BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**1241 of 2021**
Date of filing complaint:		**03.03.2021**
First date of hearing	:	**07.04.2021**
Date of decision	:	**10.11.2021**

	Rajiv Kothiwal and Anr R/o: Brijraj Bhawan, Civil Lines, Moradabad, UP-244001	**Complainants**
	Versus	
	M/s Vatika Limited R/o: Unit 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. Abhijeet Gupta (Advocate)	Complainants
Ms. Ankur Berry (Advocate)	Respondent

ORDER

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

the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. No	Heads	Information
1.	Name and location of the project	Vatika Inxt
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.	Subsequent allottee	Date is not mentioned
7.	Agreement to sell between first party and second party	08.05.2012
8.	Unit no.	1005, 10th floor, tower A (Page no 31 of BBA),
9.	Unit measuring	500 sq. ft.
10	New unit allotted	408, 4th floor, block A(page 56 annexure E of complaint)
11	Date of execution of apartment buyer's agreement	21.11.2009 (Page 30 of BBA)
12	Total sale consideration	Rs 17,50,000/- as per clause 1 of BBA (page 32 of complaint being sale consideration)
13	Total amount actually paid by the complainant	Rs 17,50,000/-

		as per clause 2 of BBA (page 32 of complaint being sale consideration)
14	Due date of delivery of possession	21.11.2012 as per clause 2 of the builder buyer agreement [Page 32 of BBA]
15	Provision regarding assured return	Addendum to the agreement dated 21.11.2009 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 21.11.2009. 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. 21.11.2009 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.
16	Offer of possession	Not offered
17	Occupation certificate	Not obtained
18	Delay in handing over possession till date of decision i.e., 10.11.2021	8 years 11 months 20 days

B. Facts of the complaint

3. That, in pursuant to the elaborate advertisements, assurances, representations and promises made by respondent in the brochure circulated by them about the timely completion of a premium project with impeccable facilities and believing the same to be correct and true, our client considered booking unit 1005, 10th floor at Block-A of **Vatika INXT City Centre Gurugram** from **Vinod Kumar Agarwal and Sangeeta Agarwal** R/o – E-301 Sadan, 5 Hailey Road, NDMC, New Delhi-110001 (hereinafter referred to as the **"Former Allottees"**). It was represented and assured by the

respondent that the project including the flat of the complainants would be completed by end of 2012.

4. That the booking of the said unit i.e., unit 1005, 10th floor at tower A in the "Vatika INXT City Centre Gurugram" project was confirmed to the former allotees vide allotment Letter dated 21. 11.2009 enclosing with respective terms and conditions.

5. That, relying upon the respondent's representations and being assured that the respondent would abide by their commitments, the complainants in good faith purchased a previously booked unit 1005 ,10th floor, tower A of Vatika INXT city centre from the former allotees vide sale deed dated 8th May,2012.

6. That subsequently, the booking of the said unit i.e., unit 1005, **10th floor at tower A** in the **"Vatika INXT City Centre Gurugram"** project was confirmed to the former allotees vide assignment letter dated 24 07.2012 wherein the respondent explicitly assigned all the rights and benefits under the builder buyer agreement dated 21.11.2009 to the present complainants.

7. That, previously pursuant to the booking of the unit by the former allottees, a builder-buyer agreement dated 21.11.2009 was executed between the parties which included all the details of the project such as amenities promised, site plan, payment schedule, date of completion etc. Under the said builder buyer agreement, the respondent No.1 promised, assured, represented and committed to the complainant that this residential project would be completed and will be handed over to the buyer within the above-mentioned stipulated period of time. Further, as per **clause 2** of the builder-buyer agreement, the respondent assured that the time is of the

essence. The relevant clause is reproduced hereunder for the convenience of this Hon'ble Tribunal:

> *"The Developer undertakes to complete the construction of the complex / Building within 3 (three) years from the date of execution of this Agreement. Since the Allottee has paid full sale consideration on signing of this agreement, the Developer further undertakes to make payment at. Refer 'Annexure A' per sq. ft. super area per month by way of committed return during construction period, which the Allottee duly accepts. In the event of a time over run, the Allottee shall continue to receive the same assured return as mentioned herein until the building is ready for possession."*

8. That pursuant to the original builder buyers agreement an addendum dated 18.12.2009, which is marked as annexure A to the BBA, was duly signed and executed by and amongst the complainants and the respondent wherein the respondent undertook to pay a monthly rent of Rs. 65/- per sq.ft. per month to the complainants, which is equivalent to Rs. 32,500 per month. It is stated that the complainants were getting paid the promised monthly rentals till September 2018 however the respondent stopped paying the monthly rentals to the complainants after September 2018.

9. Furthermore, the complainants were shocked and appalled when respondent changed the Unit re-allotted from Unit No. 1005 to Unit No. 408 stating the Original plan of 14 (Fourteen) storey Building has been cancelled and now they have a basement plus 4 (four) storey commercial building in plan to which the complainants had agreed upon initially. That it is not out the place to mention that this act of respondent is arbitrary and in contravention to various provisions of the BBA and other agreements agreed between the parties.

10. Thereafter, several efforts from the complainants were made to seek timely updates about the status of the construction work at the site, but due to the negligence of the respondent, there was no satisfactory response from their end. The agreement entered between the complainants and the respondent provided for construction linked payment plan, the complainant had assumed the money collected by the respondent from the complainants would be utilized for construction purpose. Unfortunately, the respondent did not properly utilize the complainant's hard-earned money and even after the lapse of the 11 (Eleven) Years of the date of booking the project is yet to be completed.

11. After getting zero response from the respondent, the complainants visited the construction site but were shocked and appalled to see that construction that had not been completed. Despite respondent promising the complainants to provide him with world class project with impeccable facilities the complainants is shocked to see incomplete construction being done at the construction site and the purpose of the complainants to book the unit is completely not fulfilled.

12. That vide email dated 05.05.2020 the respondent informed the complainants that the respondent is inclined towards establishing its corporate office at 4th and 5th floor of tower-A of the said project and is offering rental at the rate of Rs.30 per sq. ft. which is much lesser than the agreed amount of Rs. 65 per sq. ft. according to builder-buyer's agreement. It is not out of the place to mention that the said offer was straightaway rejected and the same has been conveyed to the respondent vide reply email dated 16.05.2020.

13. It is further stated that after complainant expressly rejected the offer of new rental, the respondent without the consent of the complainants arbitrarily shifted their allotted unit from **Unit No 408 on the 4th Floor in Tower A** to **Unit No. 135 on the 1st Floor in Tower A** at the abovesaid Project. It is stated that the respondent has done this re-allotment without even informing and taking Prior consent of the complainants and the complainants got to know about the abovesaid re-allotment after they received an email dated 29.05.2020.

14. It is further stated that the abovesaid re-allotted Unit No 135 on the 1st Floor has been leased out to one company named Krueger International Furniture Systems Pvt. Ltd. However, the above said lease deed seems to be fictitious and was executed by the respondent in order to avoid paying monthly rentals to the complainants since no rental is being paid either by the said company or the respondent. It is stated that the respondent has involved themselves into act of forgery, criminal breach of trust and cheating in order to avoid their financial obligations towards the complainants.

15. That the respondent at various instances violated the terms and condition of the builder buyer's agreement by:

    i. Not handing over the peaceful and vacant possession of the abovesaid allotted Unit.
    ii. Not paying the promised monthly rentals to the complainants at initially promised rates.

iii. By not executing the sale deed of the abovesaid Unit.

iv. By re-allotting the unit without any prior consent of the complainants.

16. That, even at the time of the filing of the present complaint before this Hon'ble Haryana Real Estate Regulatory Authority, Gurugram, the respondent has not got the project registered with the Authority and for the same reason, the Respondent has violated the Provisions of Section 3 and Section 4 of the Real Estate Regulation and Development Act, 2016 and therefore liable to be punished under Section 59 & 60 of the abovesaid Act.

17. That at the time of execution of the builder-buyer agreement the respondent had represented to the 1st Buyer (later reassigned to the complainants) that they are in possession of the necessary approvals from the DTCP, Haryana to commence with the construction work of the commercial project. However, till date only incomplete construction whatsoever has taken place at the site.

18. That, it is abundantly clear that the respondent has no intentions of completing the above said project and have not abided to the terms and conditions mentioned in the clauses of the builder buyer agreement.

19. That, it is unambiguously lucid that no force majeure was involved, and the project has been at a standstill since several years, precisely in the end of 2012 and it has been 10 years till the present date, therefore the respondent cannot take a plea that the construction was halted due to the covid-19 pandemic. It is submitted that the

reassigned complainants have already made the full payment to the respondent towards the commercial unit booked by them. That, despite paying such a huge sum towards the commercial Unit, the respondent has failed to stand by the terms and condition of the builder-buyer agreement and the promises, assurances, representations etc., which they made to the complainants at the time of the booking the abovesaid unit.

20. That, the respondent is not only guilty of deficiency of Services and for unfair trade policy along with the breach of contractual obligations, mental torture, harassment of the complainants by misguiding them, keeping them in dark and putting their future at risk by rendering them homeless.

21. That the complainants herein are constrained and left with no option but to file this present complaint seeking the peaceful and vacant possession, registration of the sale deed of the allotted Unit No. 408 on Fourth Floor in Tower A at Vatika INXT City. Further, the complainants herein reserve their right(s) to add/supplement/amend/change/alter any submission(s) made herein in the complaint and further, reserve the right to produce additional document(s) or submissions, as and when necessary or directed by this Hon'ble Tribunal.

C. Relief sought by the complainants:

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

    1. Direct the respondent to pay assured rental return @ Rs.65/- per sq. ft. per month as per terms of BBA dated 11.03.2011.
    2. Direct the respondent to execute & register the conveyance

deed for the unit in favour of the complainant.

3. To handover the actual, physical, vacant possession of the unit no. 408 in Tower A of the abovesaid project.

D. Reply by the respondent

23. 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 complainants have misdirected himself in filing the above captioned complaint before the Hon'ble Real Estate Regulatory Authority as the reliefs being claimed by the complainants 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 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"*

24. The First Schedule of the Banning of Unregulated Deposit Schemes Act, 2019 That at the very outset it is submitted that the present complaint is not maintainable or tenable in the eyes of law. The complainants have misdirected himself in filing the above captioned complaint before the Hon'ble Real Estate Regulatory Authority as the reliefs being claimed by the complainants 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 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

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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 Complainants 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 has become illegal by the operation of law and the respondent 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.

25. That the complainants have not come before the Hon'ble Authority with clean hands. That the complaint has been filed by the

complainants 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 complainants 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.

26. 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*).

27. 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: CC006000000000078 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.

28. 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.

29. 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".*

30. 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."*

31. That in view of the catena of judgments passed by this Hon'ble Authority and the intent and purpose of enactment RERA Act, 2016, the Hon'ble Authority is not the right forum for the relief sought by the complainants. 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 are 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 respondent by engaging

and igniting frivolous issues with ulterior motives to pressurize the respondent.

32. That the present complaint is an arm-twisting method employed by the complainants 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.

33. It is humbly submitted that the complainants be treated as 'Co-Promoter' and not as an 'Allottee', as the complainant have invested in the project just to earn profits from the commercial unit. That the sole motive of the complainants are to get profits from the project by the way of assured returns scheme. Thus, the complainants shall be treated as co-promoter in the project and in no eventuality, the complainants 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.

34. That the bare reading of the agreement executed between the complainants and the respondent, clearly shows that the intention of the complainants have never been to take possession and only to gain assured returns. That as per clause 32.1 of the Builder Buyer agreement, the complainants/ allottees has authorized the respondent/ developer 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.

35. 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.

36. That it is brought to the knowledge of the Hon'ble Authority that the complainants are guilty of placing untrue facts and is attempting to hide the true colour of the intention of the complainants. That before signing the agreement the complainants were 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 are misrepresenting the true contents of the Agreement to extract more money from the respondent. That the respondent has fulfilled all the obligations so far, as per the said agreement.

37. It is further submitted that the complainant is making false statement before the Hon'ble Authority and all the averments made by the complainant are 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 Respondent 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.

38. That the BBA dated 21.11.2009, never intended to give possession to the complainants and the said fact is ample clear due to absence of clause of possession in the BBA. The BBA dated 21.11.2009 does not contain a single clause as to the due date of delivery of possession and rather the only clause is of leasing arrangement. Thus the prayer of the complaints seeking possession, is illegal and the present complaint ought to be dismissed.

39. 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

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

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana the jurisdiction of Haryana Real Estate Regulatory Authority,

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

E. II Subject-matter jurisdiction

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

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

So, in view of the provisions of the Act of 2016 quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the relief sought by the complainant:

F.I. Assured returns

41. While filing the claim petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 21.11.2009, 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 respondents have not complied with the terms and conditions of the agreement. Though for some time the amount of assured returns was paid but later on, the respondents refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019 (herein after referred to as the Act of 2019). But that Act does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act. However, the plea of respondents is otherwise and who took a stand that though they paid the amount of assured return upto the year 2018 but did not pay assured return amount after coming into force of the Act of 2019 as the same was declared illegal.

42. 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

43. 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.

44. 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.*

45. 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;

46. 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.

47. 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.

48. 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.

49. 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.

50. 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.*

51. 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.

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

F. Directions of the authority'

53. 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 respondent to handover the possession to the complainants after receipt of occupation certificate.

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

iii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the 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 complainants which is not part of the agreement of sale.

54. Complaint stands disposed of.

55. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 10.11.2021

Judgement uploaded on 16.03.2022.