BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 2136 of 2019
First date of hearing: 29.05.2019
Date of decision : 10.11.2021

	Ms. Jyoti Vadhera R/o: I- 21, Kirti Nagar, New Delhi- 110015.	**Complainant**
	Versus	
1.	M/s Vatika Limited R/o 4th Floor, Vatika Triangle, Block-A, Sushant Lok, Phase I, Gurgaon 1220022.	**Respondents**
2.	M/s Trishul Industries M/s Roots Developers Pvt. Ltd. R/o 4th Floor, Vatika Triangle, Block-A, Sushant Lok, Phase I, Gurgaon 1220022.	

CORAM:	
Dr. K.K. Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Amit Wahi (Advocate)	Complainant
Sh. Venket Rao (Advocate)	Respondents

ORDER

1. The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter-alia prescribed that the pror..oter 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	India Next City Centre
2.	Nature of the project	Commercial complex
3.	Area of the project	10.718 acres
4.	DTCP license	122 of 2008
	License validity/ renewal period	13.06.2016
5.	RERA registered/not registered	Not registered
6.	Unit no.	201 B, 2nd floor, block A (Page no 24 of BBA),
7.	Unit measuring	500 sq. ft.
8.	Unit no. 407, 4th floor, block F	25.04.2013 (page 23 of reply)
9.	Allotment letter	N/A
10	Date of execution of apartment buyer's agreement	18.01.2012 Note: Date is not mentioned on agreement. The date of agreement is mentioned in intimation of possession. (page 22 of complaint)

11.	Total consideration	Rs. 24,37,500/- as per clause 2 of application form (page 20 of complaint)
12.	Total amount paid by the complainant	Rs. 24,37,500/- as per clause 1 of BBA (page 24 of complaint)
13.	Due date of delivery of possession	18.01.2015
14.	Provision regarding assured return clause 12	12. Assured return and leasing arrangement Since the buyer has paid the full basic sale consideration for the said commercial unit upon signing of this agreement and has also requested for putting the same on lease in combination with other adjoining units/spaces of other owners after the said building is ready for occupation and use, the developer has agreed to pay Rs. 71.5/- per sq.ft. super area of the said commercial unit per month by way of assured return to the buyer from the date of execution of this agreement till the completion of construction of the said building. The buyer hereby gives full authority and powers to the developer to put the said commercial unit in combination with other adjoining commercial units of other owners, on lease , for and on behalf of the buyer, as and when the said building/said commercial unit is ready and fit

		for occupation. The buyer, as and when the said building/said commercial unit is ready and fit for occupation. The buyer, as and when the said building/said commercial unit is ready and fit for occupation. The buyer has clearly understood the general risks involved in giving any premises on lease to third parties and has undertaken to bear the said risks exclusively without any liability whatsoever on the part of the developer or the confirming party. It is further agreed that: i. The developer will pay to the buyer Rs. 65/- per sq.ft. super area of the said commercial unit as committed return for upto thee years from the date of completion of construction of the said building or till the said commercial unit is put on lease, which ever is earlier. After the said commercial unit is put on lease in the above manner, then payment of the aforesaid committed return will come to an end and the buyer will start receiving lease rental in respect of the said commercial unit in accordance with the lease document as may be executed and as described herein after.
15.	Offer of possession	Not offered
16.	Occupation certificate	Not obtained
17.	Delay in handing over possession till date of decision i.e. 10.11.2021	6 years 9 months 23 days

B. Facts of the complaint

3. The complainant has submitted that respondent no 1. Is the developer a company having its regd. Office flat no. 621 A, 6th floor, Devika towers, 6, Nehru Place, New Delhi- 110019 and the corporate office at 7th floor, Vatika Triangle, block- A, Sushant Lok, Gurugram- 122022, through its director and duly authorized signatory Mr. Gautam Bhalla DIN no. 00005043. The respondent no 2. As the confirming party, a partnership firm registered, Delhi vide registration no. 1069/1997 having its principal place of business at 98, II nd floor, Sant Nagar, New Delhi, through its principal partner, the developer herein through its director and duly authorised signatory Mr. Gautam Bhalla.

4. That the complainant paid the booking amount/earnest money of Rs. 1,00,000/- on the 09.12.2011 vide cheque no. 014486, Drawn on ICIC bank, South extension branch, in favour of Vatika Limited i.e. respondent no 1. The receipt of the above-mentioned cheque, the receipt no. 2841, Dt: 30.12.2011 was issued in favour of the complainant. The complainant paid the full and final consideration of the commercial unit alongwith the service tax through two cheques vide cheque no. 022866, Dt: 01.01.2012, for an amount of

Rs. 23,37,500/- drawn on ICICI bank, South Extension Branch, New Delhi and another cheque no. 022866 Dt: 01.01.2012, for an amount of Rs. 62, 766/- drawn on ICICI bank, South extension branch, New Delhi. The receipts of the above-mentioned cheques have been acknowledged/ issued by the authorised representative of Vatika limited in token of having received the cheques, the receipt no. 2827, Dt: 02.01.2012 and receipt no. 2832, Dt: 02.01.2012 were also issued respectively in favour of the complainant.

5. The builder buyer agreement was executed between the complainant and respondents on 18.01.2012, the complainant booked the commercial unit measuring 500 sq.ft. in the commercial complex named "India Next City Centre" and the said unit no. 201 B on 2nd floor of block A was booked. The complainant has paid entire sale consideration in terms of the agreement, and nothing remains due towards sale consideration of the Said commercial unit under the agreement. The respondents assured the complainant to give an assured return on the complainant @Rs. 71.50/- per sq.ft. for the super area of the said commercial unit per month to the complainant from th date of execution of agreement till the completion of construction of the building. The complainant has

been receiving the amount of assured return from the respondents of Rs 32,175/- excluding TDS from Jan, 2012 to Feb, 2018. Further the amount was reduced to @Rs. 65/- per sq.ft. for the super area of the said commercial unit from March 2018 to Aug 2018 i.e. the amount was reduced to the extent of Rs 29,250/- completely in violation of the sub-clause (i) of clause 12 of the agreement. Since the amount of the assured return was reduced by the respondents without any intimation in violation of the terms and conditions of the agreement to the complainant i.e. Clause 12 clearly states that the assured return amount would reduce when the construction of the building is complete or till the said commercial unit is put on lease, whichever is earlier, but for this unjustified action of the respondents even no initimation/information to that effect was given by the respondents to the complainant in any manner whatsoever. Further, the respondents stopped making the assured return since Oct 2018 without any valid reasons and prior intimation of it.

6. As per the committed liability of the respondents to pay the assured return upto three years after the completion of the construction of the said building. The respondents failed on this ground and did not bother to fulfil the assured commitments. It is pertinent to mention

here that the physical possession of the said commercial unit has not been offered to the complainant by the respondents. The respondents have been assuring that they are going to offer/deliver the possession of the said commercial unit but till now nothing has been offered nor any intimation to that effect has been received by the complainant. The complainant being a female have tried to reach the office of the respondents, but no one gives any confirmed information regarding the project except false assurance given to her.

7. That the act and omission on the part of respondents under the said agreement amounts to breach of agreement and despite several request having been made by the complainant to the respondent, the respondents completely failed to execute/register sale deed of the said commercial unit in favour of the complainant. The respondents are jointly and severally liable for the above acts, in actions and omission and therefore, the complainant have preferred to file complaint before this authority for appropriate relied and direction to the respondents to pay the entire amount of committed return and execute and register sale deed of the said commercial unit in favour of the complainant.

C. Relief sought by the complainant:

The reliefs sought by the complainant are given below-

1. "Direct the respondents to execute and register sale deed of the said commercial unit in favour of the complainant;
2. Direct the respondents to complete the construction and give the physical possession of the said commercial unit to the complainant;
3. Direct the respondents to give the complete amount of assured return termed as committed liability since March, 2018 till the date of application is decided."

D. Reply by the respondents

8. That the present complaint, filed by the complainant, is bundle of lied and hence liable to be dismissed as it is filed without cause of action. Also, the complaint is an abuse of the process of this hon'ble authority and is not maintainable. The complainant has not approached this ld. authority with clean hands and is trying to suppress material facts relevant to the matter. The complainant is making false, misleading, frivolous, baseless, unsubstantiated allegations against the respondents with malicious intent and sole purpose of extracting unlawful gains from the respondents.

9. It is crystal clear that complainant is not " an allottee, but is an investor" who is only seeking assured return from the respondents, by way of present complaint, which is not maintainable under RERA. The complainant has booked the said unit by way of agreement containing a clause no 12 about the terms and conditions of assured return and leasing agreement and as per which, the complainant has been receiving assured return in the

form of profit and thus, the complainant is the investors not the allottee as they have booked commercial unit with a sole motive to earn profits. Even clause 12 of said agreement clearly stipulated that the complainant has booked the present commercial unit for the purpose of leasing it further for gaining commercial advantage. Therefore, it is submitted that as the complainant is an investor, thus the present complaint does not fall within the purview of the hon'ble authority.

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

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

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

> *"As already decided by the authority in complaint no.141 of 2018 titled as Brhimjeet Versus M/s Landmark Apartments Pvt. Ltd. no case is made out by the complainant. Counsel for respondent has placed on record a Supreme Court judgment dated 25.7.1997 vide which he has pleaded the doctrine of precedent. Since the authority has taken a view much earlier as stated above, the authority cannot go beyond the view already taken. In such type of assured return schemes, the authority has no jurisdiction, as such the complainant is at liberty to approach the appropriate forum*

to seek remedy. However, at the instance of the complainant, a direction is issued to the respondent/builder to complete the construction work within the time framed as per MoU and fulfil his committed liability."

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

10. That the complainant have come before this hon'ble authority with ulterior motive. That the present complaint has been filed by the complainants just to harass the respondents and to gain the unjust enrichment. It is pertinent to mention here that for the fair adjudication of grievance as alleged by the complainants, a detailed deliberation by leading the evidence and cross-examination is required, thus only the civil court has jurisdiction to deal with the cases requiring detailed evidence for proper and fair adjudication, if at all the contents of the complaint are taken to be correct and true.

11. It is brought to the knowledge of the hon'ble authority that the complainants are guilty of placing untrue facts and are attempting to hide the true colour of the intention of the complainants. It is evident that the entire case of the complainant is nothing but a web of lied and the false and frivolous allegation made against the respondents are nothing but an afterthought and a concocted story, hence the present complaint filed by the complainants deserve to be dismissed with heavy costs.

12. That the various contentions raised by the complainant are fictious baseless, vague, wrong and created to misrepresent and mislead this hon'ble authority, for the reasons stated above. That its is further submitted that none of the relief as stated above. That it is further submitted that none of the relief as prayed for by the complainant are sustainable before this hon'ble authority and in the eyes of law. Hence, the complaint is liable to be dismissed with imposition of exemplary cost for wasting the precious time and resources of the hon'ble authority. That the present complaint is an utter abuse of the process of law, and hence deserves to be dismissed. The complainants are attempting to seek an advantage getting the speculative gain by selling its to other on higher rates as one of his mails shows his intention. It is apparent from the facts of the present case that the main purpose of the present complaint is to harass the respondents by engaging and igniting frivolous issues with ulterior motives to pressurize the respondents company. Thus, the present complaint is without any basis and no cause of action has arisen till date in favour of the complainants and against the respondents and hence the complaint deserves to be dismissed.

13. That at the very outset it is submitted that the complaint failed by the complainant before the Ld. Authority besides being misconceived and erroneous, is untenable in the eyes of law and liable to be rejected. The complainant has misdirected themselves in filing the above captioned complaint before this Ld. authority as the reliefs being claimed by the complainant cannot be said to even fall within the realm of jurisdiction of this ld. authority. The complainant relied upon various documents and statements as

annexed with the complaint were not supported by affidavit/ certificate under section 65(B) of Evidence Act hence, the e-mails placed on record by the complainant has no authenticity, be invalid and is not an admissible document.

14. All the annexures as attached with the complaint are not connected or reiterated by the complainant with the complaint nor it be relied or be referred/ connected or reiterated in the affidavit filed by the complaint, thus all the annexures are not readable and admissible or not to be taken as a part of present complaint, thus not to be relied and the complaint is liable to be dismissed. The respondents craves leave of this hon'ble authority to refer to and rely upon the terms and conditions set our in the buyer's agreement in detail at the time of the hearing of the present complaint, so as to bring out the mutual obligations and the responsibilities of the respondents as well as the complainants.

15. 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

16. The respondents have 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

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

E. II Subject-matter jurisdiction

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

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

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside

compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Finding on the relief sought by the complainant:

F. I Assured returns.

18. While filing the claim petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 18.01.2012, the claimant has also sought assured returns on monthly basis as per clause 12 of builder buyer agreement at the rate of Rs 71.5/- 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.

19. 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 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

20. 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 allottees 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 returns. Moreover, an agreement 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 assured returns cases as the contractual relationship arise out of the agreement for sale only and between the parties. In the case in hand, the issue of assured returns is on the basis of contractual obligations arising between the parties. In cases of ***Anil Mahindroo & Anr. v/s Earth Iconic Infrastructure Pvt. Ltd.*** (Company Appeal (AT) (Insolvency) No. 74 of 2017) and ***Nikhil Mehta and Sons (HUF) and Ors. vs. AMR Infrastructure***

Ltd. (CA NO. 811 (PB)/2018 in (IB)-02(PB)/2017) decided on 02.08.2017 and 29.09.2018 respectively, it was held that the allottees are investors and have chosen committed return plans. The builder in turn agreed to pay monthly committed return to the investors. Thus, the amount due to the allottee comes within the meaning of 'debt' defined in Section 3(11) of the I&B Code. Then in case of ***Pioneer Urban Land and Infrastructure Limited & Anr. v/s Union of India & Ors.*** (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019, it was observed by the Hon'ble Apex Court of the land that "*...allottees who had entered into "assured return/committed returns' agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of agreement till the date of handing over of possession to the allottees*". It was further held that 'amounts raised by developers under assured return schemes had the "commercial effect of a borrowing' which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code." including its treatment in books of accounts of the promoter and for the purposes of income tax. Then, in the latest pronouncement on this aspect in case ***Jaypee Kensington Boulevard Apartments Welfare Association and Ors. vs. NBCC (India) Ltd. and Ors.*** (24.03.2021-SC): MANU/ SC/0206 /2021, the same view was followed as taken earlier in the case of

Pioneer Urban Land Infrastructure Ld & Anr. with regard to the allottees of assured returns to be financial creditors within the meaning of section 5(7) of the Code. Then after coming into force the Act of 2016 w.e.f 01.05.2017, the builder is obligated to register the project with the authority being an ongoing project as per proviso to section 3(1) of the Act of 2017 read with rule 2(o) of the Rules, 2017. The Act of 2016 has no provision for re-writing of contractual obligations between the parties as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.,*** (supra) as quoted earlier. So, the respondents/builders can't take a plea that there was no contractual obligation to pay the amount of assured returns to the allottee after the Act of 2016 came into force or that a new agreement is being executed with regard to that fact. When there is an obligation of the promoter against an allottee to pay the amount of assured returns, then he can't wriggle out from that situation by taking a plea of the enforcement of Act of 2016, BUDS Act 2019 or any other law.

21. It is pleaded on behalf of respondents/builders that after the 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.

22. 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 an 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.

23. 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.

24. 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.

25. 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.

26. 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.

27. 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.

28. 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.

29. It is not disputed that the respondents 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.

G. Direction of the authority

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

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

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

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

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

31. Complaint stands disposed of.

32. File be consigned to registry.

(Dr. K.K. Khandelwal)
Chairman

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated:10.11.2021

Judgement uploaded on 16.03.2022.