BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**518 of 2021**
Date of filling of complaint		**28.01.2021**
First date of hearing:		**07.04.2021**
Date of decision	**:**	**10.11.2021**

Ms Rohini Dua R/o: K-1436, Palam Vihar, Gurugram, Haryana	**Complainant**
Versus	
M/s Vatika One on One Pvt. ltd. R/o: Flat no. 621-a, 6th floor, Devika towers 6, Nehru Place, New Delhi-110019.	**Respondent**

CORAM:	
Dr. K.K. Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Gaurav Rawat (Advocate)	Complainant
Sh. Venket Rao (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee in Form CRA 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 to the allottee as per the agreement for sale executed inter-se them.

A. Unit and Project related details:

2. The particulars of the project, the details of 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 one on one Pvt. Ltd. Sector 16, Gurugram
2.	Nature of the project	Commercial complex
3.	Area of the project	12.12125 acres
4.	DTCP License	05 of 2015 dated 06.08.2015 valid upto 05.08.2020
5.	RERA registered/ not registered	237 of 2017 dated 20.09.2017 valid upto 19.09.2022
6.	Date of allotment	29.01.2018 [Page 49 of the complaint]
7.	Date of execution of builder buyer's agreement	BBA Not executed
8.	Unit no.	Priority unit no. P-705, admeasuring 500 sq. ft. (page 49 annexure C3 of complaint)
9.	Total sale consideration	Rs. 46,20,000/- as per clause 2 of application from (page 44 of complaint)
10.	Total amount actually paid by the complainant	Rs. 46,20,000/- as per cheque dated 19.01.2018 (page 48 of complaint
11.	Due date of delivery of possession	Can't be ascertain
12.	Provision regarding assured return clause 2 of allotment letter	That the payment of your assured return of Rs 150.26/- per sq. ft. per month on super area will commence only on receipt of 100% of basic sale consideration by us from you, in

		terms of the payment plan/schedule of payment as agreed/opted by you and will and will be paid till the completion of the construction of the said building. Post completion construction of the said building, you will be paid committed return of Rs 131/- per sq.ft. per month on super area for upto three years from th completion of construction of the said building or the said unit is put on lease whichever is earlier. You will be entitled to receive lease rent in respect of said unit from the rent commencement date in accordance with lease document as may be executed with prospective tenant. If there is any rent-free period on account of fit out or otherwise then you will not be entitled for rent during rent free period.
13.	Offer of possession	Not offered
14.	Occupation certificate	Not Obtained

B. Facts of the complaint

3. Relying on various representations and assurances given by the Respondent company and on belief of such assurances, the complainant) booked a unit in the project by paying an amount of Rs. 46,20,000 vide cheque no. 198605 dated 19.01.2018 drawn on Oriental bank of commerce towards the booking of the said unit bearing no. P-705, in Sector 16, having super area measuring 500 sq. ft. to the respondent dated 19.01.2015 and the same was acknowledged by the respondent vide dated 19.01.2018.

4. That the respondent sent allotment letter dated 29.01.2018 to the complainant providing the details of the project, confirming the booking of the unit dated 19.01.2018, allotting a unit no. P-705 (hereinafter referred to as 'unit') measuring 500 sq. ft (super built-up area) in the aforesaid project of the developer for a total sale consideration of the unit i.e. Rs. 46,20,000/-, which includes basic price of Rs. 41,25,000/- including EDC and IDC, Car parking charges and other specifications of the allotted unit and providing the time frame within which the next instalment was to be paid.

5. As per clause 1 of the above said allotment letter respondent assured of getting the builder buyers agreement within 30 days from the date of the above said allotment letter i.e. 29.01.2018

6. At the time of purchasing the unit, the complainant was assured that the possession of the unit would be delivered within the promised period of 2 years from the date of allotment letter i.e. by 29.01.2020.

7. That as per clause 2 of the memorandum Of understanding, the respondent undertake to make the payment of commitment amount/assured return of Rs. 150.26/- per sq. ft. per month on super area of 500 Sq. Ft. from the date of allotment letter i.e. 29.01.2018 till the completion of the construction of the said unit. Further, as per clause 2 of the allotment letter dated 29.01.2018 respondent promised that post the completion of the construction of the said building, complainant will be paid committed return of Rs. 131/- per Sq. Ft. per Month on super area for upto 3 years from

the date of completion of construction of said building or the said unit is put on lease, whichever is earlier.

8. Furthermore, respondent as per clause 1 of the said allotment letter also undertake to enter into buyer's agreement with the complainant. It is pertinent to mention here that till date respondent has failed to execute the buyer's agreement and also failed to offer/handover the possession the said unit even after delay of more than 1 year. Even till date respondent has also failed to pay assured return as promised as the above said clause of allotment letter.

9. That as per clause 3 of the allotment letter the respondent agreed to put the said unit on lease @ Rs.131/- per Sq. Ft. per month and to effectuate the same. But till date respondent has failed to abide and honour the above said clause of the allotment letter by not leasing out the above said unit.

10. That as per clause 3 of the allotment letter, respondent guaranteed the complainant in terms of clause 3 of the allotment letter, that in event the said unit is leased at a gross monthly rental of less than the commitment amount of Rs.131/- per Sq. Ft. Per month, then the respondent agrees that the complainant will get refunded amount calculated @ Rs. 141.18/- per Sq. Ft. for every Rs.1/- by which the achieved rent is less than Rs. 131/- per Sq. Ft.

11. As per clause 4 of allotment letter, respondent further agreed that there will be no maintenance charges/ electricity charges/ water charges etc shall be charges from the complainant for the period

unit is on lease and the said charges will be paid by the prospective tenant.

12. As per the said allotment letter, the respondent was liable to handover the possession of the said unit on or before 29.01.2020, therefore, the respondent was liable to pay interest as per the prescribed rate as laid under the RERA Act, 2016 & HRERA Rules, 2017 for the delay in the delivery and the complainant as per clause 2 of the allotment letter is also entitled to get the monthly assured amount till the completion of the construction of building and also post the completion of the construction of the said building, complainant will be paid committed return of Rs. 131/- per sq. ft. per month on super area for up to 3 years from the date of completion of construction of said building or the said unit is put on lease, whichever is earlier.

13. Furthermore, as per 13 of the RERA Act, respondent cannot accept the sum more than 10% of the total coats the unit but in present case respondent has collected 100% amount. Relevant provision of the act is reproduced below:

> *(1) A promoter shall not accept a sum more than ten per cent 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. (2) The agreement for sale referred to in sub-section (1) shall be in such form as may be prescribed and shall specify the particulars of development of the project including the construction of building and apartments, along with specifications and internal development works and external development works, the dates and the manner by which payments towards the cost of the apartment, plot or building, as the case may be, are to be made by the allottees and the date on which the possession of the apartment, plot or building is to be handed over, the rates of interest payable by the*

promoter to the allottee and the allottee to the promoter in case of default, and such other particulars, as may be prescribed.

14. The respondent not only failed to adhere to the terms and conditions of booking but also illegally extracted money from the complainant by making false promises and statements at the time of booking. The respondent is unable to handover a possession even after a delay of 1 year.

15. By falsely ensuring wrong delivery lines and falsely assuring the timely delivery of possession, the complainant has been subjected to unethical/unfair trade practice as well as subjected to harassment in the guise of a biased allotment letter. The above said acts of the opposite parties clearly reveal that the "opposite parties" with prejudice has been indulging in unfair trade practices and has also been providing gross deficient services and thereby causing deficiency in services. All such Act and omissions on the part of the opposite party has caused an immeasurable mental stress and agony to the complainant. That by having intentionally and knowingly induced and having falsely mis-represented to the complainant and thereby making them to act in accordance to its misrepresentations, and owing to all the deliberate lapses/delays on the part of the " opposite parties", the opposite parties" are liable to make as being requisitioned/claimed by the complainant

16. Further, the complainant having dream of its own unit in NCR signed the agreement in the hope that the unit will be delivered within 2 years from the date of allotment letter. The complainant was also handed over one detailed payment plan. It is unfortunate that the dream of owning a unit of the complainant

were shattered due to dishonest, unethical attitude of the respondent.

17. That the payment plan was designed in such a way to extract maximum payment from the buyers viz a viz or done/completed. The complainant approached the respondent and asked about the status of construction and also raised objections towards non-completion of the project. It is pertinent to state herein that such arbitrary and illegal practices have been prevalent amongst builders before the advent of RERA, wherein the payment/demands/ etc. have not been transparent and demands were being raised without sufficient justifications and maximum payment was extracted just raising structure leaving all amenities/finishing/facilities/common area/road and other things promised in the brochure, which counts to almost 50% of the total project work.

18. The above said acts of the opposite parties clearly reveal that the "opposite parties" with prejudice has been indulging in unfair trade practices and has also been providing gross deficient services and thereby causing deficiency in services. All such Act and omissions on the part of the opposite party has caused an immeasurable mental stress and agony to the complainant.

19. During the period the complainant went to the office of respondent several times and requested them to allow them to visit the site and when the respondent will get buyers agreement executed and also the assured return the complainant is entitled to but it was never allowed saying that they do not permit any buyer to visit the site

during construction period, once complainant visited the site but was not allowed to enter the site and even there was no proper approached road. The complainant even after paying amounts still received nothing in return but only loss of the time and money invested by them.

20. The complainant contacted the respondents on several occasions and were regularly in touch with the Respondent. The Respondent was never able to give any satisfactory response to the complainant regarding the status of the construction and were never definite about the delivery of the possession.

21. The complainant kept pursuing the matter with the representatives of the respondent by visiting their office regularly as well as raising the matter to when will they deliver the project and why construction is going on at such a slow pace, but to no avail. Some or the other reason was being given in terms of shortage of labor etc.

22. That the complainant continuously asking the respondent company about the status of the project, time by which the project is expected to be completed, when the respondent will get buyers agreement executed and the penalty amount that respondent is liable to pay and also the monthly assured amount but Respondent was never able to give any satisfactory response to the complainant.

23. The complainant has suffered a loss and damage in as much as they had deposited the money in the hope of getting the said unit. They have not only been deprived of the timely possession of the said

Unit but the prospective return they could have got if they had invested in fixed deposit in bank. Therefore, the compensation in such cases would necessarily have to be higher than what is agreed in the allotment letter.

24. That the complainant continuously asking the respondent company about the status of the project, time by which the project is expected to be completed, assured amount respondent required to pay to the complainant and the penalty amount that respondent is liable to pay but respondent was never able to give any satisfactory response to the complainant.

C. Relief sought by the complainant:

25. The complainant has sought following relief:

a. Direct the respondent to pay the interest on the total amount paid by the complainant at the prescribed rate of interest from due date of possession till date of actual physical possession as the possession is being denied to the complainant by the Respondent in spite of the fact that the complainant desires to take the possession.

b. Order the respondent to pay the balance amount due to the complainant from the respondent on account of the interest, as per the guidelines laid in the RERA, 2016 and the monthly assured amount as per clause 2 of the allotment letter before signing the Conveyance Deed/ sale deed.

c. Order the respondent to pay monthly assured amount till the physical handover of the possession or first lease of the property.

d. Order the respondent to get the buyers agreement executed.

e. Direct the respondent did not levy any holding charges imposed upon the complainant.

f. Order the respondent to kindly handover the possession of the unit after completing in all aspect to the complainant and not to force to deliver an incomplete unit.

g. Direct the respondent to provide the exact lay out plan of the said unit.

h. Order the respondent to pay monthly assured amount post the completion of the construction of the said building, complainant will be paid committed return of Rs. 131/- per sq. ft. per month on super area for up to 3 years from the date of completion of construction of said building or the said unit is put on lease, whichever is earlier.

26. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Relief by the respondent:

27. That the complainant has immense and deep interest on the subject project and thereby filled the booking application form dated 19.01.2018.The respondent issued the allotment Letter on 29.01.2018

whereby the complainant was allotted unit bearing No. P-705, admeasuring super area 500 sq. ft. That it is pertinent to note that the respondent on various occasions insisted the complainant to execute the builder buyer agreement, but the complainant never come forward to execute the agreement.

28. That it is submitted that the complainant was very well aware of the completion period of the aforesaid project, despite which the complainant repetitively engaged in raising false allegations. The respondent much earlier during booking period conveyed the information regarding the schedule period of completion of the allotted unit of complainant in consonance within the validity period of the registration of the subject project vide registration No. 237 of 2017 i.e., on or before 19.09.2022.

29. It is submitted that the present complaint is premature. There is no cause of action arising in favour of the complainants. It is pertinent to mention herein that Section 18 read with Section 19 of Real Estate (Regulation and Development) Act, 2016 and Haryana Real Estate (Regulation and Development) Rules (herein referred as RERA) provide for the right of the Allottee to demand refund along with interest and compensation only on failure of the Promoter to offer possession in accordance with the agreement to sale duly completed by the date specified therein."

30. The completion period of the present project shall be in consonance with the validity period of the registration i.e. on or before 19.09.2022.

31. That the complainant has filed the present complainant before the wrong forum. That the complainant is praying for the relief of "Assured Returns" which is beyond the jurisdiction that this Ld. Authority has been dressed with. That from the bare perusal of the RERA Act, it is clear that the said Act provides for three kinds of remedies in case of any dispute between a builder and buyer with respect to the development of the project as per the agreement. That such remedies are provided under Section 18 of the RERA Act, 2016 for violation of any provision of the act. That the said remedies are of "Refund" in case the allottee wants to withdraw from the project and the other being "interest for delay of every month" in case the Allottee wants to continue in the project and the last one is for compensation for the loss occurred by the Allottee. That it is pertinent to note herein, that nowhere in the said provision the Ld. Authority has been dressed with jurisdiction to grant "Assured Returns".

32. That the respondent cannot pay the "Assured Returns" to the complainant by any stretch of Imagination in the view of prevailing laws. That on 21.02.2019 the Central Government passed an ordinance "Banning of Unregulated Deposits, 2019", to stop the menace of unregulated deposits, the "Assured Returns Scheme" given to the complainant fell under the scope of this Ordinance and the payment of such returns became wholly illegal. That later, an act by the name "The Banning of Unregulated Deposits Schemes Act, 2019" (hereinafter referred to as "the BUDS Act") notified on 31.07.2019 and came into force. That under the said Act all the

unregulated deposit schemes such as "Assured Returns" have been banned and made punishable with strict penal provisions.

33. It is also provided that in respect of respondent, "deposit" shall have the same meaning as assigned to it under the Companies Act, 2013. Sub section 31 of section 2 of the companies Act provides that "deposit" includes any receipt of money by way of deposit or loan or in any other form by a respondent but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India.

34. One of the amounts as set out under sub rule (1)(c)(xii)(b) of Rule 2 of the Deposit Rules (i.e. which is not a deposit) is an advance, accounted for in any manner whatsoever, received in connection with consideration for an immovable property under an agreement or arrangement, provided that such advance is adjusted against such property in accordance with the terms of the agreement or the arrangement.

35. Therefore, the agreements or any other understanding of these kinds, may, after 2018, and if any assured return is paid thereon or continued therewith may be in complete contravention of the provisions of the BUDS Act. The BUDS Act provides two forms of deposit schemes, namely Regulated Deposit Schemes and Unregulated Deposit Schemes. Thus, for any deposit scheme, for not to fall foul of the provisions of the BUDS Act, must satisfy the requirement of being a 'Regulated Deposit Scheme' as opposed to Unregulated Deposit Scheme. Hence, the main object of the BUDS

Act is to provide for a comprehensive mechanism to ban Unregulated Deposit Scheme.

36. Further, any orders or continuation of payment of any assured return or any directions thereof may be completely contrary to the subsequent act passed post the RERA Act, which, is not violating the obligations or provisions of the RERA Act. Therefore, enforcing an obligation on a promoter against a central Act which is specifically banned, may be contrary to the central legislation which has come up to stop the menace of unregulated deposit.

37. It is pertinent to note that the schemes being harped upon by the complainant would have no foundation in the builder buyer agreement, therefore the concerns arising out of the same cannot be adjudicated by this authority. The "Assured Returns" scheme has become illegal. It is noteworthy in the present situation, that in order to provide a comprehensive mechanism to ban the unregulated deposit schemes, other than the deposits taken in the ordinary course of business, Parliament has passed an act titled as "The Banning of Unregulated Deposit Schemes Act, 2019" (hereinafter referred to as "BUDS Act").

38. It is pertinent to note herein that the respondents have faced various challenges in the seamless execution of the present project. That the project had deferred due to various reasons beyond the control of the respondent which directly affected the execution of the project. Demonetization and GST resulted in a serious economic meltdown and sluggishness in the real estate sector. That the respondent, with no cash circulation in the market the respondent

could not make timely payments to the labourers and the contractors which stalled the construction. Further, the NGT vide its order dated 09.11.2017 a complete ban on construction activities in around Delhi-NCR which further caused serious damage to the project. Despite the various challenges the respondent is trying his level best to complete the said project well within the timeline as declared during the time of registration.

39. That the current covid-19 pandemic resulted in serious challenges to the project with no available labourers, contractors etc for the construction of the Project. The Ministry of Home Affairs, GOI vide notification dated March 24,2020 bearing no. 40-3/2020-DM-I(A) recognised that India was threatened with the spread of Covid-19 pandemic and ordered a complete lockdown in the entire country for an initial period of 21 days which started on March 25,2020. By virtue of various subsequent notifications, the Ministry of Home Affairs, GOI further extended the lockdown from time to time and till date the same continues in some or the other form to curb the pandemic. Various State Governments, including the Government of Haryana have also enforced various strict measures to prevent the pandemic including imposing curfew, lockdown, stopping all commercial activities, stopping all construction activities. Pursuant to the issuance of advisory by the GOI vide office memorandum dated May 13, 2020 regarding extension of registrations of real estate projects under the provisions of the RERA Act, 2016 due to "Force Majeure", the Haryana Real Estate Regulatory Authority has also extended the registration and completion date by 6 months for

all real estate projects whose registration or completion date expired and or was supposed to expire on or after March 25, 2020.

40. In past few years construction activities have also been hit by repeated bans by the Courts/Tribunals/Authorities to curb pollution in Delhi-NCR Region. In the recent past the Environmental Pollution (Prevention and Control) Authority, NCR (EPCA) vide its notification bearing no. EPCA-R/2019/L-49 dt 25.10.2019 banned construction activity in NCR during night hours (6 pm to 6 am) from 26.10.2019 to 30.10.2019 which was later on converted to complete ban from 1.11.2019 to 05.11.2019 by EPCA vide its notification bearing no. R/2019/L-53 dated 01.11.2019.

41. The Hon'ble Supreme Court of India vide its order dated 04.11.2019 passed in writ petition bearing no. 13029/1985 titled as "MC Mehta vs Union of India" completely banned all construction activities in Delhi-NCR which restriction was partly modified vide order dated 09.12.2019 and was completely lifted by the Hon'ble Supreme Court vide its order dated 14.02.2020. These bans forced the migrant labourers to return to their native towns/states/villages creating an acute shortage of labourers in the NCR Region. Due to the said shortage the construction activity could not resume at full throttle even after the lifting of ban by the Hon'ble Apex Court. Even before the normalcy could resume the world was hit by the covid-19 pandemic. Therefore, it is safely concluded that the said delay in the seamless execution of the project was due to genuine force majeure circumstances and the said period shall not be added while computing the delay.

E. Jurisdiction of the authority

42. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. 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, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. 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 filed by the complainant:

F.I Assured returns

43. While filing the claim petition besides delayed possession charges of the allotted unit as per allotment letter dated 29.01.2018, the claimant has also sought assured returns on monthly basis as per clause 3 of allotment letter at the rate of Rs 131/- 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.

44. The allotment letter is a document issued by the respondent to the complainant and can be term as the agreement. The Act of 2016 defines "agreement for sale" means an agreement entered into between the promoter and the allottee [Section 2(c)]. An agreement for sale is defined as an arrangement entered between the promoter and allottee with freewill and consent of both the parties. An agreement defines the rights and liabilities of both the parties i.e., promoter and the allottee and marks the start of new contractual relationship between them. This contractual relationship gives rise to future agreements and transactions between them. Therefore, different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral parts of this agreement is the transaction of assured return inter-se parties. The "agreement for sale" after coming into force of this Act (i.e., Act of 2016) shall be in the prescribed form as per rules but this Act of 2016 does not rewrite the "agreement" entered between promoter and allottee prior to coming into force of the Act as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.,*** (Writ Petition No. 2737 of 2017) decided on 06.12.2017. Since the agreement defines the buyer-promoter relationship therefore, it can be said that the agreement for assured return between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate regulatory

authority has complete jurisdiction to deal with assured return cases as the contractual relationship arise out of agreement for sale only and between the same parties as per the provisions of section 11(4)(a) of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the agreement for sale till the execution of conveyance deed of the unit in favour of the allottees. Now, two issues arise for consideration as to:

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

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

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

45. 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 ***Neeikamal 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.

46. 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.*

47. 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;

48. 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.

49. 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.

50. 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.

51. 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.

52. 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.

53. 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.

54. 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.

H. Directions of the authority:

55. 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 November 2018 till the date of handing over possession.

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

iii. Both the parties are directed to execute the builder buyer agreement as well as directed to submit the due date of possession.

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

56. Complaint stands disposed of.

57. 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.