BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**1391 of 2021**
Date of filing complaint:		**19.03.2021**
First date of hearing	:	**27.05.2021**
Date of decision	:	**10.11.2021**

	Siddhant Khemka R/o:B/3/16, ground floor, DLF phase I, Gurugram, Haryana 122002	**Complainant**
	Versus	
	M/s Vatika Limited R/o Unit no. A002, INXT City Centre, ground floor, block A, Sector 83, Vatika India Next, Gurugram-122012, Haryana.	**Respondent**

CORAM:	
Dr. K.K. Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Abhijeet Gupta (Advocate)	Complainant
Sh. Dhruv Dutt Sharma (Advocate)	Respondent

ORDER

1. The present complaint dated 19.03.2021 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 Trade Centre, Sector- 83, Gurugram
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.	1725, 17th floor, tower A (Page no 27 of BBA),
7.	Unit measuring	750 sq. ft.
8.	New unit allotted	Unit no E-5, 507, 5th floor, tower E
9.	Date of execution of apartment buyer's agreement	22.05.2010 (Page 24 of BBA)
10.	Total sale consideration	Rs 30,00,000/- as per clause 1 of BBA (page 27 of complaint being sale consideration)
11.	Total amount actually paid by the complainant	Rs 30,00,000/- as per clause 2 of BBA (page 27 of complaint being sale consideration)

12.	Due date of delivery of possession	22.05.2013 as per clause 2 of the builder buyer agreement [Page 27 of BBA]
13.	Provision regarding assured return	Addendum to the agreement dated 22.05.2010. 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 13/- per sq.ft. Therefore your return payable to you shall be as follows: This addendum forms an integral part of builder buyer agreement dated 22.05.2010. a. Till offer of possession: Rs. 78/- sq.ft. b. After completion of the building: Rs 65/- per sq.ft. You would be paid an assured return w.e.f. 22.05.2010on 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 116/- per sq.ft. for every Rs 1/- by which achieved rental is less than Rs 65/- per sq.ft.

		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 116/- 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	8 years 3 months 28 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 commercial project with impeccable facilities and believing the same to be correct and true, our client considered booking unit 1725, 17th floor at tower-A of **Vatika Trade Center Gurugram**. It was represented and assured by the respondent that the project including the commercial unit of the complainant would be completed on or before 30.09.2012.

4. That, relying upon the respondent's representations and being assured that the respondent would abide by their commitments, the complainant in good faith purchased a

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4. That, relying upon the respondent's representations and being assured that the respondent would abide by their commitments, the complainant in good faith purchased a

commercial unit bearing unit no. 1725, 17th floor, tower- A of Vatika Trade Centre from the respondent.

5. That, pursuant to the booking of the unit by the complainant, a builder buyer agreement dated 22.05.2010 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, promised, assured, represented and committed to the complainant that this residential project would be completed and will be handed over to the complainant within the 3 years of execution of the aforementioned agreement. Further, as per **clause D** 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."***

6. That pursuant to the original builder buyers agreement an addendum dated 22.05.2010, which is marked, was duly signed and executed by and amongst the complainant and the respondent wherein the respondent undertook to pay a monthly rent of Rs.78/- per sq.ft. per month till completion of the said project and thereafter Rs. 65/- per sq. ft. per month upon completion of the said project upto 3 years from the date of completion to the complainant, which is equivalent to Rs. 58,500/- per month till completion of the project and thereafter Rs.48,750/- per month upon completion of the project upto three (3) years from the date of completion. It is stated that the complainant was getting paid the promised monthly rentals till September 2018 however the respondent stopped paying the monthly rentals to the complainant after September 2018.

7. Furthermore, the complainant was shocked and appalled when respondent changed the unit re-allotted from unit no. 1725, 17th floor, tower-A, Vatika Trade Center to Vatika INXT City Center storey building has been cancelled and now they have a basement plus 4 (four) storey commercial building in plan to which the complainant had agreed upon initially. That it is pertinent to mention that this act of respondent is arbitrary and in contravention to provisions of the buyer's

agreement and other agreements as agreed and executed between the parties.

8. Thereafter, several efforts from the complainant 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 both the parties provided for construction linked payment plan, the complainant had assumed the money collected by the respondent from the complainant would be utilized for construction purpose. Unfortunately, the respondent did not properly utilize the complainant 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.

9. After getting no response from the respondent, the complainant visited the construction site but were shocked and appalled to see that construction that had not been completed. Despite respondent promising the complainant to provide him with world class project with impeccable facilities the complainant 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.

10. It is further stated that after complainant expressly rejected the offer of new rental, the respondent without the consent of the complainant arbitrarily shifted their allotted unit from

unit no. 1725 on the 17th floor in tower A to **unit no. E-5, 507 on the 5th floor in tower E,** 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. 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 prior consent of the complainants.

11. That, even at the time of the filing of complaint before the 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 Sections 59 & 60 of the abovesaid Act.

12. That at the time of execution of the builder buyer agreement the respondent had represented to the complainant 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.

13. 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.

14. 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. That the reassigned complainant has 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 complainant at the time of the booking the abovesaid unit.

15. 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, but harassment of the complainant by also misguiding them, keeping them in dark and putting their future at risk by rendering them homeless.

16. That the complainant is constrained and left with no option but to file the complaint seeking the peaceful and vacant

possession, registration of the sale deed of the allotted unit no. E-5, 507 on 5th floor in tower E, at Vatika INXT City Center, Gurugram. Further, the complainant reserves 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 authority.

17. That, the complainant further declares that the matter regarding which this complaint has been made is not pending before any court of law or any other authority or any other tribunal.

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

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

I. Respondent shall be directed to honor their obligation of paying the monthly rental income at the rate of Rs. 78/- sq. ft. till completion of the project.

II. To handover the actual, physical, vacant possession of the unit No. E-5, 507, in tower E of the abovesaid project.

III. To direct the respondent to execute the sale deed of the abovesaid unit in favour of the complainants.

D. **Reply by the respondent**

19. That the complaint filed by the complainant before the authority, besides being misconceived and erroneous is untenable in the eyes of law. The complainant has misdirected

himself in filing the above captioned complaint before this ld. authority as the relief being claimed by the complainant, besides being illegal, misconceived, erroneous and cannot be said to even fall within the realm of jurisdiction of this authority.

I. It would be pertinent to make reference to some of the provisions of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as 2016 Act) and the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred to as 2017 Haryana Rules), made by the Government of Haryana in exercise of powers conferred by sub-section 1 read with sub-section 2 of section 84 of 2016 Act. Section 31 of 2016 Act provides for filing of complaints with this authority or the adjudicating officer. Sub-section (1) thereof provides that any aggrieved person may file a complaint with the authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of 2016 Act or the rules and regulations made there under against any promoter, allottee or real estate agent, as the case may be. Sub- section (2) provides that the form, manner, and fees for filing complaint under sub-section (1) shall be such as may be prescribed. Rule 28 of 2017 Haryana Rules provides for filing of complaint

with this authority, in reference to section 31 of 2016 Act. Sub-clause (1) *inter alia,* provides that any aggrieved person may file a complaint with the authority for any violation of the provisions of 2016 Act or the rules and regulations made thereunder, save as those provided to be adjudicated by the adjudicating officer, in form 'CRA'. Significantly, reference to the "authority", which is this authority in the present case and to the "adjudicating officer", is separate and distinct." Adjudicating officer" has been defined under section 2(a) to mean the adjudicating officer appointed under sub-section (1) of section 71, whereas the "authority "has been defined under section 2(i) to mean the Real Estate Regulatory Authority, established under sub-section (1) of section 20.

II. Apparently, under section 71, adjudicating officer is appointed by the authority in consultation with the appropriate government for the purpose of adjudging compensation under section 12, 14, 18 and 19 of the 2016 Act and for holding an enquiry in the prescribed manner. A reference may also be made to section 72, which provides for factors to be taken into account by the adjudicating officer while adjudging the quantum of compensation and interest, as the case may be, under Section 71 of the Act.

III. The domain of the adjudicating officer cannot be said to be restricted to adjudging only compensation in the matters which are covered under Sections 12,14,18 and 19 of the Act. The inquiry, as regards the compliance with the provisions of section 12,14,18 and 19, is to be made by the adjudicating officer. This submission find support from reading of section 71(3) which *inter alia,* provides that the adjudicating officer, while holding inquiry, shall have power to summon and enforce the attendance of any person and if on such inquiry he is satisfied that the person had failed to comply with the provisions of any of the sections specified in sub-section (1) he may directed to pay such compensation or interest, as the case may be, as he thinks fit in accordance with the provisions of any of those sections. Suffice it is to mention that the sections specified in sub-section (1) of section 71 are section 12,14,18 and 19.

IV. Apparently, in the present case, the complainant is seeking reliefs which, from reading of the provisions of the 2016 Act and 2017 rules, especially those mentioned hereinabove, would be liable for adjudication, if at all, by the adjudicating officer and not this authority. Thus, on this ground alone the complaint is liable to be rejected.

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

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

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

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

VIII. From the conjoint reading of the aforementioned sections/rules, form and annexure 'A', it is evident that

the 'agreement for sale', for the purposes of Act of 2016 as well as Haryana rules, 2017 Haryana rules, is the one as laid down in annexure 'A', which is required to be executed *inter se* the promoter and the allottee.

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

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

XI. Thus, in view of the submissions made above, no relief much less as claimed can be granted to the complainant. It is reiterated at the risk of repetition that this is without prejudice to the submissions that in any event, the

complaint, as filed, is not maintainable before this authority.

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

XIII. That apparently, the complaint filed by the complainant is abuse and misuse of process of law and the reliefs claimed as sought for, are liable to be dismissed. No relief much less any interim relief, as sought for, is liable to be granted to the complainant.

XIV. That the complainant by way of present complaint is seeking the relief of recovery of pending assured return amount under interim relief and main relief. However, it is submitted that the authority does not have jurisdiction to decide upon the amount of assured return which the ld. authority has already held in its various judgements.

XV. That complainant is not "allottee but is an investor" who is only seeking assured return from the respondents, by way of present complaint which is not maintainable under the Act. The complainant after his own independent judgment and after going through the clauses of the agreement has booked the said unit and

executed the builder buyer agreement dated 10.02.2016 (hereinafter referred as "agreement"). As per clause 16 of the agreement, the complainant has agreed for leasing arrangement wherein he has booked the said commercial unit for earning profit and is meant for leasing only and not for personal occupation. Therefore, the present complaint does not fall within the purview of the hon'ble authority.

20. 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

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 completed territorial jurisdiction to deal with the present complaint.

E. II Subject-matter jurisdiction

21. 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.*

22. 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

20. While filing the claim petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 22.05.2010, the claimant has also sought assured returns on monthly basis as per addendum to the agreement at the rate of Rs 78/- per sq. ft. of super area per month till the construction of the said commercial unit is complete. It is pleaded by the claimant that the respondents have not complied with the terms and conditions of the agreement. Though for some time the amount of assured returns was paid but later on, the respondents refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019 (herein after referred to as the Act of 2019). But that Act does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act. However, the plea of respondents is otherwise and who took a stand that though they paid the amount of assured return upto the year 2018 but did not pay assured return amount after coming into force of the Act of 2019 as the same was declared illegal.

21. The Act of 2016 defines "agreement for sale" means an agreement entered into between the promoter and the allottee [Section 2(c)]. An agreement for sale is defined as an arrangement entered between the promoter and allottee with freewill and consent of both the parties. An agreement defines the rights and liabilities of both the parties i.e., promoter and the allottee and marks the start

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

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

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

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

22. While taking up the cases of ***Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd. (complaint no 141 of 2018)***, and ***Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP"*** (complaint no 175 of 2018) decided on 07.08.2018 and 27.11.2018 respectively, it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the issue of assured returns was involved to be paid by the builder to an allottee but at that time, neither the full facts were brought before the authority nor it was argued on behalf of the allottee that on the basis of contractual obligations, the builder is obligated to pay that amount. However, there is no bar to take a different view from the earlier one if new facts and law have been brought before an adjudicating authority or the court. There is a doctrine of ***"prospective overruling"*** and which provides that the law declared by the court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. A reference in this regard can be made to the case of ***Sarwan Kumar & Anr Vs. Madan Lal Aggarwal*** Appeal (civil) 1058 of 2003 decided on 06.02.2003 and wherein the hon'ble apex court observed as mentioned above. So, now a plea raised with regard to maintainability of the complaint in the face of earlier orders of the authority in not tenable. The authority can take

different view from the earlier one on the basis of new facts and law and the pronouncements made by the apex court of the land. It is now well settled preposition of law that when payment of assured returns is part and parcel of builder buyer's agreement (maybe there is a clause in that document or by way of addendum , memorandum of understanding or terms and conditions of the allotment of a unit), then the builder is liable to pay that amount as agreed upon and can't take a plea that it is not liable to pay the amount of assured return. Moreover, an agreement for sale defines the builder-buyer relationship. So, it can be said that the agreement for assured returns between the promoter and allotee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arise out of the agreement for sale only and between the same contracting parties to agreement for sale. In the case in hand, the issue of assured returns is on the basis of contractual obligations arising between the parties. In cases of ***Anil Mahindroo & Anr. v/s Earth Iconic Infrastructure Pvt. Ltd.*** (Company Appeal (AT) (Insolvency) No. 74 of 2017) and ***Nikhil Mehta and Sons (HUF) and Ors. vs. AMR Infrastructure Ltd.*** (CA NO. 811 (PB)/2018 in (IB)-02(PB)/2017) decided on 02.08.2017 and 29.09.2018 respectively, it was held that the allottees are investors and have chosen committed return plans. The builder in turn agreed to pay monthly committed return to the investors. Thus, the amount due to the allottee comes within the meaning of 'debt' defined in Section 3(11) of the I&B Code. Then in case of ***Pioneer Urban Land and Infrastructure Limited & Anr. v/s Union of India***

& Ors. (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019, it was observed by the Hon'ble Apex Court of the land that *"...allottees who had entered into "assured return/committed returns' agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of agreement till the date of handing over of possession to the allottees".* It was further held that 'amounts raised by developers under assured return schemes had the "commercial effect of a borrowing' which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code" including its treatment in books of accounts of the promoter and for the purposes of income tax. Then, in the latest pronouncement on this aspect in case ***Jaypee Kensington Boulevard Apartments Welfare Association and Ors. vs. NBCC (India) Ltd. and Ors.*** (24.03.2021-SC): MANU/ SC/0206 /2021, the same view was followed as taken earlier in the case of ***Pioneer Urban Land Infrastructure Ld & Anr.*** with regard to the allottees of assured returns to be financial creditors within the meaning of section 5(7) of the Code. Then after coming into force the Act of 2016 w.e.f 01.05.2017, the builder is obligated to register the project with the authority being an ongoing project as per proviso to section 3(1) of the Act of 2017 read with rule 2(o) of the Rules, 2017. The Act of 2016 has no provision for re-writing of contractual obligations between the parties as held by the Hon'ble

Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.,*** (supra) as quoted earlier. So, the respondent/builder can't take a plea that there was no contractual obligation to pay the amount of assured returns to the allottee after the Act of 2016 came into force or that a new agreement is being executed with regard to that fact. When there is an obligation of the promoter against an allottee to pay the amount of assured returns, then he can't wriggle out from that situation by taking a plea of the enforcement of Act of 2016, BUDS Act 2019 or any other law.

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

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

24. A perusal of the above-mentioned definition of the term 'deposit' shows that it has been given the same meaning as assigned to it under the Companies Act, 2013 and the same provides under section 2(31) includes any receipt by way of deposit or loan or in any other form by a company but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India. Similarly rule 2(c) of the Companies (Acceptance of Deposits) Rules, 2014 defines the meaning of deposit which includes any receipt of money by way of deposit or loan or in any other form by a company but does not include.

    i. *as a advance, accounted for in any manner whatsoever, received in connection with consideration for an immovable property*
    ii. *as an advance received and as allowed by any sectoral regulator or in accordance with directions of Central or State Government;*

25. So, keeping in view the above-mentioned provisions of the Act of 2019 and the Companies Act 2013, it is to be seen as to whether an allottee is entitled to assured returns in a case where he has deposited substantial amount of sale consideration against the allotment of a unit with the builder at the time of booking or immediately thereafter and as agreed upon between them.

26. The Government of India enacted the Banning of Unregulated Deposit Schemes Act, 2019 to provide for a comprehensive mechanism to ban the unregulated deposit schemes, other than deposits taken in the ordinary course of business and to protect the interest of depositors and for matters connected therewith or incidental thereto as defined in section 2 (4) of the BUDS Act 2019 mentioned above.

23. 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.

27. 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.

24. 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.

25. 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.

26. 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'

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

i. The respondent is 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.

ii. 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.

iii. The complainant is directed to pay outstanding dues, if any, after adjustment the amount of assured returns.

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

29. Complaint stands disposed of.

30. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Datad: 10.11.2021

Judgement uploaded on 16.03.2022.