXT City Centre is completed, and the building is operational and ready*

for occupation. Further, we are in active discussion with a number of prospective tenants for the property and expect to lease our substantial area in the building in due course. Please note that as per the terms and conditions of the Builder Buyer Agreement/Annexure/Allotment Letter executed w.r.t your unit no. COM-012-Tower-D-0-006 admeasuring area 980 sq. ft. the commitment charges shall be revised to Rs. 75/- per sq. ft. per month from the date of building getting operational. As the building got operational in the last week of February 2018, the commitment charges payable against your premise shall be revised to Rs. 75 sq. ft. per month from 1st March 2018".

10. That on 04.04.2018, the complainants sent an email and alleged that block – D is not ready for occupation and operation and asked for a joint inspection.

11. That on 29.09.2018, the respondent sent a tax invoice for payment on milestone "offer of Possession" and asked the complainants to pay Rs. 43,90,400/-.

12. That on 12.10.2018, the complainants sent a grievance email and alleged regarding not sending timely payment demands to the complainants which lead to delayed payments, and that too is not adjusted by the respondent and asked to share a copy of occupation certificate for the tower.

13. That on 15.10.2018, the complainants sent another email and stated that DD of Rs. 43,51,200/- towards the full payment as per of your invoice no. I/306/1819/00062 for commercial unit no. COM-012-tower-D-0-006 is ready and we are awaiting your

confirmation on receipt of OC of tower D and tower – E of the project.

14. That on 19.08.2020, the respondent sent a letter for cancellation of builder buyer agreement cum refund letter and cancelled the unit. On 27.08.2020, the complainants replied to the letter of the respondent dated 19.08.2020, regarding the cancellation of the builder buyer agreement cum refund letter.

15. That on 15.01.2021, the complainants downloaded the information from the website of DTCP, which states that till now the respondent has not received an occupation certificate from the authority, and the license has also expired.

16. That, since October 2018 the complainants are regularly requesting the respondent to pay the committed assured return and also to provide a copy of the occupation certificate. Despite several visits and requests by the complainants, the respondent did not pay the committed assured returns from October 2018.

17. That it is highly germane to mention here that the respondent has assured to give committed assured returns to the complainants as per clause no. 12 of the builder buyer agreement, but the respondent has paid assured returns to the complainants only till September 2018 and thereafter the respondent has stopped paying assured returns. The respondent has made misuse of his highly dominant position to harass the complainants and has sent a unit cancellation letter and asked to hand over all the original documents to the respondent. Despite paying more than 50% of the consideration amount i.e., Rs. 40,57,200/- the respondent has failed to offer possession on

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time. Moreover, till today i.e., 20.01.2020, the respondent did not procure the OC from the concerned department.

18. That the main grievance of the complainants in the present complaint is that despite the complainants have paid more than 50% of the actual cost of the unit and ready and willing to pay the remaining amount (justified) (if any), the respondent party has failed to deliver the possession of unit on promised time and till date project is without amenities and stopped paying assured return.

19. That the facts and circumstances as enumerated above would lead to the only conclusion that there is a deficiency of service on the part of the respondent party and as such, he is liable to be punished and compensate the complainants.

20. That due to the acts of the above and the terms and conditions of the builder buyer agreement, the complainants have been unnecessarily harassed mentally as well as financially, therefore the opposite party is liable to compensate the complainants on account of the aforesaid act of unfair trade practice.

21. That the cause of action for the present complaint arose in September 2018, when the respondent party stopped paying committed assured returns to the complainants as per the buyer agreement. The cause of action again arose on various occasions, including on a) October 2018; b) December 2018; c) January 2019, d) May 2019; e) April 2020, f) December 2020, and on many times till date, when the protests were lodged with the respondent party about its failure to pay committed assured returns. The cause of action is alive and continuing and will

continue to subsist till such time as this authority restrains the respondent party by an order of injunction and/or passes the necessary orders.

22. That the complainant(s) being an aggrieved person filing the present complaint under section 31 with the Authority for violation/contravention of provisions of this Act. That as per section 11 (4) of the Act of 2016, the promoter is under obligation towards allottees.
23. That as per section 12 of the Act of 2016, the promoter is liable to return the entire investment along with interest to the allottees of an apartment, building, or project for giving any incorrect, false statement, etc.
24. That as per section 18 of the Act of 2016, the promoter is liable to pay the interest or return of amount and to pay compensation to the allottees of a unit, building, or project for a delay or failure in handing over of such possession as per the terms and agreement of the sale.
25. That as per section 19 (4) of the Act of 2016, the promoter is entitled to a refund of the amount paid along with interest.
26. That the complainants do not want to withdraw from the project. The promoter has not fulfilled his obligation therefore as per obligations on the promoter under section 18(1) proviso, the promoter is obligated to pay the interest at the prescribed rate for every month of delay till the handing over of the possession.
27. That the present complaint is not for seeking compensation, without prejudice, complainants reserve the right to file a complaint to adjudicating officer for compensation.

C. Relief sought by the complainants:

28. The complainants have sought following relief(s):

- Direct the respondent party to refrain from cancelling the builder buyer agreement/ cancellation of the unit of the complainants.
- Direct the respondent party to pay the committed assured returns as per builder buyer agreement from October 2018 to till the 3 years/the first lease from the date of completion of the project (after obtaining OC).

D. Reply by the respondent

29. That at the outset, the respondent humbly submits that each and every averment and contention, as made/raised in the complaint, unless specifically admitted, be taken to have been categorically denied by respondent and may be read as travesty of facts.

30. That the complaint filed by the complainants before the ld. authority, besides being misconceived and erroneous, is untenable in the eyes of law. The complainants have misdirected herself in filing the above captioned complaint before this ld. authority as the relief being claimed by the complainants, besides being illegal, misconceived and erroneous, cannot be said to even fall within the realm of jurisdiction of this ld. authority.

31. It would be pertinent to make reference to some of the provisions of the Real Estate (Regulation and Development) Act,

2016 (hereinafter referred to as '2016 Act') and the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred to as '2017 Haryana Rules'), made by the Government of Haryana in exercise of powers conferred by Sub-section 1 read with sub-section 2 of section 84 of 2016 Act. section 31 of 2016 Act provides for filing of complaints with this ld. authority or the adjudicating officer. Sub-Section (1) thereof provides that any aggrieved person may file a complaint with the authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of 2016 Act or the rules and regulations made there under against any promoter, allottee or real estate agent, as the case may be. Sub section (2) provides that the form, manner and fees for filing complaint under sub-section (1) shall be such as may be prescribed. Rule 28 of 2017 Haryana rules provides for filing of complaint with this ld. authority, in reference to section 31 of 2016 Act. Sub-clause (1) *inter alia*, provides that any aggrieved person may file a complaint with the authority for any violation of the provisions of 2016 Act or the rules and regulations made thereunder, save as those provided to be adjudicated by the adjudicating officer, in Form 'CRA'. Significantly, reference to the "authority", which is this ld. authority in the present case and to the "adjudicating officer", is separate and distinct. "adjudicating officer" has been defined under section 2(a) to mean the adjudicating officer appointed under sub-section (1) of section 71, whereas the "authority" has been defined under section 2(i)

to mean the real estate regulatory authority, established under sub-section (1) of section 20.

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

33. That in the present case, the complainants are seeking reliefs which, from reading of the provisions of the 2016 Act and 2017

Rules, especially those mentioned hereinabove, would be liable for adjudication, if at all, by the adjudicating officer and not this ld. authority. Thus, on this ground alone the complaint is liable to be rejected.

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

35. That from perusal of the provisions of 2016 Act and/or the 2017 Haryana rules and conjoint reading of the same, it is evident that the 'agreement for sale' that has been referred to under the provisions of 2016 Act and 2017 Haryana rules, is the 'agreement for sale', as prescribed in annexure 'A' of 2017 Haryana rules. Apparently, in terms of section 4(1), a promoter is required to file an application to the 'authority' for registration of the real estate project in such form, manner, within such time and accompanied by such fee as may be prescribed. The term 'prescribed' has been defined under section 2(z)(i) to mean prescribed by Rules made under the Act. Further, section 4(2)(g) of 2016 Act provides that a promoter shall enclose, alongwith the application referred to in sub-section 1 of section 4, a proforma of the allotment letter, agreement for sale, and conveyance deed proposed to be signed with the allottees. Section 13 (1) of 2016 Act *inter alia*, provides that a promoter shall not accept a sum more than 10% of the cost of the apartment, plot or building as the case may be, as an

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

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

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

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

39. That apparently, the complaint filed by the complainants are 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 complainants.

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

41. It is crystal clear that complainants are not an "allottee but is an investor" who is only seeking assured return from the respondent, by way of present complaint, which is not maintainable under real estate regulatory authority. The complainants after its own independent judgment have booked the said unit. The complainants have agreed for leasing arrangement wherein complainants have booked the said commercial unit for earning profit and is meant for leasing only

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and not for personal occupation. Therefore, the present complaint does not fall within the purview of the authority.

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

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

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

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

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

45. That due to the evolving policies, regulations and legal framework governing real estate investments, the company also informed the clients of commercial Units that as per the guidelines newly promulgated ordinance i.e., "Banning of Unregulated Deposit Scheme Ordinance 2018" and further "Banning of Unregulated Deposit Scheme Act 2019", the Government banned such assured / committed returns and schemes of such returns completely. It is submitted that the respondent duly paid the assured return till September 2018 amounting to Rs. 16,70,900/- and it was only due to the above-mentioned ordinance and Act, the respondent suspended all return-based sales and stopped making payments towards the assured returns. Thus, in view of the above-mentioned ordinance and Act, the assured return is not payable.

46. That the complainants are not "allottees" within the meaning of the Act of 2016. It is submitted that the complainants are real estate investors who have made the booking with the respondent only with an intention to earn assured return from the respondent. As per clause 3(iv) r.w. 12 of the builder buyer agreement, the complainants have agreed for leasing arrangement wherein the complainants have booked the said commercial unit for earning profit and is meant for leasing only and not for personal physical occupation or use. Therefore, the present complaint does not fall within the purview of the authority.

47. That the respondent had already cancelled the Unit of the complainants vide letter dated 19.08.2020. It is submitted that

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before cancellation the respondent offered various options to the complainants for swapping their investment, but the complainants did not accept the alternate options and thus the respondent was constrained to cancel the unit of the complainants. It is pertinent to mention here that the respondent informed the complainants that the refund shall be processed within 6 months and further requested the complainants to return all the original documents at the earliest. However, it was the complainants who did not return the original documents and the refund could not be processed.

E. Jurisdiction of the authority

48. The respondent has raised preliminary objection regarding jurisdiction of authority to entertain the present complaint. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

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

E. II Subject-matter jurisdiction

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

> ***Section 11(4)(a)***
>
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;*
>
> *The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.*
>
> ***Section 34-Functions of the Authority:***
>
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*

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

F. Findings on the relief sought by the complainants:

F.I. Assured returns

49. The complainants have sought assured returns on monthly basis as per clause 12 of the agreement dated 16.12.2016 at the rate of Rs

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75/- per sq. ft. of super area of the said commercial unit per month by way of assured return to the buyer from the date of execution of this agreement till the completion of construction of the said building, also the developer will pay to the buyer Rs. 100/- per sq. ft. super area of the said commercial unit as committed return for up to 3 years from the date of completion of construction of the said building or till the said commercial unit is put on lease, whichever is earlier. Though for some time the amount of assured returns was paid but later on, the respondent refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019 (herein after referred to as the Act of 2019). But that Act does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act. However, the plea of respondent is otherwise and who took a stand that though they paid the amount of assured return up to 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.

50. The allotment letter dated 16.11.2016 is a document which was issued by the respondent and can be termed as agreement. The Act of 2016 defines "agreement for sale" means an agreement entered into between the promoter and the allottee [Section 2(c)]. An agreement for sale is defined as an arrangement entered between the promoter and allottee with freewill and consent of both the parties. An agreement defines the rights and liabilities of both the parties i.e., promoter and the allottee and marks the start of new contractual relationship between them. This contractual

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

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

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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

51. 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

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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

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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.

52. It is pleaded on behalf of respondent/builder that after the Act of 2019 came into force, there is bar for payment of assured returns to an allottee. 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*

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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.

53. 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;

54. 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.

55. 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.

56. 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.

57. 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 complainants till possession of respective apartments stands handed over and there is no illegality in this regard.

58. 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

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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.*

59. 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.

60. 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 complainants 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 complainants besides initiating penal proceedings.

F . II Cancellation of the unit

61. While applying for that unit in the project of respondent known as Vatika INXT City Centre to be developed and constructed by them. The respondent/builder issued a letter of allotment of unit no. 006 on ground floor, block D, in Vatika INXT city centre dated 16.11.2016 was issuing the terms and condition of allotment of the unit its area basic sale price and location etc. It was also provided in that letter at page 42 of the complaint. That the rate of allotted unit per sq. ft. would be Rs 8,000/- the booking amount of the unit was to be 5% of the total sale consideration. Secondly 45% the TSC was to be deposited within 60 days from the date of booking. Thirdly, 50% of the total consideration was to be paid on offer of possession. There is also a clause in that letter of allotment which for a ready reference may be reproduced as under:

> ***"In the event the allottees does not ay the instalment amount within seven (7) days of the stipulated time mentioned in this letter of allotment/payable as per payment***

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plan/Schedule of payments/terms and conditions mentioned below then penal interest @18% per annum shall be payable along with the amount due. If the default continues beyond 90 days from the stipulated time then developr/vatika limited, shall have the right to cancel/withdraw this letter of allotment and refund the amount paid by the allottee, till date, after deducting 10% of the total sales consideration as earnest money along with other non refundable amounts"

62. It is not disputed that on the date of the allotment the allottees paid a sum of Rs. 5,00,000/- and Rs. 35,57,200/- on 16.11.2016 (Page 48 of the complaint) out of total sale consideration of Rs. 78,40,000/- i.e., more than 50% of the total sale consideration within 60 days of the booking of the unit as per the payment plan. So, in such a situation whether the respondent/builder could have cancelled the unit and order a refund of the amount deposited with it vide letter dated 27.08.2020. The answer is in the negative. There are only two situations an envisaging cancellation of allotted unit as per the condition detailed above and embodied in the letter of allotment dated 16.11.2016. Neither the allottees defaulted in payment of amount as agreed upon as per the letter of the allotment nor failed to pay the same beyond 90 days. So, the cancellation of the allotted unit alleged made by the respondent/builder is not as per terms and conditions of the allotment. Secondly, there was correspondence exchanged between the parties through email and which was not replied satisfactorily by the

respondent/builder. Thirdly, the letter of cancellation of the allotted unit was issued by the respondent/builder on 27.08.2020 i.e., after coming into force the Act of 2016 and the same is violated of the provisions of regulation framed by the authority on 05.12.2018 which provides that only a reasonable amount can be deducted from the deposited amount and the remaining amount has to be sent to the allottee a cancellation. So, taking into consideration all these facts the respondent/builder was not justified in cancelling the allotted unit of the complainants on their refusal to accept any of the options given to them by the builder and ordering process of refund of the deposited amount within a period of 6 months vide letter dated 27.08.2020.

G. Directions of the authority.

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

i. The respondent is directed to pay the amount of assured return as agreed upon with the complainants from October 2018 till the date of handing over possession.

ii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the amount of assured returns.

iii. Interest on the delayed payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the

respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.

iv. The respondent shall not charge anything from the complainants which is not part of the agreement of sale.

64. Complaint stands disposed of.

65. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.11.2021