HARERA
GURUGRAM

Complaint no. 5551 of 2019

BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**5551 of 2019**
Date of filing complaint:		**26.11.2019**
First date of hearing	:	**06.12.2019**
Date of decision	:	**08.02.2022**

1. Smt. Deeya Dewan
2. Shri Tushar Dewan

Both RR/o: - L-18, LGF, Green Park Main, New Delhi-110016 **Complainants**

Versus

M/s Vatika Limited
Regd. office: Vatika Triangle, 4th floor, Sushant Lok-I, Block A, MG Road, Gurugram-122002 **Respondent**

CORAM:
Dr. K.K. Khandelwal **Chairman**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Mr. Rohit Oberoi Advocate for the complainants
Ms. Priyadarshni Advocate for the respondent

ORDER

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

obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter-se them.

A. Project and unit related details

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

S. No.	Heads	Information
1.	Name and location of the project	"Vatika INXT City Centre", Sector 82, Gurgaon, Haryana
2.	Nature of the project	Commercial complex
3.	Area of the project	10.48 acres
4.	DTCP License	122 of 2008 dated 14.06.2008
	valid upto	13.06.2016
5.	RERA registered/ not registered	**Not registered**
6.	Payment plan	Construction linked plan
7.	Date of execution of builder buyer's agreement	06.09.2011 (page 20 of BBA)
8.	Unit no.	349A, 3rd floor, tower-A (page 23 of complaint)
9.	Unit measuring	750 sq. ft.
10.	New unit no.	822, 8th floor, block F admeasuring 750 sq.ft. (page 73 of complaint)
11.	Total consideration	Rs. 36,56,250/- As per clause 1 of BBA (page 23 of complaint being sale consideration)

12.	Total amount paid by the complainants	Rs. 36,56,250/- As per clause 1 of BBA (page 23 of complaint being sale consideration)
13.	Due date of delivery of possession	06.09.2014 (As per recital D of the builder buyer's agreement- within 3 years from the date of execution of the agreement)
14.	Provision regarding assured return	**Addendum to the agreement dated 06.09.2011** The unit has been allotted to you with an assured monthly return of Rs.65/- per sq. ft. However, during the course of construction till such time the building in which your unit is situated offered for possession you will be paid an additional return of Rs 6.50/- per sq. ft. Therefore, your return payable to you shall be as follows: This addendum forms an integral part of builder buyer agreement dated 06.09.2011. a. Till offer of possession: Rs. 71.50/- sq. ft. b. After completion of the building: Rs 65/- per sq. ft. You would be paid an assured return w.e.f. 06.09.2011 on a monthly basis before the 15th of each calendar month. The obligation of the developer shall be to lease the promises of which your flat is part @Rs. 65/- per sq. ft. In the eventuality the achieved return being higher or lower than Rs

		65/- per sq. ft. the following would be applicable. 1. If the rental is less than Rs 65/- per sq. ft. than you shall be refunded @ Rs 120/- per sq. ft. for every Rs 1/- by which achieved rental is less than Rs 65/- per sq. ft. If the achieved rental is higher than Rs 65/- per sq. ft. than 50% of the increased rental shall accrue to you free of any additional sale consideration. However, you will be requested to pay additional sale consideration @Rs 120/- sq. ft. for every rupee of additional rental achieved in the case of balance 50% of increased rentals.
15.	Date of offer of possession to the complainants	**Not offered**
16.	Occupation certificate	**Not obtained**
17.	Delay in handing over till date of decision i.e., 08.02.2022	7 years 5 month 2 days

B. Facts of the complaint

3. The complainants have submitted that the project which was sold to them was never constructed and thereafter their unit was unilaterally transferred to another project, and they were informed of the same vide a letter. It was submitted that no permission was sought, and no notice of the project not being built was provided to them. The complainants who inspite of paying each and every amount within time and never defaulting on any amount, questioned the same, were told in a very curt manner that in case

they are not interested in continuing, they shall be refunded the amount only after heavy deductions and that too when this project is either over or their unit is sold to someone else, whichever is earlier. The hapless complainants having no option continued with the project. The opposite party however committing that they would still handover the project within time as was promised for the earlier project, did not handover the project within time as was promised for he earlier project, did not hand over the possession within the stipulated time. It is further stated that the opposite party in the submission made before this hon'ble authority for provision of RERA license, have state that as on 14.11.2018, neither did they have the requisite electricity connection nor had the project been completed. In fact, in the said submission, they have categorically stated that the possession date as 31.01.2020 and as on 14.11.2018, the project was 80% ready, however on 26.02.2019, the opposite party made a false statement that the project is ready, and the complainants can offer confirm the same. The complainants on visiting the site were left speechless as the project which was stated to be ready for fit outs and the portions of which were stated to have been leased out, were nowhere near completion as the lifts were yet to be installed and the interior finishing work was far from completed. Thus, the complainants crave for the indulgence of this Hon'ble authority direct the opposite party to hand over the possession of the premises being unit number 822 on the 8th floor in tower F of the project "Vatika Inxt City Centre" as well as the

outstanding amount as committed vide the BBA be paid, from March 2018 till the date of handing over of possession. The copy of the RERA disclosure dated 14.11.2018 made by the opposite party on the website of RERA as on 11.11.2019 is attached herein with present petition and is marked as annexure 8. The copy of GPA executed on behalf of Mr. Tushar Dewan in favour of Ms Deeya Dewan is attached herein with the present petition and is marked as annexure 9.

C. Relief sought by the complainants:

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

   i. Direct the respondent to deliver possession of the subject property and adhere to the terms of all the agreements and their subsequent addendum thereof,

   ii. Direct the respondent to pay the outstanding amount as is due and payable by the respondent to the complainants from March 2018 till the date of handing over possession,

   iii. Direct the respondent to pay interest at the rate if 18% per annum for every month of delay on the excess amount paid by the complainant i.e., 36,56,250/-.

5. 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. Reply by the respondent

6. The respondent has contested the complaint on the following grounds.

i. That the complainants by way of present complaint are seeking the relief of recovery of pending assured return amount under interim relief and main relief. However, it is submitted that the Ld. Authority does not have jurisdiction to decide upon the amount of assured return as it has already held in its various judgements. It is crystal clear that complainants are not "allottees but are investor" who are only seeking assured returns from the respondent, by way of present complaint, which is not maintainable under RERA. The complainants have booked the said unit by way of agreement having annexure A about the terms and conditions of assured return and leasing and as per which, the complainants have been receiving assured returns in the form of profit and thus, the complainants are investor not allottees as they have booked commercial unit with a sole motive to earn profits. Even addendum to the agreement clearly stipulated that the complainants have booked the present commercial unit for the purpose of leasing it further for gaining commercial advantage. Therefore, it is submitted that as the complainants are investors and 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 Apartment Pvt. Ltd.* (complaint no.141 of 2018), and *"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 Apartment Pvt. Ltd. No case is made out by the complainant. Counsel for respondent has placed on record a Supreme Court Judgement dated 25.07.1997 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.

ii. That the complainants have come before this hon'ble authority with ulterior motive. That the present complaint has been filed by the complainants just to harass the respondent and to gain the unjust enrichment. It is pertinent to mention here that for the fair adjudication of grievance as alleged by the complainants, a detailed deliberation by leading 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.

iii. That the project was delayed due to the various reasons beyond the control of the respondent. the main reason behind the delay in project was due to the non-acquisition of sector roads by HUDA and initiation of GAIL corridor passing through. The "Vatika India Next" is large township and respondent has already given possession of more than approx. 6500 units in the past few years which included residential plots, villas, independent floors, group housing flats and commercials. Thus, due to extraneous reasons which is beyond control of the respondent, it was unable to execute and carry out all necessary work for completion in some part of the project. There was change in the master layout plan of the project by the concerned govt. due to because of which the entire plot cluster map changed, and due to this, there was a delay in the handing over of the possession. The concomitant cascading effects of such a colossal change necessitated realignment of the entire layout of the various projects, including plotted/group housing/ commercial/ institutional in the entire township. This was further compounded with the non-removal or shifting of the defunct high-tension lines passing through the land which also contributed to the inevitable change in the layout plans.

iv. Unfortunately, owing to significant subsequent events and due to a host of extraneous reasons beyond the control of the company, it was unable to execute and carry out all the necessary work for the completion of the allotted unit in the

above said project. These subsequent developments have repeatedly marred and adversely impacted the progress of the company's projects. It is submitted that the project was not completed till year 2016 due to the reason mentioned above and due to several other reasons and circumstances absolutely beyond the control of the respondent, such as interim orders dated 16.07.2012,31.0.2012 and 21.08.2012 of the hon'ble High Court of Punjab & Haryana in CWP no. 20032/2008 whereby ground water extraction was banned in Gurgaon and orders passed by National Green Tribunal to stop construction to prevent emission of dust in the month of April 2015 and again in November, 2016 adversely affecting the progress of the project. When the project was near completion, the government of India imposed the nationwide lockdown due to the pandemic of Covid-19 and therefore, the development of project has come to the halt. In this tough time of Covid-19, the respondent is facing severe hardship due to the lack of work force/labour and building materials.

v. That due to the evolving policies, regulations and legal framework governing real estate investments, the company also informed the clients of commercial units as per the guidelines and subsequently as per newly promulgated ordinance i.e., "Banning of unregulated deposit scheme ordinance 2018" and further "Banning of unregulated deposit scheme Act 2019, the government banned such

assured/committed returns and schemes of such returns completely.

vi. On account of the aforementioned reasons the progress of the work of the respondent was abruptly hampered. It is further submitted that all these events led to suspension and stoppage of work on several occasions which also resulted in labourers and contractors abandoning work. As a result of various directions from the authorities at different occasions, regarding water shortage and pollution control etc., coupled with labourers and contractors abounding the work, the respondent had to run form pillar to post in order to find new contractors and labourers, thus affecting progress of project. Hence, respondent is not liable for the delay in handing over of possession of the unit of the complainants.

vii. That the complainants are attempting to seek an advantage getting the speculative gain by selling it to other on higher rates as one of their mail shows the real intentions. It is apparent from the facts of the present case that the main purpose of the present complaint is to harass the respondent by engaging and igniting frivolous issues with ulterior motives to pressurize the respondent 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 respondent and hence the complaint deserves to be dismissed.

viii. That at the very outset it is submitted that the complaint filed before the Ld. Authority besides being misconceived and erroneous, is untenable in the eyes of law and liable to be rejected. The complainants have misdirected themselves in filing the above captioned complaint before this Ld. authority as the relief being claimed by the complainants cannot be said to even fall within the realm of jurisdiction of this Ld. Authority.

ix. That the complainants relied upon various documents and statements as annexed with the complaint are not supported by affidavit/certificate under section 65 (B) of Evidence Act. Hence, the e-mails placed on record by the complainants have no authenticity, invalid and are not admissible document.

x. That no proper legal affidavit has been filed in support of complaint as per the provisions of law. Thus, the complaint is the complaint is not tenable in the eyes of law & thus is liable to be dismissed.

xi. That all the annexures as attached with the complaint are not connected or reiterated by the complainants with the complaint nor it be relied on or be referred/ connected pr reiterated in the affidavit filed by the complainants, Thus all the annexures are not readable and /or 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 respondent craves leave of this hon'ble authority to refer to and rely upon the

terms and conditions set out in the buyers 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 respondent as well as the complainants. The complainants are trying to shift onus of failure on the respondent as it is the complainants who failed to comply their part of obligation and miserably failed to pay the instalments in time despite payment reminders being sent by the respondent from time to time.

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

E. Jurisdiction of the authority

8. 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

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana 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 completed 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 complainants at a later stage.

F. Findings on the relief sought by the complainants:

F.I Assured return

10. While filing the claim petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 06.09.2011, the claimants have also sought assured returns on monthly basis as per addendum to the agreement at the rate of Rs 71.50/- per sq. ft. of super area per month till offer of possession. It is pleaded that the respondent has not complied with the terms and conditions of the agreement. Though for some time the amount of assured returns was paid but later on, the respondent refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019 (herein after referred to as the Act of 2019). But that Act does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act. However, the plea of respondent is otherwise and who took a stand that though it paid the amount of assured returns upto the year 2018 but did not pay the same amount after coming into force of the Act of 2019 as it was declared illegal.

11. The addendum to the agreement dated 06.09.2011 is a document which was executed between both the parties on 06.09.2011 and can be termed as 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. The different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral part 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 returns 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, three issues arise for consideration as to:

i. Whether authority is within the jurisdiction to vary its earlier stand regarding assured returns 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

12. 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 the 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 adifferent 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 arises 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. 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.

13. 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.

14. 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;

15. 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.

16. 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.

17. 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.

18. 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 complainants till possession of respective apartments stands handed over and there is no illegality in this regard.

19. 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.

20. 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.

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

F. II Delay possession charges

22. In the present complaint, the complainants intends to continue with the project and are seeking possession of the subject unit and delay possession charges as provided under the provisions of section 18(1) of the Act which reads as under.

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —

.....

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

23. The builder buyer agreement dated 06.09.2011 was executed between the parties. As per recital D of the builder buyer agreement, the possession was to be handed over within a period of 3 years from the date of execution of this agreement. Recital D of the builder buyer agreement is reproduced below:

> *The developer has represented thar it will complete the construction of the said complex and makes it ready of occupation and possession in all respects, on or before expiry of 03 years from the date of execution of this agreement unless the construction of the same is stopped or delayed on account of factors beyond its control, as has been stipulated in the latter part of this agree.*

24. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions is not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottees that even a single default by him in fulfilling

formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

25. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges. However, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

26. The legislature in its wisdom in the subordinate legislation under the rule 15 of the rules has determined the prescribed rate of interest.

27. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., 08.02.2022 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

28. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.
Explanation. —For the purpose of this clause—
(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;
(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

29. On consideration of documents available on record and submissions made by the complainants and the respondent, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of recital D of the agreement executed between the parties on 06.09.2011, the possession of the subject unit was to be delivered within stipulated time i.e. 06.09.2014. However now, the proposition before it is as to whether an allottee who is getting/entitled for assured return even after expiry of due date of possession, can claim both the assured return as well as delayed possession charges?

20. To answer the above proposition, it is worthwhile to consider that the assured return is payable to the allottee on account of a provision in the BBA or in a MoU having reference of the BBA or an addendum to the BBA or in a MoU or allotment letter. The assured return in this case is payable from the date of making 100% of the total sale consideration till completion of the building. The rate at which assured return has been committed by the promoter is Rs. 71.50/- per sq. ft. which is more than reasonable in the present circumstance. If we compare this assured return with delayed possession charges payable under proviso to section 18(1) of the Act, 2016, the assured return is much better i.e. assured return in this case is payable approximately Rs. 53,625/- per month whereas the delayed possession charges are payable approximately Rs. 38,290/- per month. By way of assured return, the promoter has assured the allottee that he will be entitled for this specific amount

till offer of possession. Accordingly, the interest of the allottee is protected even after the due date of possession is over as the assured returns are payable till construction of the said commercial building is complete. The purpose of delayed possession charges after due date of possession is served on payment of assured return after due date of possession as the same is to safeguard the interest of the allottee as his money is continued to be used by the promoter even after the promised due date and in return, he is paid either the assured return or delayed possession charges whichever is higher. Accordingly, the authority decides that in cases where assured return is reasonable and comparable with the delayed possession charges under section 18 and assured return is payable even after due date of possession till completion of building, then the allottee shall be entitled to assured return or delayed possession charges, whichever is higher without prejudice to any other remedy including compensation.

The authority directs the respondent/promoter to pay assured return from the date the payment of assured return has not been paid till offer of possession @Rs. 71.50/- per sq.ft. per month and @Rs. 65/- per sq.ft. per month of super area after completion of the building and declines to order payment of any amount on account of delayed possession charges as his interest has been protected by granting assured return till construction of the said commercial building is complete.

G. Directions of the authority

32. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act:

i. The respondent is directed to pay the amount of assured return at the agreed rate i.e., 71.50/- per sq.ft. to the complainant from the date the payment of assured return has not been paid i.e., March 2018 till the offer of possession.

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

iii. The respondent shall not charge anything from the complainants which is not the part of the agreement of sale.

33. Complaint stands disposed of.

34. File be consigned to registry.

(Dr. K.K. Khandelwal)
Chairman

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 08.02.2022