BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**1118 of 2021**
Date of filing complaint	:	**01.03.2021**
First date of hearing	:	**07.04.2021**
Date of decision	:	**10.11.2021**
Rectified on	:	**04.02.2022**

Anu Mehta R/o: 21st floor, block A, The Crest, Park Drive, DLF, Phase -V, Gurugram	**Complainant**
Versus	
1. M/s Vatika Limited 2. Gautam Bhalla (Managing Director) Both Address : Unit no. A002, INXT City Centre, Ground floor, block A, Sector 83, Vatika India Next, Gurgram-122012, Haryana	**Respondent**

CORAM:	
Dr. K.K. Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Sanjeev Kumar Sing (Advocate)	Complainant
Ms. Ankur Berry (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter-alia prescribed that the promoter shall be responsible for all

obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. No.	Heads	Information
1.	Name and location of the project	Vatika Inxt City Centre,
2.	Nature of the project	Commercial complex
3.	Area of the project	10.48 acres
4.	DTCP license	258 of 2007 dated 19.11.2007
	License validity/ renewal period	18.11.2019
5.	RERA registered/not registered	Not registered
6.	Unit no.	343, 3rd floor, tower A (Page no 34 of BBA),
7.	Unit measuring	1000 sq. ft.
8.	New unit allotted	817, 8th floor, block F (page 57 annexure P-7 of complaint)
9.	Date of execution of apartment buyer's agreement	11.03.2011 (Page 52 of BBA)
10.	Total sale consideration	Rs 50,00,000/- as per clause 1 of BBA (page 34 of complaint being sale consideration)

11.	Total amount actually paid by the complainant	Rs 50,00,000/- as per clause 2 of BBA (page 34 of complaint being sale consideration)
12.	Due date of delivery of possession	11.03.2014 as per clause 2 of the builder buyer agreement [Page 34 of BBA]
13.	Provision regarding assured return	Addendum to the agreement dated 11.03.2011 The unit has been allotted to you with an assured monthly return of Rs.65/- per sq. ft. However during the course of construction till such time the building in which your unit is situated offered for possession you will be paid an additional return of Rs 6.50/- per sq. ft. Therefore your return payable to you shall be as follows: This addendum forms an integral part of builder buyer agreement dated 11.03.2014. a. Till offer of possession: Rs. 71.50/- sq. ft. b. After completion of the building: Rs 65/- per sq. ft. You would be paid an assured return w.e.f. 11.03.2014 on a monthly basis before the 15th of each calendar month. The obligation of the developer shall be to lease the promises of which your flat is part @Rs. 65/- per sq. ft. In the eventuality the achieved return being higher or lower than Rs 65/- per sq. ft. the following would be applicable.

		1. If the rental is less than Rs 65/- per sq. ft. than you shall be refunded @ Rs 120/- per sq. ft. for every Rs 1/- by which achieved rental is less than Rs 65/- per sq. ft. 2. If the achieved rental is higher than Rs 65/- per sq. ft. than 50% of the increased rental shall accrue to you free of any additional sale consideration. However you will be requested to pay additional sale consideration @Rs 120/- sq. ft. for every rupee of additional rental achieved in the case of balance 50% of increased rentals.
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	7 years 7 months 30 days

B. Facts of the complaint

3. That the complainant is a bona fide purchaser of a commercial space bearing unit no. 817, 8th floor, tower - F of the project named as "Vatika INXT City Centre", Sector-83, NH-8, Gurgaon, Haryana of the Opposite Party No.1 i.e., Vatika Limited.

4. That the respondent no. 1 i.e., Vatika Limited is a public limited company having been incorporated under the companies act, 1956 which is engaged in real estate business. The respondent no.2 is the managing director of the respondent no. 1 and he is responsible for the day-to-day affairs of the respondent no. 1 and he had signed the

documents including BBA & addendums to BBA etc. on behalf the respondent no. 1 in the capacity of authorised signatory.

5. That complainant acting on the representations of the respondent agreed to purchase a shop/commercial space in the aforesaid commercial complex project named as "Vatika Trade Centre" and accordingly submitted an application dated 01.03.2011 seeking allotment of a shop/commercial enclosing therewith a cheque bearing no. 385150 dated 01.03.2011 of Rs. 5,00,000/- (Rs. 5 lakhs only) drawn on HDFC bank favouring respondent no.1 towards booking amount and earnest money.

6. That in furtherance of the above application of the complainant, the respondent no. 1 allotted a shop/commercial space admeasuring 1000 sq. ft. (Super area) being Unit no. 343 on 3rd Floor of Block-A in the building namely" Vatika Trade Centre" and both the parties executed and signed the Builder Buyer Agreement (hereinafter referred as BBA) dated 11.03.2011. As per the BBA, the unit under reference was to be constructed within 3 years from the date of execution of BBA and the agreed total sale price for the said unit was Rs. 50,00,000/- (Rupees Fifty Lacs Only).

7. That the complainant had paid the balance sale consideration of Rs.45,00,000/- (Rs. forty-five lakh only) vide cheque bearing no. 574236 dated 09.03.2011 drawn on HDFC bank favouring respondent no.1 at the time of signing of the BBA. Thus, entire sale consideration of Rs. 50,00,000/- of the said unit stood paid at the

time of signing of the BBA and the said detail was mentioned and acknowledged in clause 2 of the BBA. According to clause 2 of the BBA, the construction of the said unit was to be given to the complainant within three (3) years from the date of execution of agreement i.e. 10.03.2014 and further as per clause 32.1 of the BBA the respondent were under an obligation to put the said unit on lease on completion of the project subject to assured rental returns to the complainant in terms of clause 32.2 of said agreement.

8. That an addendum to the aforesaid BBA being forming an integral part thereof and providing for payment of "assured returns" by the respondent to the complainant were also simultaneously executed between the parties vide which respondent had undertaken to pay the complainant @ Rs. 71.50/- per sq. ft. per month till the offer of possession and @ Rs. 65/- per sq. ft. per month after the completion of the building.

9. That the respondent no. 1 vide letter dated 11.03.2011 acknowledged & confirmed the allotment of the said unit and duly signed "BBA" alongwith "Annexure A" was provided to the complainant by enclosing therewith and it was also confirmed that the unit will be ready for lease by 30.09.2012 and the respondent shall be paying rentals/assured returns to the complainant as per "Annexure A" in case constructed premises is leased out any time after 01.10.2012.

10. That as the respondent were facing some legal impediments in construction of said project, the respondent in the month of July 2011, requested the complainant to relocate her unit to another project titled as "Vatika Inxt City Centre" falling in the revenue estate of Village – Sikhopur, Tehsil – Sohna, District – Gurugram. The complainant accepted the proposal of the respondent for relocating her unit to "Vatika Inxt City Centre" and in pursuance of the same, an addendum to the BBA dated 11.03.2011 was executed on 27.07.2011 wherein it was clarified that unit allocation shall be finalized on approval of the pending Building Plans by the competent authority and it was also reiterated that all terms and conditions of the BBA dated 11.03.2011 shall remain the same apart from Clause A, B and C which were the recital clauses.
11. That Pursuant to the above addendum to the BBA, the Respondent vide letter dated 31.07.2013 re-allocated another unit admeasuring 1000 sq. ft. bearing Unit No. 817, 8th Floor, Tower-F of "Vatika INXT City Centre" in project namely "India Next City Centre", Sector – 83, NH - 8, Gurgaon, Haryana to the complainant and it was again reiterated in the said letter that all the terms and conditions of the BBA was to remain same. However, after a period of few months from the date of execution of the BBA, the construction at the site slowed down substantially and the respondent were not able to deliver the possession of the Unit of the complainant on time as per clause 2 of the BBA i.e., by 10.03.2014.

12. That it is pertinent to mention here that complainant had paid the entire sale consideration agreed between the parties at the time of execution of the BBA but there is intentional and wilful default on the Part of Respondent in performance of the agreement on their part in delivering the possession of unit in question to the complainant. Thereafter, the respondent vide letter dated 27.03.2018 intimated to the complainant that the construction work of Block F of "INXT City Centre". Gurugram has been completed and the building got operational in the last week of February 2018 and ready for occupation. In the latter it was stated that they are in process of finalizing prospective tenants for the unit of the complainant and in view of the completion of the Tower of the complainant, the commitment charges/assured returns have been revised to Rs.65 /- per sq. ft. per month with effect from 01.03.2018.

13. That from the above, it is evident that the respondents were and are under an obligation to pay the assured/committed rental return to the Complainant in terms of clause 32.2 of the BBA and the "Annexure A" which was Addendum to the BBA as under:

    (a) Till offer of possession @ Rs.71.50 per sq. ft. per month.

    (b) After completion of building @ Rs. 65/- per sq. ft. per month subject to the following conditions.

(i) In case of lease rent being less than Rs.65/- per sq. ft. per month, your company would be liable to refund @ Rs.120 per sq. ft. for every one Rs. drop to the undersigned.

(ii) In case of lease rent being more than 65/- per sq. ft., the undersigned will be liable to pay your company additional sale consideration @ Rs.120/- sq. ft. for every one Rs. in excess of 50% increase for which no additional sale consideration is payable.

14. That it is submitted that the complainant understands that the unit has not been leased out till now as no intimation in this regard has been received by her from the respondents till date and thus respondent are liable to pay assured rental return @ Rs. 65 per sq. ft. per month i.e., Rs. 65000/- per month to the complainant from 01.03.2018 onwards.

15. That the respondents continued to pay due assured returns @ Rs.71.50 per sq. ft. per month till the offer of possession/completion of construction work i. e., upto 28.02.2018 to the completion of work. However, the respondent paid the due assured rental returns @ Rs.65/- per sq. ft. per month to the complainant till the month of September 2018 only and thereafter suddenly stopped making payment of due assured/committed rental returns from 01.10.2018 onwards to the complainant without any justification or assigning any reason.

16. That in view of the non-receipt of the payment towards assured/committed rental return with effect from 01.10.2018, the complainant contacted the concerned officials of the respondent time and again for release of the due amount, however to no avail. As a result of the said breach of the BBA and evasive approach of the respondent, the complainant was constrained to send 03 representations dated 26.12.2019, 06.07.2020 and 09.11.2020 to the Respondent requesting for payment of the outstanding due amount to be paid by the respondent and for the execution & registration of the conveyance deed of the unit under reference in favour of the complainant in terms of Clause 8 of the BBA. Copies of the said representations dated 26.12.2019, 06.07.2020 and 09.11.2020 are collectively.
17. That the complainant herein went from pillar to post to redress her grievances for which she has made personal visits to the office of the Respondent. Unfortunately, the respondent have shown their indifference with an intention to misappropriate the due money of the complaint.
18. That the indifferent acts of the respondents are causing financial strain, physical and mental harassment. The complaint has approached several times to the respondents to honour its commitments, but the respondent had not responded to the complaint.

19. That the above actions and practice of the Respondent amounts to breach of the terms of BBA, deficiency in services and unfair trade practice besides being an offence under the Indian Penal Code.
20. That the above actions of the respondent are in violation of section 11(4)(a) of the Haryana Real Estate (Regulation and Development) Act, 2016 wherein it is inter alia provided that the promotor shall 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 and under section 34 (f) of this Act this Hon'ble authority is fully empowered to ensure compliance of the obligations cast upon the promoters.
21. That it is submitted that the respondent have unjustly enriched themselves by denying the payment of the due amount of the complainant and undue advantage taken by the respondent of the complainant's situation. It is submitted that as per the principles of natural justice and it is equitable and lawful that the outstanding due money amounting to Rs. 22,80,850/- (Rs. Twenty-Two Lakh Eighty Thousand Eight Hundred Fifty only) of the complainant should be paid to her. The act of the respondents have caused hardship, harassment, frustration, distress, agony and inconvenience to complainant and by such act the complainant have been defrauded by the respondent. The laws of the land including the Indian Contract Act, 1872 and RERA - Real Estate

(Regulation and Development) Act, 2016 entitles the complainant to seek payment of outstanding due amount from the respondent.

22. That the present case of the complainant squarely falls within the ambit of the doctrine of promissory Estoppel. That the complainant had invested her savings in the project of the respondents relying on the promise of the respondent to pay assured/committed rental return to the complainant, however the act of the respondent of not paying the said due amount from 01.10.2018 had caused loss to the complainant.

23. That the complainant has suffered at the hands of the respondent who by exploiting their upper hand between the parties had not only not fulfilled their promise but also illegally holding the due money of the complainant. The complainant therefore intends to bring forth the wrongs committed by the respondent and seeks the remedy before this Ld. Regulatory Authority and hence this present complaint.

24. That in view of the facts and circumstances mentioned above the complainant is entitled for the compensation to the tune of Rs. 10 Lac for mental harassment, frustration, distress, agony and inconvenience to Complainant and Rs. 55000/- as litigation cost.

C. **Relief sought by the complainant:**

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

i. Direct the respondents to pay assured rental return @ Rs.65/-

per sq. ft. per month for the period from 01.10.2018 till date and continue to pay due amounts in future as per terms of BBA dated 11.03.2011.

ii. Direct the respondents to execute & register the conveyance deed for the unit in favour of the complainant.

D. Reply by the respondents

26. That at the very outset it is submitted that the present complaint is not maintainable or tenable in the eyes of law. The complainant has misdirected himself in filing the above captioned complaint before the Hon'ble Real Estate Regulatory Authority as the reliefs being claimed by the complainant cannot be said to fall within the realm of jurisdiction of this Forum. It is humbly submitted that upon the enactment of the Banning of That at the very outset it is submitted that the present complaint is not maintainable or tenable in the eyes of law. The complainant has misdirected himself in filing the above captioned complaint before the Hon'ble Real Estate Regulatory Authority as the reliefs being claimed by the complainant cannot be said to fall within the realm of jurisdiction of this Forum. It is humbly submitted that upon the enactment of the Banning of Unregulated Deposit Schemes Act, 2019, (hereinafter referred as BUDS Act) the 'Assured Return' and/ or any "Committed Returns" on the deposit schemes have been banned. The respondent company having not taken registration from SEBI Board cannot run, operate, continue an

assured return scheme. The Section 2(17) of the Banning of Unregulated Deposit Schemes Act, 2019 defines the "Unregulated Deposit Scheme" as follows:

> *"2(17) Unregulated Deposit Scheme- means a Scheme or an arrangement under which deposits are accepted or solicited by any deposit taker by way of business and which is not a Regulated Deposit Scheme, as specified under column (3) of the First Schedule"*

27. The First Schedule of the Banning of Unregulated Deposit Schemes Act, 2019 prescribed limited Regulator who can publish Regulated Deposit Schemes, the same being only,

i. The Securities and Exchange Board of India,
ii. The Reserve Bank of India,
iii. The Insurance Regulatory and Development Authority of India,
iv. The State Government or Union territory Government,
v. The National Housing Bank,
vi. The Pension Fund Regulatory and Development Authority,
vii. The Employees' Provident Fund Organisation,
viii. The Central Registrar, Multi-State Co-operative Societies
ix. the Ministry of Corporate Affairs Government of India,

Thus the 'Assured Return Scheme proposed and floated by the respondent has become infructuous due to operation of law, thus the relief prayed for in the present complaint cannot survive due to operation of law. Thus the 'Assured Return Scheme proposed and floated by the respondent has become infructuous due to operation

of law, thus the relief prayed for in the present complaint cannot survive due to operation of law. Further the respondent company made due payments of assured returns to the complainant and the same is evident from the computation sheet which is annexed herewith and marked as **Annexure R-2.**

28. That as per Section 3 of the BUDS Act all Unregulated Deposit Scheme have been strictly banned and deposit takers such as builders, cannot, directly or indirectly promote, operate, issue any advertisements soliciting participation or enrolment in; or accept deposit. Thus, the section 3 of the BUDS Act, makes the Assured Return Schemes, of the builders and promoter, illegal and punishable under law. Further as per the Securities Exchange Board of India Act, 1992 (hereinafter referred as SEBI Act) Collective Investment Schemes as defined under Section 11 AA can only be run and operated by a registered person/Company. Hence, the assured return scheme of the Respondent Company has become illegal by the operation of law and the Respondent Company cannot be made to run a scheme which has become infructuous by law. Also, it is important to rely upon Clause 35 of the BBA dated 11.03.2011 which specifically caters to situation where certain provisions of the BBA become inoperable due to application of law. The Clause 35 of the BBA states:

"If any provision of this Agreement shall be determined to be void or unenforceable under applicable law, such provisions shall be deemed to be amended or deleted in so far as reasonable inconsistent with the purpose of this Agree Agreement and to the extent necessary to conform to applicable law and the remaining provisions of this Agreement shall remain valid and enforceable as applicable at the time of execution of this Agreement."

Thus, the present complaint deserves to be dismissed at the very outset, without wasting precious time of this hon'ble authority.

29. That the complainant has not come before the hon'ble authority with clean hands. That the complaint has been filed by the complainant just to harass the respondent and to gain the unjust enrichment. It is pertinent to mention here that for the fair adjudication of grievance as alleged by the complainant requires detailed deliberation by leading the evidence and cross-examination, thus only the civil court has jurisdiction to deal with the cases required detailed evidence for proper and fair adjudication.

30. That it is pertinent to mention that the present complaint is not maintainable before the hon'ble authority as it is apparent from the prayers sought in the complaint. That further it is crystal clear from reading the complaint that the complainant is not an 'Allottee', but purely is an 'Investor', who is only seeking assured return from the Respondent as well as compensation, by way of present petition, which is not maintainable under the provisions of the Real Estate

(Regulation and Development) Act, 2016 (*hereinafter referred as RERA).*

31. That in view of the judgment and order dated 16.10.2017 passed by the Maharashtra Rera authority in the complaint titled *Mahesh Pariani* vs. *Monarch Solitaire* order, complaint no: CC00600000000078 of 2017 wherein it has been observed that in case where the complainant has invested money in the project with sole intention of gaining profits out of the project, then the complainant is in the position of co-promoter and cannot be treated as 'allottee'. the authority therein opined as under:

> *"It means that the Complainant has the status of 'Co-promoter' of the project, it is evident that the dispute between the Complainant and the Respondent is of a civil nature between the promoter and co-promoter, and does not pertain to any contravention of the Real state (Regulation and Development) Act, 2016. The complaint is, therefore, dismissed."*

Thus, in view of the aforesaid decision, the complainant herein could not and ought not have filed the present complaint being a co-promoter.

32. That in the matter of *Brhimjeet & Ors vs. M/s Landmark Apartments Pvt.Ltd.* (Complaint No. 141 of 2018), this Hon'ble Authority has taken the same view as observed by Maharashtra RERA in Mahesh Pariani (supra) stating that:

> *"The complainant has made a complaint dated 15.5.2018 with regard to the refund of the assured return of Rs.55,000/- per month. As per Clause 4 of the Memorandum of Understanding dated 14.8.2010, the complainant is insisting that the RERA Authority may get the assured return of Rs.55,000/- per month released to him. A perusal of the Real Estate (Regulation & Development) Act, 2016 reveals that as per the*

> *Memorandum of Understanding, the assured return is not a formal clause with regard to giving or taking of possession of unit for which the buyer has paid an amount of Rs.55 Lakhs to the builder which is not within the purview of RERA Act. Rather, it is a civil matter. 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 the provisions of Section 18 (1) of the Act. As such, the buyer is directed to pursue the matter with regard to getting assured return as per the Memorandum of Understanding by filing a case before an appropriate forum/Adjudicating Officer".*

Thus, the RERA Act, 2016 cannot deal with issues of Assured Return and hence the present complaint deserves to be dismissed at the very outset. Copy of the matter titled Brihmjeet & Ors. (Supra) is annexed herewith as **Annexure R-3**.

33. That further in the matter of *Bharam Singh & Ors* vs. *Venetian LDF Projects LLP* (Complaint No. 175 of 2018), the Hon'ble Real Estate Regulatory Authority, Gurugram upheld its earlier decision of not entertaining any matter related to assured returns. That the Hon'ble Authority in the said order stated:

> "that *as already decided in complaint no. 141 of 2018 no case is made out by the Complainant". "That since the authority has taken a view of much earlier as stated above, the authority cannot go beyond the view taken already. In such types of assured return schemes, the authority has no jurisdiction, as such the Complainant is at liberty to approach the appropriate forum to seek remedy".*

34. That further in the matter of *Jasjit Kaur Grewal vs. M/s MVL Ltd.* (Complaint No. 58 of 2018), the Hon'ble Real Estate Regulatory Authority, Gurugram has taken the same view of not entertaining any matter related to 'collective investment scheme' without the approval of SEBI. That the Hon'ble Authority in the said order stated:

> *"Keeping in view the facts and circumstances of the case, even the basic issue whether it is a real estate project or collective investment scheme has been challenged in the SAT in appeal and the SEBI has already held that this being a collective investment scheme is without their approval.*
> *As the matter is already with the SEBI/SAT, accordingly there is no case left for the present before this authority and to continue further proceedings in the matter. Let the issue be decided by the SEBI/SAT. Once the SAT set aside the order of the SEBI then only allottee may come to us for proceedings under the RERA Act."*

35. That in view of the catena of judgments passed by this Hon'ble authority and the intent and purpose of enactment of the Act, 2016, the hon'ble authority is not the right forum for the relief sought by the complainant. further there is no question of interest to be paid upon the alleged assured returns plan in view of the catena of judgements passed by the hon'ble real estate regulatory authority, Gurugram. That the complainant is attempting to seek an advantage of the slowdown in the real estate sector and it is apparent from the facts of the present case that the main purpose of the present complaint is to harass the respondents by engaging and igniting frivolous issues with ulterior motives to pressurize the respondent.
36. That the present complaint is an arm-twisting method employed by the complainant to fulfil the illegitimate, illegal and baseless claims so as to get benefit from the respondent. Thus, the present complaint is without any basis and no cause of action has arisen, till

date, in favour of the complainant and against the respondent and hence the complaint deserves to be dismissed.

37. It is humbly submitted that the complainant be treated as 'Co-Promoter' and not as an 'allottee', as the complainant has invested in the project just to earn profits from the commercial unit. That the sole motive of the complainant is to get profits from the project by the way of assured returns scheme. Thus, the complainant shall be treated as co-promoter in the project and in no eventuality, the complainant be called or allowed to come within the definition of an "allottee" before this Hon'ble Authority under the definition and provisions of RERA Act, 2016 and, thus, on this ground alone, the present complaint is not maintainable in the eyes of law before the Hon'ble Authority and is liable to be rejected.

38. That the bare reading of the agreement executed between the complainant and the respondent, clearly shows that the intention of the complainant has never been to take possession and only to gain assured returns. That as per clause 32.1 of the Builder Buyer agreement, the complainant has authorized the respondents to negotiate and finalize leasing arrangement with suitable tenants. The abovementioned clause is reproduced herein;

> *"That on completion of the project, the Developer undertakes to put the said unit on lease and to effectuate the same the Allottee hereby authorizes the Developer (and agrees, if deemed expedient, to execute any other necessary document in future in this regard in favour of the Developer) to negotiate and finalize leasing arrangement with any suitable tenants. The Allottee expressly authorizes the Developer to enter into any agreement*

with any third party for leasing of the Said Unit and to appear before the HUDA or any other competent authority of Assurances and to lodge the lease deed as aforesaid for registra registration charges on account of the Allottee, in respect of the lease if payable. However, it is understood and agreed between the Allottee and the Developer that:

(a) The rents shall be paid by the Lessee / Developer to the Allottee.

(b) The Developer shall neither be a party nor shall be privy to such lease agreement.

(c) The Developer shall arrange for the execution and registration of the lease deed but charges & expenses for the same, including but not limited to stamp duty and registration charge shall be borne by the Allottee / proposed lessee as may be negotiated and agreed to.

(d) The unit shall be deemed to have been legally possessed by the Allottee.

(e) In the event of non-payment of rent or any other dues by the Lessee or the delayed payments, the Allottee shall have the remedies available to it as may be stipulated in the said lease agreement.

(f) The Developer shall at all time have the right of leasing of the Unit and such decision as to the choice of the tenant and the lease rent shall be binding on the Allottee. This clause is a power of attorney executed by the Allottee as donor with the Developer as done / attorney and the Allottee hereby ratifies and confirms all acts deeds and things to be done by the Developer as its attorney, by virtue of the present above.

(g) Xxx

(h) The Allottee shall not without the written consent of the Developer (such consent not being unreasonable withheld) be entitled to take the physical possession including self-occupation of the unit. In case an Allottee is given

possession of his unit, such possession shall be given in the same state in which, the previous occupant / Lessee had vacated the space viz 'as is where is basis'......."

That from the facts of the complaint and from the agreed terms and conditions of the agreement it entails that the complainant is an Investor since, the only purpose of booking a commercial unit in the project was to get monetary gains even after the completion of the said unit.

39. It is most respectfully submitted that the complainant had wilfully agreed to the terms and conditions of the Builder Buyer Agreement and now at a belated stage is attempting to wriggle out of the obligation imposed by the said mutually agreed agreement terms by the filing the instant complaint before this Hon'ble Authority.

40. That it is brought to the knowledge of the Hon'ble Authority that the complainant is guilty of placing untrue facts and is attempting to hide the true colour of the intention of the complainant. That before signing the agreement the complainant was well aware of the terms and conditions as imposed upon the parties under the agreement and only after thorough reading, the said agreement got signed and executed. That the complainant is misrepresenting the true contents of the agreement to extract more money from the Respondent. That the respondents have fulfilled all the obligations so far, as per the said agreement.

41. It is further submitted that the complainant is making false statement before the Hon'ble Authority and all the averments made by the complainant is to be put to strict proof thereof. Thus, it is evident that the entire case of the complainant is nothing but a web of lies and the false and frivolous allegations made against the respondents are nothing but an afterthought hence the present complaint filed by the complainant deserves to be dismissed with heavy costs. It is pertinent to mention here that complainant's act is also violative of the provisions of Banning of Unregulated Deposit Act, 2019 as the complaint falls within the definition of "Deposit Takers", as per the Section 2(6) of 'Banning of Unregulated Deposit Schemes Act, 2019 and the said ordinance bans such deposits, thereby also bars such assured returns.

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

E. Jurisdiction of the authority

43. The respondent no. 1 has raised preliminary objection regarding jurisdiction of authority to entertain the present complaint. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

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

E. II Subject-matter jurisdiction

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

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

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

Section 34-Functions of the Authority:

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

So, in view of the provisions of the Act of 2016 quoted above, the authority has complete jurisdiction to decide the complaint

regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

E. Findings on the relief sought by the complainant:

F.I. Assured returns

45. While filing the claim petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 11.03.2011, the claimant has also sought assured returns on monthly basis as per addendum to the agreement at the rate of Rs 71.50/- per sq. ft. of super area per month till the construction of the said commercial unit is complete. It is pleaded by the claimant that the respondent have not complied with the terms and conditions of the agreement. Though for some time the amount of assured returns was paid but later on, the respondent refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019 (herein after referred to as the Act of 2019). But that Act does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act. However, the plea of respondent is otherwise and who took a stand that though they paid the amount of assured return upto the year 2018 but did not pay assured return amount after coming into force of the Act of 2019 as the same was declared illegal.

46. 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

47. 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.

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

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

49. 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;

50. 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.

51. 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.

52. 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.

53. Moreover, the developer is also bound by promissory estoppel. As per this doctrine, the view is that if any person has made a promise and the promisee has acted on such promise and altered his position, then the person/promisor is bound to comply with his or her promise. When the builders failed to honour their commitments, a number of cases were filed by the creditors at different forums such as ***Nikhil Mehta, Pioneer Urban Land and Infrastructure*** which ultimately led the central government to enact the Banning of Unregulated Deposit Scheme Act, 2019 on 31.07.2019 in pursuant to the Banning of Unregulated Deposit Scheme Ordinance, 2018. However, the moot question to be decided is as to whether the schemes floated earlier by the builders and promising as assured returns on the basis of allotment of units

are covered by the abovementioned Act or not. A similar issue for consideration arose before Hon'ble RERA Panchkula in case ***Baldev Gautam VS Rise Projects Private Limited*** (*RERA-PKL-2068-2019*) where in it was held on 11.03.2020 that a builder is liable to pay monthly assured returns to the complainant till possession of respective apartments stands handed over and there is no illegality in this regard.

54. 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.

55. 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.

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

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

57. Hence, the authority, hereby passes this order and issues the following directions under section 37 of the Act to ensure

compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

i. The respondents are directed to handover the possession of the subject unit to the complainant after receipt of occupation certificate.

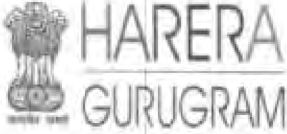
ii. The respondents are directed to pay the amount of assured return at the agreed rate i.e. Rs.71.50/- per sq. ft. to the complainants from the date the payment of assured return has not been paid i.e. October 2018 till the offer of possession. After completion of the construction of the building, the respondent/builder would be liable to pay monthly assured returns @65/- per sq. ft. of the super area up to 36 months or till the unit is put on lease whichever is earlier.

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

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

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

58. 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.

59. Complaint stands disposed of.

60. File be consigned to registry.

(Vijay Kumar Goyal)
Member

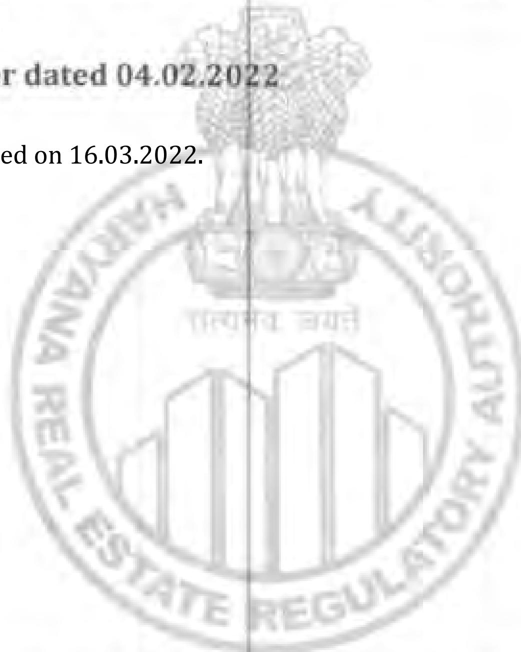
(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.11.2021

Rectified vide order dated 04.02.2022

Corrected order uploaded on 16.03.2022.



HARERA
GURUGRAM

BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**1118 of 2021**
Date of filing complaint	:	**01.03.2021**
First date of hearing	:	**07.04.2021**
Date of decision	:	**10.11.2021**

Anu Mehta R/o: 21st floor, block A, The Crest, Park Drive, DLF, Phase -V, Gurugram	**Complainant**
Versus	
1. M/s Vatika Limited 2. Gautam Bhalla (Managing Director) Both Address : Unit no. A002, INXT City Centre, Ground floor, block A, Sector 83, Vatika India Next, Gurgram-122012, Haryana	**Respondent**

CORAM:	
Dr. K.K. Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Sanjeev Kumar Sing (Advocate)	Complainant
Ms. Ankur Berry (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter-alia prescribed that the promoter shall be responsible for all

obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. No.	Heads	Information
1.	Name and location of the project	Vatika Inxt City Centre.
2.	Nature of the project	Commercial complex
3.	Area of the project	10.48 acres
4.	DTCP license	258 of 2007 dated
	License validity/ renewal period	05.08.2020
5.	RERA registered/not registered	Not registered
6.	Unit no.	343, 3rd floor, tower A (Page no 34 of BBA).
7.	Unit measuring	1000 sq. ft.
8.	New unit allotted	817, 8th floor, block F (page 57 annexure P-7 of complaint)
9.	Date of execution of apartment buyer's agreement	11.03.2011 (Page 52 of BBA)
10.	Total sale consideration	Rs 50,00,000/- as per clause 1 of BBA (page 34 of complaint being sale consideration)

63

11.	Total amount actually paid by the complainant	Rs 50,00,000/- as per clause 2 of BBA (page 34 of complaint being sale consideration)
12.	Due date of delivery of possession	11.03.2014 as per clause 2 of the builder buyer agreement [Page 34 of BBA]
13.	Provision regarding assured return	Addendum to the agreement dated 11.03.2011 The unit has been allotted to you with an assured monthly return of Rs.65/- per sq. ft. However during the course of construction till such time the building in which your unit is situated offered for possession you will be paid an additional return of Rs 6.50/- per sq. ft. Therefore your return payable to you shall be as follows: This addendum forms an integral part of builder buyer agreement dated 11.03.2014. a. Till offer of possession: Rs. 71.50/- sq. ft. b. After completion of the building: Rs 65/- per sq. ft. You would be paid an assured return w.e.f. 11.03.2014 on a monthly basis before the 15th of each calendar month. The obligation of the developer shall be to lease the promises of which your flat is part @Rs. 65/- per sq. ft. In the eventuality the achieved return being higher or lower than Rs 65/- per sq. ft. the following would be applicable.

		1. If the rental is less than Rs 65/- per sq. ft. than you shall be refunded @ Rs 120/- per sq. ft. for every Rs 1/- by which achieved rental is less than Rs 65/- per sq. ft. 2. If the achieved rental is higher than Rs 65/- per sq. ft. than 50% of the increased rental shall accrue to you free of any additional sale consideration. However you will be requested to pay additional sale consideration @Rs 120/- sq. ft. for every rupee of additional rental achieved in the case of balance 50% of increased rentals.
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	7 years 7 months 30 days

B. Facts of the complaint

3. That the complainant is a bona fide purchaser of a commercial space bearing unit no. 817, 8th floor, tower - F of the project named as "Vatika INXT City Centre", Sector-83, NH-8, Gurgaon, Haryana of the Opposite Party No.1 i.e., Vatika Limited.

4. That the respondent no. 1 i.e., Vatika Limited is a public limited company having been incorporated under the companies act, 1956 which is engaged in real estate business. The respondent no.2 is the managing director of the respondent no. 1 and he is responsible for the day-to-day affairs of the respondent no. 1 and he had signed the

documents including BBA & addendums to BBA etc. on behalf the respondent no. 1 in the capacity of authorised signatory.

5. That complainant acting on the representations of the respondent agreed to purchase a shop/commercial space in the aforesaid commercial complex project named as "Vatika Trade Centre" and accordingly submitted an application dated 01.03.2011 seeking allotment of a shop/commercial enclosing therewith a cheque bearing no. 385150 dated 01.03.2011 of Rs. 5,00,000/- (Rs. 5 lakhs only) drawn on HDFC bank favouring respondent no.1 towards booking amount and earnest money.

6. That in furtherance of the above application of the complainant, the respondent no. 1 allotted a shop/commercial space admeasuring 1000 sq. ft. (Super area) being Unit no. 343 on 3rd Floor of Block-A in the building namely" Vatika Trade Centre" and both the parties executed and signed the Builder Buyer Agreement (hereinafter referred as BBA) dated 11.03.2011. As per the BBA, the unit under reference was to be constructed within 3 years from the date of execution of BBA and the agreed total sale price for the said unit was Rs. 50,00,000/- (Rupees Fifty Lacs Only).

7. That the complainant had paid the balance sale consideration of Rs.45,00,000/- (Rs. forty-five lakh only) vide cheque bearing no. 574236 dated 09.03.2011 drawn on HDFC bank favouring respondent no.1 at the time of signing of the BBA. Thus, entire sale consideration of Rs. 50,00,000/- of the said unit stood paid at the

time of signing of the BBA and the said detail was mentioned and acknowledged in clause 2 of the BBA. According to clause 2 of the BBA, the construction of the said unit was to be given to the complainant within three (3) years from the date of execution of agreement i.e. 10.03.2014 and further as per clause 32.1 of the BBA the respondent were under an obligation to put the said unit on lease on completion of the project subject to assured rental returns to the complainant in terms of clause 32.2 of said agreement.

8. That an addendum to the aforesaid BBA being forming an integral part thereof and providing for payment of "assured returns" by the respondent to the complainant were also simultaneously executed between the parties vide which respondent had undertaken to pay the complainant @ Rs. 71.50/- per sq. ft. per month till the offer of possession and @ Rs. 65/- per sq. ft. per month after the completion of the building.

9. That the respondent no. 1 vide letter dated 11.03.2011 acknowledged & confirmed the allotment of the said unit and duly signed "BBA" alongwith "Annexure A" was provided to the complainant by enclosing therewith and it was also confirmed that the unit will be ready for lease by 30.09.2012 and the respondent shall be paying rentals/assured returns to the complainant as per "Annexure A" in case constructed premises is leased out any time after 01.10.2012.

49

10. That as the respondent were facing some legal impediments in construction of said project, the respondent in the month of July 2011, requested the complainant to relocate her unit to another project titled as "Vatika Inxt City Centre" falling in the revenue estate of Village - Sikhopur, Tehsil - Sohna, District - Gurugram. The complainant accepted the proposal of the respondent for relocating her unit to "Vatika Inxt City Centre" and in pursuance of the same, an addendum to the BBA dated 11.03.2011 was executed on 27.07.2011 wherein it was clarified that unit allocation shall be finalized on approval of the pending Building Plans by the competent authority and it was also reiterated that all terms and conditions of the BBA dated 11.03.2011 shall remain the same apart from Clause A, B and C which were the recital clauses.
11. That Pursuant to the above addendum to the BBA, the Respondent vide letter dated 31.07.2013 re-allocated another unit admeasuring 1000 sq. ft. bearing Unit No. 817, 8th Floor, Tower-F of "Vatika INXT City Centre" in project namely "India Next City Centre", Sector - 83, NH - 8, Gurgaon, Haryana to the complainant and it was again reiterated in the said letter that all the terms and conditions of the BBA was to remain same. However, after a period of few months from the date of execution of the BBA, the construction at the site slowed down substantially and the respondent were not able to deliver the possession of the Unit of the complainant on time as per clause 2 of the BBA i.e., by 10.03.2014.

118

12. That it is pertinent to mention here that complainant had paid the entire sale consideration agreed between the parties at the time of execution of the BBA but there is intentional and wilful default on the Part of Respondent in performance of the agreement on their part in delivering the possession of unit in question to the complainant. Thereafter, the respondent vide letter dated 27.03.2018 intimated to the complainant that the construction work of Block F of "INXT City Centre". Gurugram has been completed and the building got operational in the last week of February 2018 and ready for occupation. In the latter it was stated that they are in process of finalizing prospective tenants for the unit of the complainant and in view of the completion of the Tower of the complainant, the commitment charges/assured returns have been revised to Rs.65 /- per sq. ft. per month with effect from 01.03.2018.

13. That from the above, it is evident that the respondents were and are under an obligation to pay the assured/committed rental return to the Complainant in terms of clause 32.2 of the BBA and the "Annexure A" which was Addendum to the BBA as under:

    (a) Till offer of possession @ Rs.71.50 per sq. ft. per month.

    (b) After completion of building @ Rs. 65/- per sq. ft. per month subject to the following conditions.

(i) In case of lease rent being less than Rs.65/- per sq. ft. per month, your company would be liable to refund @ Rs.120 per sq. ft. for every one Rs. drop to the undersigned.

(ii) In case of lease rent being more than 65/- per sq. ft., the undersigned will be liable to pay your company additional sale consideration @ Rs.120/- sq. ft. for every one Rs. in excess of 50% increase for which no additional sale consideration is payable.

14. That it is submitted that the complainant understands that the unit has not been leased out till now as no intimation in this regard has been received by her from the respondents till date and thus respondent are liable to pay assured rental return @ Rs. 65 per sq. ft. per month i.e., Rs. 65000/- per month to the complainant from 01.03.2018 onwards.

15. That the respondents continued to pay due assured returns @ Rs.71.50 per sq. ft. per month till the offer of possession/completion of construction work i. e., upto 28.02.2018 to the completion of work. However, the respondent paid the due assured rental returns @ Rs.65/- per sq. ft. per month to the complainant till the month of September 2018 only and thereafter suddenly stopped making payment of due assured/committed rental returns from 01.10.2018 onwards to the complainant without any justification or assigning any reason.

16. That in view of the non-receipt of the payment towards assured/committed rental return with effect from 01.10.2018, the complainant contacted the concerned officials of the respondent time and again for release of the due amount, however to no avail. As a result of the said breach of the BBA and evasive approach of the respondent, the complainant was constrained to send 03 representations dated 26.12.2019, 06.07.2020 and 09.11.2020 to the Respondent requesting for payment of the outstanding due amount to be paid by the respondent and for the execution & registration of the conveyance deed of the unit under reference in favour of the complainant in terms of Clause 8 of the BBA. Copies of the said representations dated 26.12.2019, 06.07.2020 and 09.11.2020 are collectively.
17. That the complainant herein went from pillar to post to redress her grievances for which she has made personal visits to the office of the Respondent. Unfortunately, the respondent have shown their indifference with an intention to misappropriate the due money of the complaint.
18. That the indifferent acts of the respondents are causing financial strain, physical and mental harassment. The complaint has approached several times to the respondents to honour its commitments, but the respondent had not responded to the complaint.

19. That the above actions and practice of the Respondent amounts to breach of the terms of BBA, deficiency in services and unfair trade practice besides being an offence under the Indian Penal Code.
20. That the above actions of the respondent are in violation of section 11(4)(a) of the Haryana Real Estate (Regulation and Development) Act, 2016 wherein it is inter alia provided that the promotor shall 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 and under section 34 (f) of this Act this Hon'ble authority is fully empowered to ensure compliance of the obligations cast upon the promoters.
21. That it is submitted that the respondent have unjustly enriched themselves by denying the payment of the due amount of the complainant and undue advantage taken by the respondent of the complainant's situation. It is submitted that as per the principles of natural justice and it is equitable and lawful that the outstanding due money amounting to Rs. 22,80,850/- (Rs. Twenty-Two Lakh Eighty Thousand Eight Hundred Fifty only) of the complainant should be paid to her. The act of the respondents have caused hardship, harassment, frustration, distress, agony and inconvenience to complainant and by such act the complainant have been defrauded by the respondent. The laws of the land including the Indian Contract Act, 1872 and RERA - Real Estate

(Regulation and Development) Act, 2016 entitles the complainant to seek payment of outstanding due amount from the respondent.

22. That the present case of the complainant squarely falls within the ambit of the doctrine of promissory Estoppel. That the complainant had invested her savings in the project of the respondents relying on the promise of the respondent to pay assured/committed rental return to the complainant, however the act of the respondent of not paying the said due amount from 01.10.2018 had caused loss to the complainant.

23. That the complainant has suffered at the hands of the respondent who by exploiting their upper hand between the parties had not only not fulfilled their promise but also illegally holding the due money of the complainant. The complainant therefore intends to bring forth the wrongs committed by the respondent and seeks the remedy before this Ld. Regulatory Authority and hence this present complaint.

24. That in view of the facts and circumstances mentioned above the complainant is entitled for the compensation to the tune of Rs. 10 Lac for mental harassment, frustration, distress, agony and inconvenience to Complainant and Rs. 55000/- as litigation cost.

C. Relief sought by the complainant:

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

    i. Direct the respondents to pay assured rental return @ Rs.65/-

per sq. ft. per month for the period from 01.10.2018 till date and continue to pay due amounts in future as per terms of BBA dated 11.03.2011.

ii. Direct the respondents to execute & register the conveyance deed for the unit in favour of the complainant.

D. Reply by the respondent

26. That at the very outset it is submitted that the present complaint is not maintainable or tenable in the eyes of law. The complainant has misdirected himself in filing the above captioned complaint before the Hon'ble Real Estate Regulatory Authority as the reliefs being claimed by the complainant cannot be said to fall within the realm of jurisdiction of this Forum. It is humbly submitted that upon the enactment of the Banning of That at the very outset it is submitted that the present complaint is not maintainable or tenable in the eyes of law. The complainant has misdirected himself in filing the above captioned complaint before the Hon'ble Real Estate Regulatory Authority as the reliefs being claimed by the complainant cannot be said to fall within the realm of jurisdiction of this Forum. It is humbly submitted that upon the enactment of the Banning of Unregulated Deposit Schemes Act, 2019, (hereinafter referred as BUDS Act) the 'Assured Return' and/ or any "Committed Returns" on the deposit schemes have been banned. The respondent company having not taken registration from SEBI Board cannot run, operate, continue an

assured return scheme. The Section 2(17) of the Banning of Unregulated Deposit Schemes Act, 2019 defines the "Unregulated Deposit Scheme" as follows:

> *"2(17) Unregulated Deposit Scheme- means a Scheme or an arrangement under which deposits are accepted or solicited by any deposit taker by way of business and which is not a Regulated Deposit Scheme, as specified under column (3) of the First Schedule"*

27. The First Schedule of the Banning of Unregulated Deposit Schemes Act, 2019 prescribed limited Regulator who can publish Regulated Deposit Schemes, the same being only,

i. The Securities and Exchange Board of India,
ii. The Reserve Bank of India,
iii. The Insurance Regulatory and Development Authority of India,
iv. The State Government or Union territory Government,
v. The National Housing Bank,
vi. The Pension Fund Regulatory and Development Authority,
vii. The Employees' Provident Fund Organisation,
viii. The Central Registrar, Multi-State Co-operative Societies
ix. the Ministry of Corporate Affairs Government of India,

Thus the 'Assured Return Scheme proposed and floated by the respondent has become infructuous due to operation of law, thus the relief prayed for in the present complaint cannot survive due to operation of law. Thus the 'Assured Return Scheme proposed and floated by the respondent has become infructuous due to operation

of law, thus the relief prayed for in the present complaint cannot survive due to operation of law. Further the respondent company made due payments of assured returns to the complainant and the same is evident from the computation sheet which is annexed herewith and marked as **Annexure R-2**.

28. That as per Section 3 of the BUDS Act all Unregulated Deposit Scheme have been strictly banned and deposit takers such as builders, cannot, directly or indirectly promote, operate, issue any advertisements soliciting participation or enrolment in; or accept deposit. Thus, the section 3 of the BUDS Act, makes the Assured Return Schemes, of the builders and promoter, illegal and punishable under law. Further as per the Securities Exchange Board of India Act, 1992 (hereinafter referred as SEBI Act) Collective Investment Schemes as defined under Section 11 AA can only be run and operated by a registered person/Company. Hence, the assured return scheme of the Respondent Company has become illegal by the operation of law and the Respondent Company cannot be made to run a scheme which has become infructuous by law. Also, it is important to rely upon Clause 35 of the BBA dated 11.03.2011 which specifically caters to situation where certain provisions of the BBA become inoperable due to application of law. The Clause 35 of the BBA states:

> *"If any provision of this Agreement shall be determined to be void or unenforceable under applicable law, such provisions shall be deemed to be amended or deleted in so far as reasonable inconsistent with the purpose of this Agree Agreement and to the extent necessary to conform to applicable law and the remaining provisions of this Agreement shall remain valid and enforceable as applicable at the time of execution of this Agreement. "*

Thus, the present complaint deserves to be dismissed at the very outset, without wasting precious time of this hon'ble authority.

29. That the complainant has not come before the hon'ble authority with clean hands. That the complaint has been filed by the complainant just to harass the respondent and to gain the unjust enrichment. It is pertinent to mention here that for the fair adjudication of grievance as alleged by the complainant requires detailed deliberation by leading the evidence and cross-examination, thus only the civil court has jurisdiction to deal with the cases required detailed evidence for proper and fair adjudication.

30. That it is pertinent to mention that the present complaint is not maintainable before the hon'ble authority as it is apparent from the prayers sought in the complaint. That further it is crystal clear from reading the complaint that the complainant is not an 'Allottee', but purely is an 'Investor', who is only seeking assured return from the Respondent as well as compensation, by way of present petition, which is not maintainable under the provisions of the Real Estate

(Regulation and Development) Act, 2016 (*hereinafter referred as RERA).*

31. That in view of the judgment and order dated 16.10.2017 passed by the Maharashtra Rera authority in the complaint titled *Mahesh Pariani* vs. *Monarch Solitaire* order, complaint no: CC00600000000078 of 2017 wherein it has been observed that in case where the complainant has invested money in the project with sole intention of gaining profits out of the project, then the complainant is in the position of co-promoter and cannot be treated as 'allottee'. the authority therein opined as under:

> *"It means that the Complainant has the status of 'Co- promoter' of the project, it is evident that the dispute between the Complainant and the Respondent is of a civil nature between the promoter and co-promoter, and does not pertain to any contravention of the Real state (Regulation and Development) Act, 2016. The complaint is, therefore, dismissed."*

Thus, in view of the aforesaid decision, the complainant herein could not and ought not have filed the present complaint being a co-promoter.

32. That in the matter of *Brhimjeet & Ors* vs. *M/s Landmark Apartments Pvt.Ltd.* (Complaint No. 141 of 2018), this Hon'ble Authority has taken the same view as observed by Maharashtra RERA in Mahesh Pariani (supra) stating that:

> *"The complainant has made a complaint dated 15.5.2018 with regard to the refund of the assured return of Rs.55,000/- per month. As per Clause 4 of the Memorandum of Understanding dated 14.8.2010, the complainant is insisting that the RERA Authority may get the assured return of Rs.55,000/- per month released to him. A perusal of the Real Estate (Regulation & Development) Act, 2016 reveals that as per the*

> *Memorandum of Understanding, the assured return is not a formal clause with regard to giving or taking of possession of unit for which the buyer has paid an amount of Rs.55 Lakhs to the builder which is not within the purview of RERA Act. Rather, it is a civil matter. 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 the provisions of Section 18 (1) of the Act. As such, the buyer is directed to pursue the matter with regard to getting assured return as per the Memorandum of Understanding by filing a case before an appropriate forum/Adjudicating Officer".*

Thus, the RERA Act, 2016 cannot deal with issues of Assured Return and hence the present complaint deserves to be dismissed at the very outset. Copy of the matter titled Brihmjeet & Ors. (Supra) is annexed herewith as **Annexure R-3**.

33. That further in the matter of *Bharam Singh & Ors* vs. *Venetian LDF Projects LLP* (Complaint No. 175 of 2018), the Hon'ble Real Estate Regulatory Authority, Gurugram upheld its earlier decision of not entertaining any matter related to assured returns. That the Hon'ble Authority in the said order stated:

> "that *as already decided in complaint no. 141 of 2018 no case is made out by the Complainant". "That since the authority has taken a view of much earlier as stated above, the authority cannot go beyond the view taken already. In such types of assured return schemes, the authority has no jurisdiction, as such the Complainant is at liberty to approach the appropriate forum to seek remedy".*

34. That further in the matter of *Jasjit Kaur Grewal vs. M/s MVL Ltd.* (Complaint No. 58 of 2018), the Hon'ble Real Estate Regulatory Authority, Gurugram has taken the same view of not entertaining any matter related to 'collective investment scheme' without the approval of SEBI. That the Hon'ble Authority in the said order stated:

"Keeping in view the facts and circumstances of the case, even the basic issue whether it is a real estate project or collective investment scheme has been challenged in the SAT in appeal and the SEBI has already held that this being a collective investment scheme is without their approval.
As the matter is already with the SEBI/SAT, accordingly there is no case left for the present before this authority and to continue further proceedings in the matter. Let the issue be decided by the SEBI/SAT. Once the SAT set aside the order of the SEBI then only allottee may come to us for proceedings under the RERA Act."

35. That in view of the catena of judgments passed by this Hon'ble authority and the intent and purpose of enactment of the Act, 2016, the hon'ble authority is not the right forum for the relief sought by the complainant. further there is no question of interest to be paid upon the alleged assured returns plan in view of the catena of judgements passed by the hon'ble real estate regulatory authority, Gurugram. That the complainant is attempting to seek an advantage of the slowdown in the real estate sector and it is apparent from the facts of the present case that the main purpose of the present complaint is to harass the respondents by engaging and igniting frivolous issues with ulterior motives to pressurize the respondent.

36. That the present complaint is an arm-twisting method employed by the complainant to fulfil the illegitimate, illegal and baseless claims so as to get benefit from the respondent. Thus, the present complaint is without any basis and no cause of action has arisen, till

date, in favour of the complainant and against the respondent and hence the complaint deserves to be dismissed.

37. It is humbly submitted that the complainant be treated as 'Co-Promoter' and not as an 'allottee', as the complainant has invested in the project just to earn profits from the commercial unit. That the sole motive of the complainant is to get profits from the project by the way of assured returns scheme. Thus, the complainant shall be treated as co-promoter in the project and in no eventuality, the complainant be called or allowed to come within the definition of an "allottee" before this Hon'ble Authority under the definition and provisions of RERA Act, 2016 and, thus, on this ground alone, the present complaint is not maintainable in the eyes of law before the Hon'ble Authority and is liable to be rejected.

38. That the bare reading of the agreement executed between the complainant and the respondent, clearly shows that the intention of the complainant has never been to take possession and only to gain assured returns. That as per clause 32.1 of the Builder Buyer agreement, the complainant has authorized the respondents to negotiate and finalize leasing arrangement with suitable tenants. The abovementioned clause is reproduced herein;

> *"That on completion of the project, the Developer undertakes to put the said unit on lease and to effectuate the same the Allottee hereby authorizes the Developer (and agrees, if deemed expedient, to execute any other necessary document in future in this regard in favour of the Developer) to negotiate and finalize leasing arrangement with any suitable tenants. The Allottee expressly authorizes the Developer to enter into any agreement*

35

with any third party for leasing of the Said Unit and to appear before the HUDA or any other competent authority of Assurances and to lodge the lease deed as aforesaid for registra registration charges on account of the Allottee, in respect of the lease if payable. However, it is understood and agreed between the Allottee and the Developer that:

(a) *The rents shall be paid by the Lessee / Developer to the Allottee.*

(b) *The Developer shall neither be a party nor shall be privy to such lease agreement.*

(c) *The Developer shall arrange for the execution and registration of the lease deed but charges & expenses for the same, including but not limited to stamp duty and registration charge shall be borne by the Allottee / proposed lessee as may be negotiated and agreed to.*

(d) *The unit shall be deemed to have been legally possessed by the Allottee.*

(e) *In the event of non-payment of rent or any other dues by the Lessee or the delayed payments, the Allottee shall have the remedies available to it as may be stipulated in the said lease agreement.*

(f) *The Developer shall at all time have the right of leasing of the Unit and such decision as to the choice of the tenant and the lease rent shall be binding on the Allottee. This clause is a power of attorney executed by the Allottee as donor with the Developer as done / attorney and the Allottee hereby ratifies and confirms all acts deeds and things to be done by the Developer as its attorney, by virtue of the present above.*

(g) *Xxx*

(h) *The Allottee shall not without the written consent of the Developer (such consent not being unreasonable withheld) be entitled to take the physical possession including self-occupation of the unit. In case an Allottee is given*

34

possession of his unit, such possession shall be given in the same state in which, the previous occupant / Lessee had vacated the space viz 'as is where is basis'......."

That from the facts of the complaint and from the agreed terms and conditions of the agreement it entails that the complainant is an Investor since, the only purpose of booking a commercial unit in the project was to get monetary gains even after the completion of the said unit.

39. It is most respectfully submitted that the complainant had wilfully agreed to the terms and conditions of the Builder Buyer Agreement and now at a belated stage is attempting to wriggle out of the obligation imposed by the said mutually agreed agreement terms by the filing the instant complaint before this Hon'ble Authority.

40. That it is brought to the knowledge of the Hon'ble Authority that the complainant is guilty of placing untrue facts and is attempting to hide the true colour of the intention of the complainant. That before signing the agreement the complainant was well aware of the terms and conditions as imposed upon the parties under the agreement and only after thorough reading, the said agreement got signed and executed. That the complainant is misrepresenting the true contents of the agreement to extract more money from the Respondent. That the respondents have fulfilled all the obligations so far, as per the said agreement.

41. It is further submitted that the complainant is making false statement before the Hon'ble Authority and all the averments made by the complainant is to be put to strict proof thereof. Thus, it is evident that the entire case of the complainant is nothing but a web of lies and the false and frivolous allegations made against the respondents are nothing but an afterthought hence the present complaint filed by the complainant deserves to be dismissed with heavy costs. It is pertinent to mention here that complainant's act is also violative of the provisions of Banning of Unregulated Deposit Act, 2019 as the complaint falls within the definition of "Deposit Takers", as per the Section 2(6) of 'Banning of Unregulated Deposit Schemes Act, 2019 and the said ordinance bans such deposits, thereby also bars such assured returns.

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

E. Jurisdiction of the authority

43. The respondent no. 1 has raised preliminary objection regarding jurisdiction of authority to entertain the present complaint. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

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

E. II Subject-matter jurisdiction

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

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

So, in view of the provisions of the Act of 2016 quoted above, the authority has complete jurisdiction to decide the complaint

regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

E. **Findings on the relief sought by the complainant:**

F.I. Assured returns

45. While filing the claim petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 11.03.2011, the claimant has also sought assured returns on monthly basis as per addendum to the agreement at the rate of Rs 71.50/- per sq. ft. of super area per month till the construction of the said commercial unit is complete. It is pleaded by the claimant that the respondent have not complied with the terms and conditions of the agreement. Though for some time the amount of assured returns was paid but later on, the respondent refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019 (herein after referred to as the Act of 2019). But that Act does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act. However, the plea of respondent is otherwise and who took a stand that though they paid the amount of assured return upto the year 2018 but did not pay assured return amount after coming into force of the Act of 2019 as the same was declared illegal.

46. 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

47. 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.

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

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

49. 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;*

50. 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.

51. 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.

52. 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.

53. Moreover, the developer is also bound by promissory estoppel. As per this doctrine, the view is that if any person has made a promise and the promisee has acted on such promise and altered his position, then the person/promisor is bound to comply with his or her promise. When the builders failed to honour their commitments, a number of cases were filed by the creditors at different forums such *as Nikhil Mehta, Pioneer Urban Land and Infrastructure* which ultimately led the central government to enact the Banning of Unregulated Deposit Scheme Act, 2019 on 31.07.2019 in pursuant to the Banning of Unregulated Deposit Scheme Ordinance, 2018. However, the moot question to be decided is as to whether the schemes floated earlier by the builders and promising as assured returns on the basis of allotment of units

are covered by the abovementioned Act or not. A similar issue for consideration arose before Hon'ble RERA Panchkula in case ***Baldev Gautam VS Rise Projects Private Limited*** (*RERA-PKL-2068-2019*) where in it was held on 11.03.2020 that a builder is liable to pay monthly assured returns to the complainant till possession of respective apartments stands handed over and there is no illegality in this regard.

54. 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.**

55. 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.

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

F. Directions of the authority'

57. 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. Direct the respondents to handover the possession to the complainant after receipt of occupation certificate.

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

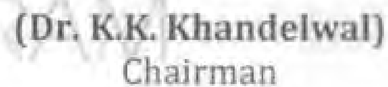
iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period as well as amount of assured returns.

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

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

58. Complaint stands disposed of.

59. File be consigned to registry.



(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.11.2021