BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**2522 of 2021**
Date of filing complaint:		**02.07.2021**
First date of hearing	:	**11.08.2021**
Date of decision	:	**05.04.2022**

1. Gurdeep Singh Guglani
2. Jasbir Kaur Guglani

Both RR/o: - H.No: 2967, Sector 23, Gurugram, Haryana-122017 **Complainants**

Versus

1. M/s Vatika Limited

R/o: Unit no. A-002, Vatika India Next city Centre, Ground floor, block A, Sector 83, Vatika India Next Gurugram, Haryana-122012. **Respondent**

CORAM:

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

APPEARANCE:

Mr. Harshit Goyal	Advocate for the complainants
Mr. Venket Rao	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 allottees 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
	Nature of the project	Commercial complex
	Area of the project	10.718 acres
	DTCP License	122 of 2008 dated 14.06.2008
	valid upto	13.06.2016
	RERA registered/ not registered	**Not registered**
	Date of execution of builder buyer's agreement	18.01.2012 (page 21 of BBA)
	Unit no.	331A, 3rd floor, block no.-A (page 23 of complaint)
	Unit measuring	600 sq. ft.
	New unit no.	740, 7th floor, block no. F (page 43 of complaint)
	Total consideration	Rs. 29,25,000/- As per clause 1 of BBA (page 23 of complaint being sale consideration)
	Total amount paid by the complainants	Rs. 30,00,319/- As per clause 1 of BBA (page 23 of complaint being sale consideration)
	Due date of delivery of possession	18.01.2015 *Note: Possession clause is not given in file. So, taken from another file of

		same project.
	Provision regarding assured return	***Clause 12: Assured return and leasing arrangement*** *Since the buyer has paid the full basic sale consideration for the said commercial unit upon signing of this agreement and has also requested for putting the same on lease in combination with other adjoining units/spaces of other owners after the said building is ready for occupation and use, the developer has agreed to pay Rs. 71.5/- per sq.ft. super area of the said commercial unit per month by way of assured return to the buyer from the date of execution of this agreement till the completion of construction of the said building. The buyer hereby gives full authority and powers to the Developer to put the said commercial unit in combination with other adjoining commercial units of other owners, on lease, for and on behalf of the buyer, as and when the said building/said commercial unit is ready and fit for occupation. The buyer, as and when the said building/said commercial unit is ready and fit for occupation. The buyer has clearly understood the general risks involved in giving any premises on lease to third parties and has undertaken to bear the said risks exclusively without any liability whatsoever on the part of the developer of the confirming party. It is further agreed that:* *(i) The develop will pay to the buyer Rs. 65/- per sq.ft. super area of the said commercial unit as committed return for upto three years from the date of completion of construction of the said building or till the said commercial unit is put on lease, whichever is earlier. After the said commercial unit is put on lease in the above manner, then payment of the*

		aforesaid committed return will come to an end and the buyer will start receiving lease rental in respect of the said commercial unit in accordance with the lease document as may be executed and as described hereinafter. *(ii).....* *(iii).....* *(iv).....* *(v)The Developer expects to lease out the said commercial unit (individually or in combination with other adjoining units) at a minimum lease rental of Rs. 65/- per sq.ft. super area per month for the first term (of whatever period). If on account of any reason, the lease rent achieved in respect of the first term of the lease is less than the aforesaid Rs. 65/- per sq.ft. super area per month, then the developer shall pay to the buyer a onetime compensation calculated at the rate of @Rs. 120/- per sq.ft. super area for every one rupee drop in the lease rental below Rs. 65/- per sq.ft. super area per month. This provision shall not apply in case of second and subsequent leases/lease terms of the said commercial unit.* *(vi) However, if the lease rental in respect of the aforesaid first term of the lease exceeds the aforesaid minimum lease rental of Rs. 65/- per sq.ft. super area, then, the buyer shall pay to the developer additional basic sale consideration calculated at Rs. 60/- per sq.ft. super area of the said commercial unit for every one rupee increase in the lease rental over and above the said minimum lease rental of Rs. 65/- per sq.ft. super area per month. This provision is confined only to the first term of the lease and shall not be applicable in case of second and subsequent leases/lease terms of the said commercial unit.* *(vii).....* *(viii).....* *(ix).....* *(x).....*

		(xi)..... (xii)..... (xiii)..... (xiv).....
	Date of offer of possession to the complainants	**Not offered**
	Occupation certificate	**Not obtained**
	Delay in handing over till date of decision i.e., 05.04.2022	7 years 2 month 18 days

B. Facts of the complaint

3. The complainants have submitted that in the year 2011, the representatives of the respondent approached them and presented a rosy picture of the project in question and assured timely payment of the assured return to them. On the basis of the assurances as given by the representatives to be true and correct, they approached the respondent and submitted an application form dated 12.09.2011 for booking of an office space in the project in question.

4. The respondent issued allotment letter dated 12.11.2011, in the name of present complainants. The BBA was duly executed between the complainants and the respondent on 18.01.2012 in respect of the booked office space bearing no. 331A situated in tower A, 3rd floor admeasuring 600 sq.ft. super area. The respondent had arbitrarily changed the booked unit from unit no. 331A situated in tower A, 3rd floor to unit no. 740 situated at 7th floor, tower F vide letter dated 31.07.2013 without consent of the complainants.

5. The complainants have submitted that as per clause 12 of BBA dated 18.01.2012, the promoter was liable to pay assured return

at the rate of RS. 71.5 per sq.ft. of the booked commercial unit per month to the, from the date of execution of BBA till the date of completion of construction of the said building. However, the promoter has failed to pay agreed assured return from March 2018. The respondent company has failed to complete construction and deliver possession of the allotted unit till date. The respondent company has intentionally failed to mention the possession clause mentioning date of delivery of possession of the booked unit in the builder buyer agreement. However, the respondent promised to deliver the possession of the booked unit within a period of 36 months from the date of execution of the builder buyer agreement i.e., 18.01.2012. Accordingly, the due date of delivery of possession was 18.01.2015.

6. The complainants have invested their hard-earned money in the booking of the unit in the project in question on the basis of false promises made by the respondent at the time of booking in order to allure them. However, the respondent has failed to abide all the obligations of him stated orally and under the builder buyer agreement duly executed between both the present parties. They had already paid total sale consideration of Rs. 30,00,319/- in advance to the respondent company.

7. As per Haryana Real Estate Regulatory Authority, Gurugram judgement dated 16.10.2020 in complaint no. 3013 of 2019 titled as ***Ashrita Singh vs. M/s Landmark Apartment Pvt. Ltd.,*** the authority has complete jurisdiction to entertain assured return cases where the subject matter in dispute is a real estate property.

C. Relief sought by the complainants:

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

   i. Direct the respondent to pay agreed assured return charges along with interest at the prescribed rate to the complainants accrued from the month of March 2018 to the date of offer of possession along with occupation certificate by respondent.

   ii. Direct the respondent to pay delayed possession charges to the complainants from due date of delivery of possession i.e., 18.01.2015 to the date of offer of possession along with occupation certificate by the respondent.

   iii. Direct the respondents to execute and register the conveyance deed of the unit after completion of pending construction works and receipt of occupation certificate in respect of same.

9. On the date of hearing, the authority explained to the respondent/promoter about the contraventions 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

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

   a. The complainants have not approached the ld. adjudicating officer with clean hands and has suppressed the relevant material facts. It is submitted that the complaint under reply is devoid of merits and the same should be dismissed with cost. At the outset, the complainants have erred gravely in filing the present complaint and misconstrued the provisions of the RERA Act. It is imperative to bring the attention of the ld.

adjudication officer that the Act, 2016 was passed with the sole intention of regularisation of the real estate projects, promoters and the dispute resolution between the builder and buyers. That the same can be perused from the objective of the said Act as published in the official gazette.

b. That it is an admitted fact that by no stretch of imagination, it can be concluded that the complainants herein are a "consumer". That they are simply investors who approached the respondents for investment opportunities and for a steady rental income. The same was also duly agreed between the parties in the said builder buyer agreement.

c. That around September 2011, the complainants herein, learnt about the project launched by the respondent tilted as "INXT City Centre" situated at Sector 82A, Gurgaon and repeatedly visited its office to know the more details of the said project. They further inquired about the specification and veracity of the commercial project and were satisfied with every proposal deemed necessary for the development. That after having direct interest in the project constructed by the respondent the complainants herein decided to make investment in the aforesaid project and on 12.09.2011, vide their application booked a unit in the aforesaid project. The respondent vide allotment letter dated 12.11.2011, allotted a unit bearing no. 331A, 3rd floor, tower A admeasuring area 600 sq.ft. It is apparent from the facts of the present case that the main purpose of the present complaint is to harass respondent by engaging and raising frivolous issues with ulterior motives to

pressurize 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. That it is an admitted fact by no stretches of imagination, it can be concluded that they are "allottees/consumers".

d. It is to note, that the complainants herein are simply an investor who approached the respondent for investment opportunities and for a steady monthly assured income. That in the lights of the said facts and circumstances it can be concluded beyond any reasonable doubt that the complainants herein are not "consumers or allottees", that the relationship between the complainants and the respondent is not that of a "builder-buyer". Further on 18.01.2012, a builder buyer agreement was executed between the complainants and the respondent for the unit allotted in the earlier project. It is pertinent to mention, that complainants were aware of terms and conditions under the aforesaid agreement and only being satisfied with each and every terms agreed to sign upon the same with free will and without any demur.

e. The complainants are trying to mislead this hon'ble authority by concealing facts which are detrimental to this complaint at hand. The agreement executed between the parties on 18.01.2012 was in the form of an "investment agreement". They approached the respondent as an investor looking for certain investment opportunities. Therefore, the said agreement for the commercial space unit contained a "lease clause" which

empowers the developer to put a unit of complainants along with the other commercial space unit on lease and does not have a "possession clauses", for physical possession.

f. Further, the complainants in the instant complaint have harped that the respondent has failed to offer timely possession of the respective unit. It is pertinent to note herein that the said agreement was of the nature of an "investment agreement". That the same does not stipulate about possession. In fact, it clearly specified and as mutually agreed by them. It is apropos to mention that they requested the respondent vide various telephonic conversations and even through personal visit to its office to change the booked unit of complainants by keeping the same super area. Therefore, the respondent being a customer centric company change the booked unit of complainants vide letter dated 31.07.2013. The respondent re-allotted the complainants with unit bearing no. 740, 7th floor, block F, in India Next City Center, NH-8, Sector-83, Gurgaon, Haryana.

g. It is further submitted that the complainants vide BBA agreed that the respondent may change the allotted unit of buyer of similar quality/specifications and such shall be done upon written intimation to the complainants from the respondent as stated under clause 3(i) of the BBA. In the agreement, the company had inter alia represented that the performance by the company of its obligations under the agreement was contingent upon approval of the unit plans of the said complex by the DTCP, Haryana, Chandigarh and any subsequent amendments/modifications in the unit plans as may be made

from time to time by the company & approved by the DTCP, Haryana, Chandigarh from time to time.

h. Subsequent to the booking and the signing of the agreement, the company was facing umpteen roadblocks in construction and development works in projects in its licensed lands comprised of the township owing to the initiation of the GAIL corridor which passes through the same. 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 these lands, which also contributed to the inevitable change in the layout plans.

i. Unfortunately, owing to significant subsequent events and due to a host of extraneous reasons beyond the control of the company, company was unable to execute and carry out all the necessary work for the completion of the said project. These subsequent developments have repeatedly marred and adversely impacted the progress of the company's projects. To further add to the woes of the company, in addition to the reasons stated above, non-acquisition of sector roads by HUDA to enable accessibility to the various corners of the project, forceful unauthorised occupation of certain parcels by some farmers coupled with other regular obstructions and impediments beyond the control of the company have resulted in the company being unable to deliver.

j. It is to note, that the respondent was committed to complete the development of the project and deliver the unit of the complainants as per the terms and conditions mentioned under the agreement. It is pertinent to apprise the hon'ble authority that the developmental work of the said project was slightly delayed due to the reasons beyond the control of the respondent. That due to the impact of the Goods and Services Act, 2017 which came into force after the effect of demonetisation in the last quarter of 2016, which left long lasting effect on various real estate and development sector even in 2019. It is a matter of fact that the respondent had to undergo huge obstacle due to adverse effect of demonetisation and implementation of GST. In the recent years, various construction activities in the real estate sector were stayed due to constant ban levied by various courts/tribunals/authorities/ to curb pollution in Delhi-NCR Region. It is pertinent to mention, that recent years the Environment (Pollution and Control) Authority, NCR (EPCA) vide its notification dated 25.10.2019, bearing no. EPCA-R/2019/L-49 banned the construction activities in NCR during night hours from 26.10.2019 to 30.10.2019. Subsequently, the EPCA vide its notification bearing no. R/2019/L-53, dated 01.11.2019, converted the same into a complete ban 01.11.2019 to 05.11.2019.

k. The hon'ble apex court in the writ petition vide its order dated 04.11.2019 passed in writ petition bearing no. 13029/1985 titled as *"MC Mehta vs. Union of India"* has 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 court vide its order dated 14.02.2020.

l. That due to the ban levied by the competent authorities, the migrant labourers were forced to return to their native towns/states/villages creating an acute shortage of labour in the NCR region. Even after lifting of ban by the hon'ble court the construction activities could not resume at full throttle due to such acute shortage.

m. Despite, after such obstacles on the construction activity in the real estate sector and before the normalcy could resume, the entire nation was hit by the worldwide 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 period shall be excluded while computing the delay.

n. The respondent cannot pay the "assured returns" to the complainants by any stretch of imagination. That the respondent by not paying the assured returns to the complainants have not committed any breach of the said agreement dated 06.09.2011 or the addendum dated 16.03.2012 nor has he acted in contravention to the provisions of the RERA Act, 2016. That further, "the Banning of Unregulated Deposits Schemes" has enforced by the parliament in the year 2018. That under the said Act "Assured Returns" have been banned and being a law-abiding company, the

respondent had to stopped to make the payments of the said assured returns. Therefore, the agreement of these kinds, may, after 2019, and if any assured return is paid thereon or continued therewith may be in complete contravention of the BUDS Act. As a matter of fact, respondent has duly paid the assured return to the tune of Rs. 32,23,430/- to the complainants till September 2018.

o. 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 th BUDS Act, must satisfy the requirement of being a "Regulated Deposit Scheme" as opposed to unregulated deposit schemes. Hence, the main object of the BUDS Act is to provide for a comprehensive mechanism to ban unregulated deposit scheme.

p. 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 deposits. That at various instances in the complaint the complainants have raised the claim that the respondent has failed to credit the promised assured return to the complainants since March, 2018. It is apropos to mention that the respondent company was engaged in providing the

assured return since booking period to the complainants. That 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, 2018". Whereas the same has been informed to the complainants on several occasions through telephonic conversation, despite which the complainants raising fabricated allegations regarding the same in order to harass the respondent.

q. It is evident that the entire case of the complainants is nothing but a web of lies false and frivolous allegations made against the respondent. The complainants are guilty of placing untrue facts and are attempting to hide the true colour of their intention.

11. 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

12. 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

15. 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

16. 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 a 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 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 treatmert in books of accounts of the promoter and for the purposes of income tax. Then, in the latest pronouncement on this aspect in case ***Jaypee Kensington Boulevard Apartments Welfare Association and Ors. vs. NBCC (India) Ltd. and Ors.*** (24.03.2021-SC): MANU/ SC/0206 /2021, the same view was followed as taken earlier in the case of ***Pioneer Urban Land Infrastructure Ld & Anr.*** with regard to the allottees of assured returns to be financial creditors within the meaning of section 5(7) of the Code. Then after coming into force the Act of 2016 w.e.f 01.05.2017, the builder is obligated to register the project with the authority being an ongoing project as per proviso to section 3(1) of the Act of 2017 read with rule 2(o)

of the Rules, 2017. The Act of 2016 has no provision for re-writing of contractual obligations between the parties as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.,*** (supra) as quoted earlier. So, the respondents/builders can't take a plea that there was no contractual obligation to pay the amount of assured returns to the allottee after the Act of 2016 came into force or that a new agreement is being executed with regard to that fact. When there is an obligation of the promoter against an allottee to pay the amount of assured returns, then he can't wriggle out from that situation by taking a plea of the enforcement of Act of 2016, BUDS Act 2019 or any other law.

17. It is pleaded on behalf of respondents/builders that after the Banning of Unregulated Deposit Schemes 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.

18. 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;*

19. 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.

20. 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.

21. 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.

22. 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.

23. 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.*

24. 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.

25. 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 the allottees is an ongoing project as per section 3(1) of the Act of 2016 and, 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

26. In the present complaint, the complainants intend 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."*

27. A builder buyer agreement dated 18.01.2012 was executed between the parties. The possession clause is not mentioned in the file and has been taken from another file of the same project i.e., 3 years from the date of execution of this agreement. Therefore, the possession was to be handed over by 18.01.2015. The relevant clause is reproduced below:

"The developer will complete the construction of the said complex within three (3) years from the date of execution of this agreement. Further, the Allottee has ad full sale consideration on signing of this agreement, the Developer further undertakes to make payment of Rs. As per Annexure 'A' (Rupees.....) per sq.ft. of super area per month by way of committed return for the period of construction, which the Allottee duly accepts. In the event of a time overrun in completion of the said complex the Developer shall continue to pay to the Allottee the within mentioned assured return until the unit is offered by the developer for possession.

28. 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 complainants 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 allottees 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 allottees is left with no option but to sign on the dotted lines.

29. **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 allottees 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.*

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

31. 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., 05.04.2022 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

32. 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;"*

33. 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. The agreement executed between the parties on 18.01.2012, the possession of the subject unit was to be delivered within stipulated time i.e., 18.01.2015. However now, the proposition before it is as to whether the allottees who are 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?

34. To answer the above proposition, it is worthwhile to consider that the assured return is payable to the allottees 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. of the super area per month which is more than reasonable in the present circumstances. 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 a Rs. 42,900/- per month whereas the delayed possession charges are payable approximately Rs. 39,000/- per month. By way of assured return, the promoter has assured the allottees that they would be entitled for this specific amount till completion of construction of the said building. Accordingly, the interest of the allottees is protected even after the due date of possession is over as the assured returns are payable from the first 3 years after the date of completion of the project or till the date of said unit/space is put on lease whichever is earlier. 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 allottees as their money is continued to be used by the promoter even after the promised due date and in return, they are to be paid either the assured return or delayed possession charges whichever is higher.

35. 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 from the date of completion of the project, then the allottees shall be entitled to assured return or delayed possession charges, whichever is higher without prejudice to any other remedy including compensation. Hence,

the authority directs the respondent/promoter to pay assured return from the date the payment of assured return has not been paid till completion of construction of building @Rs. 71.50/- per sq.ft. per month and @ Rs. 65/- per sq. ft. per month of super area as minimum guaranteed rent up to 3 years from the date of completion of the said building or the said unit is put on lease whichever is earlier and declines to order payment of any amount on account of delayed possession charges as their interest has been protected by granting assured returns till the completion of the construction of the building and thereafter also upto 3 years at different rate from the date of construction of the said building or the said unit is put on lease whichever is earlier.

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. Since assured returns being on higher side are allowed than DPC so, the respondent is directed to pay the arrears of amount of assured return at the rate i.e., Rs. 71.50/- per sq.ft. of the super area per month to the complainants from the date the payment of assured return has not been paid i.e., March 2018 till the date of completion of the building. After completion of the construction of the building, the respondent/builder would be liable to pay monthly assured returns @65/- per sq. ft. of the super area up to 3 years or till the unit is put on lease whichever is earlier.

ii. The respondent is also 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 complainants and failing which that amount would be payable with interest @7.30% p.a. till the date of actual realization.

iii. The respondent shall execute the conveyance deed within the 3 months from the final offer of possession alongwith OC upon payment of requisite stamp duty as per norms of the state government.

iv. 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.

(Vijay kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

Dated: 05.04.2022