BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**2970 of 2021**
Date of filing complaint:		**05.08.2021**
First date of hearing	:	**29.09.2021**
Date of decision	:	**05.04.2022**

1. Kiran Mehra
2. Late Mr. Devinder Mehra, through his legal heir Ms. Kiran Mehra

R/o: - B-459, New Friends Colony **Complainants**

Versus

1. M/s Vatika Limited
2. M/s Anil Bhalla
3. Gautam Bhalla
4. Brij Kishore
5. Virender Kumar

All are R/o: Vatika Triangle, 4th floor, Sushant Lok-I, Block A, MG Road, Gurugram-122002. **Respondents**

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

APPEARANCE:
Mr. Abhimanyu Dhawan Advocate for the complainants
Ms. Ankur Berry Advocate for the respondents

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
2.	Nature of the project	Commercial complex
3.	Area of the project	10.718 acres
4.	DTCP License	122 of 2008 dated 14.06.2008
	valid upto	13.06.2016
5.	RERA registered/ not registered	**Not registered**
6.	Date of execution of builder buyer's agreement	28.02.2009 (page 18 of BBA)
7.	Unit no.	814A, 8th floor, tower-A (page 19 of complaint)
8.	Unit measuring	500 sq. ft.
9.	New unit no.	324, 3rd floor, block D admeasuring 500 sq.ft. (as per letter dated 26.03.2018, page 70 of reply)
10.	Total consideration	Rs. 25,00,000/- As per clause 1 of BBA (page 20 of complaint being sale consideration)
11.	Total amount paid by the complainants	Rs. 25,00,000/- As per clause 2 of BBA

		(Page 20 of complaint being sale consideration)
12.	Due date of delivery of possession	01.10.2010 (As per clause 2 of the builder buyer's agreement (page 20 of complaint)
13.	Provision regarding assured return	Since the unit would be completed and handed over by 1st October 2010, and since the allottee has paid part/ full sale consideration on signing of this agreement, the developer hereby undertakes to make a payment by way of committed return during construction period, as under, which the allottees duly accepts: .... It is hereby specifically clarified that the committed return would be paid by the developer up to 30.09.2010 or in the event of any delay in completion of the project, up to the date of offer for handing over of completed unit to the allottee.
		Clause N(i) Return on completion of the project and letting out of space That on the completion of th project, the space would be let -out by the developer at his own cost to a bonafide lessee at a minimum rental of Rs. 64/- per

		sq.ft. per month less TDS at source. In the event of the developer being unable to finalize the leasing arrangements, it shall pay the minimum rent at Rs. 64/- per sq.ft. per month to the allottee as Minimum Guaranteed Rent for the first 36 months after the date of completion of the project or till the date the said unit/space is put on lease, whichever is earlier. If on account of any reason, the lease rent achieved is less than Rs. 64/- per sq.ft. per month of super area, then the Developer shall return to the Allottee, a compensation calculated at Rs. 130/- for everyone rupee drop in the lease rental below Rs. 64/- per sq.ft. per month. ....
14.	Date of offer of possession to the complainants	**Not offered**
15.	Occupation certificate	**Not obtained**
16.	Delay in handing over till date of decision i.e., 05.04.2022	11 years 6 month 4 days

B. Facts of the complaint

3. The complainants have submitted that in the month of August 2009, the respondents, through public advertisements in newspapers/other media platforms invited applications for purchase of prime commercial space for retail, hotels, serviced apartments & corporate offices in their real estate project under

the name of "Vatika Trade Centre" located in sector 82A, Gurugram being constructed within the revenue estate of Village Sikhopur, Tehsil Sohna & Distt Gurugram. The representations were made by the respondents that the project would be one of the most notable hubs of the region. The commercial hub would be a 'magnet for MNC's, Indian Business Houses. It would stand large in one of the most enviable locations on NH - 8 with unmatched connectivity through the proposed 8 lane expressway and the metro.

4. The complainants booked a unit no. 814A on the 8th floor of tower 'A' in "Vatika Trade Centre", Village Sikhopur in Tehsil Sohna & District Gurugram, admeasuring approx. 500 sq. ft. in the said project under the 'committed return plan' as offered by respondents and mentioned in the builder buyer agreement dated 28th February 2009. Subsequently vide letter/addendum dated 27th July 2011, the said project was unilaterally shifted to a new area, and they were allotted unit no. 324 on the 3rd floor of block 'D' in "Vatika INXT City Centre", NH-8, Sector 83, Gurugram admeasuring approx. 500 sq. ft. That showing utmost faith in the assurances given by respondents in the project, they paid the full sale consideration of Rs.39,00,000/ to the respondents. That after paying the total sale consideration amount in February 2009, the respondents executed builder buyer agreement dated 28th February 2009 in favour of the complainants. Though the said builder buyer agreement mentioned the total sale consideration of Rs. 25,00,000/- for a total area of 500 sq.ft. but the actual payment

made was Rs. 39,00,000/- as the balance amount of Rs. 4,00,000/- was paid in cash.

5. It was avowed in the said agreement that the unit would be completed and handed over by 01.10.2010. Since, the complainants had paid full sale consideration on signing of the agreement. So, the respondents undertook to make payment of Rs. 32,000/- per month, by way of committed return, during construction period. It was further declared that in the event of any delay in completion of the project, the respondents would continue to pay the said sum of Rs. 32,000/ -till the date of offer for handing over of completed unit to the complainants.

6. Needless to say, that the project is still not complete and accordingly the unit has not been handed over to the complainants till date. However, the respondents, as committed and legally bound, kept on paying the committed return of Rs. 32,000/- per month till 07.09.2018, when abruptly without any prior notice/communication, the respondents stopped paying the monthly commitment returns. Instead of giving them the monthly commitment returns respondents are forcing us to sign an addendum, which absolves respondents from any responsibility regarding payment of returns as assured, committed and agreed, vide a duly signed and legally bound and enforceable builder buyer agreement dated 28th February 2009. Despite continual requests and reminders, respondents have failed to pay the entire consideration alongwith assured returns to the complainants.

7. The respondents have intentionally breached the provisions of the builder buyer agreement dated 28.02.2009. As per the contractual obligation the respondents were to complete construction of the said commercial unit and were to handover possession of the said unit on or before the 01.10.2010. However, the respondents miserably failed to fulfil their contractual obligations and have ferociously delayed the construction as well as the offer of possession of the project "Vatika INXT City Centre".

8. That the builder with the malevolent objective to cheat and to prolong the said timeline as mentioned in the builder buyer agreement would send e-mails giving false assurances that the project and its construction was going on in full swing and soon, they would be issuing the offer of possession letter. The builder adopted that modus operandi since the beginning to keep its buyers in the dark regarding the time of offering the possession of the units. It is pertinent to mention that till date the possession of the said unit has not been offered and the builder has delayed the same for over more than 123 months now.

9. That it is pertinent to note that the developer did not construct the unit within assured period as specified in the builder buyer agreement. The complainants visited the site to inspect the stage of contraction of the tower, but they were never allowed to inspect or click photographs of the unit or the said tower.

10. The complainants want to bring to the notice and knowledge of the authority that they dutifully abided to the builder buyer's agreement. It would be correct to state that she has been duped by

the builder Vatika Limited and its Directors for having a paid their hard-earned money."

C. Relief sought by the complainants:

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

i. Direct the respondents to pay the committed return of Rs. 32,000/- per month from 01.10.2018 to till date/ date of possession, whichever is later.

ii. Direct the respondents to pay interest @18% should be awarded on the amount mentioned above for the time period starting from 01.10.2018 to till date/date of possession, whichever is later.

iii. Direct the respondents to carry out the title registration/execution of conveyance deed of the unit and to handover physical vacant possession of the unit with immediate effect.

12. On the date of hearing, the authority explained to the respondents/ promoters 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 respondents

13. The respondents have contested the complaint on the following grounds.

a. The complainants have misdirected themselves in filing the above captioned complaint before the authority as the reliefs

being claimed by them cannot be said to fall within the realm of jurisdiction of this forum. It is humbly submitted that upon the enactment of the Banning of Unregulated Deposit Schemes Act, 2019, the 'assured return' and any "committed returns" on the deposit schemes have been banned. The respondents having not taken registration from SEBI Band thus cannot run, operate, continue an assured return scheme. As per Section 3 of the BUDS Act all unregulated deposit schemes have been strictly banned and deposit takers such as builders, cannot, directly or indirectly promote, operate, issue any advertisement soliciting participation or enrolment in or accept deposit. Thus, section 3 of the BUDS Act, makes the assured return schemes, of the builders and promoters, illegal and punishable under law. Further as per the SEBI Act, 1992, collective investment schemes as defined under Section 11 AA an only be run and operated by a registered person. Hence, the assured return scheme of they has become illegal by the operation of law and the respondents cannot be made to run a scheme which has become infructuous by law. Thus, the present complaint deserves to be dismissed at the very outset, without wasting precious time of this hon'ble authority.

b. That the present complaint has been filed by the complainants without there being placed any relevant documents showing transfer of title in favour of Mrs. Kiran Mehra. It is submitted that the booking and allotment was made in favour of Mr. Devinder Mehra and the Mrs. Kiran Mehra. It is submitted that the booking

and allotment was made in favour of Mr. Devinder Mehra and the Mrs. Kiran Mehra however the complaint has only been signed by Mrs. Kiran Mehra without proof of transfer of rights in subject matter property in her favour. Thus, in few of lack of authority while filing the present complaint, the same ought is not entertained by this hon'ble authority.

c. The complainants have not come before the hon'ble authority with clean hands. The complaint has been filed by the complainants just to harass the respondents and to gain the unjust enrichment. It is pertinent to mention here that for the fair adjudication of grievance as alleged by the complainants requires detailed deliberation by leading the evidence and cross-examination, thus only the civil court has jurisdiction to deal with the cases required detailed evidence for proper and fair adjudication.

d. It is pertinent to mention that the present complaint is not maintainable before the hon'ble authority as it is apparent from the prayers sought in the complaint. It is crystal clear from reading the complaint that the complainants are not 'allottees', but purely are 'investors', who are only seeking assured return from the respondents, by way of present petition, which is not maintainable under the provisions of the Act, 2016.

e. That in view of the judgment and order dated 16.10.2017 passed by the Maharashtra RERA Authority in the complaint titled ***Mahesh Pariani* vs. *Monarch Solitaire*** order, complaint no: CC00600000000078 of 2017, wherein it has been observed that

in case where the complainants have invested money in the project with sole intention of gaining profits out of the project, then the complainants are in the position of co-promoter and cannot be treated as 'allottee'. The authority therein opined as under:

> *"It means that the Complainants have the status of 'Co-promoter' of the project, it is evident that the dispute between the Complainants and the Respondent is of a civil nature between the promoter and co-promoter, and does not pertain to any contravention of the Real state (Regulation and Development) Act, 2016. The complaint is, therefore, dismissed."*

Thus, in view of the aforesaid decision, the Complainants herein could not and ought not have filed the present complaint being a co-promoter.

f. In a matter of ***Brhimjeet & Anr. Vs. M/s landmark Apartment Pvt. Ltd.*** **(complaint no.141 of 2018),** the Hon'ble Haryana real Estate Regulatory authority has taken the same view as observed by Maharasthtra RERA in Mahesh Pariani stated that,

> *"The Complainants have made a complaint dated 15.5.2018 with regard to the refund of the assured return of Rs.55,000/- per month. As per Clause 4 of the Memorandum of Understanding dated 14.8.2010, the Complainants are insisting that the RERA Authority may get the assured return of Rs.55,000/- per month released to him. A perusal of the Real Estate (Regulation & Development) Act, 2016 reveals that as per the Memorandum of Understanding, the assured return is not a formal clause with regard to giving or taking of possession of unit for which the buyer has paid an amount of Rs.55 Lakhs to the builder which is not within the purview of RERA Act. Rather, it is a civil matter. Since RERA Act deals with the builder buyer relationship to the extent of timely delivery of possession to the buyer or deals with withdrawal from the project, as per the provisions of Section 18 (1) of the Act. As such, the buyer is directed to pursue the matter with regard to getting assured*

return as per the Memorandum of Understanding by filing a case before an appropriate forum/Adjudicating Officer."

Thus, the RERA Act, 2016 cannot deal with issues of assured return and hence the present complaint deserves to be dismissed at the very outset.

f. That further in the matter of ***Bharam Singh & Ors*** **vs.** ***Venetian LDF Projects LLP*** **(Complaint No. 175 of 2018)**, the hon'ble authority, Gurugram upheld its earlier decision of not entertaining any matter related to assured returns. That the Hon'ble Authority in the said order stated

"that as already decided in complaint no. 141 of 2018 no case is made out by the Complainant". "That since the authority has taken a view of much earlier as stated above, the authority cannot go beyond the view taken already. In such types of assured return schemes, the authority has no jurisdiction, as such the Complainants are at liberty to approach the appropriate forum to seek remedy".

g. That in view of the catena of judgments passed by this hon'ble authority and the intent and purpose of enactment RERA Act, 2016, the hon'ble authority is not the right forum for the relief sought by the complainants. Further, there is no question of interest to be paid of the alleged assured returns plan in view of the catena of judgements passed by the authority. That the complainants are attempting to seek an advantage of the slowdown in the real estate sector and it is apparent from the facts of the present case that the main purpose of the present complaint is to harass the respondents by engaging and igniting frivolous issues with ulterior motives to pressurize the respondents.

h. That the present complaint is an arm-twisting method employed by the complainants to fulfil the illegitimate, illegal and baseless claims so as to get benefit from the respondents. Thus, the present complaint is without any basis and no cause of action has arisen, till date, in favour of them and against the respondents and hence the complaint deserves to be dismissed.

i. It is humbly submitted that the complainants be treated as 'co-promoter' and not as an 'allottee', as they have invested in the project just to earn profits from the commercial unit. That the sole motive of them is to get profits from the project by the way of assured returns scheme. Thus, they shall be treated as co-promoter in the project and in no eventuality, they be called or allowed to come within the definition of an "allottee" before this hon'ble authority under the definition and provisions of RERA Act, 2016 and, thus, on this ground alone, the present complaint is not maintainable in the eyes of law before the hon'ble authority and is liable to be rejected.

j. That it is brought to the knowledge of the hon'ble authority that the complainants are guilty of placing untrue facts and are attempting to hide the true colour of the intention of their. That before signing the agreement, they were well aware of the terms and conditions as imposed upon the parties under the agreement & the addendum and only after thorough reading, the said agreement & addendum got signed and executed. They are misrepresenting the true contents of the agreement & addendum to extract more money from the respondents. The

respondents have fulfilled all the obligations so far, as per the said agreement.

k. It is further submitted that the complainants are making false statement before the hon'ble authority, and all the averments made by them are to be put to strict proof thereof. Thus, it is evident that the entire case of is nothing but a web of lies and the false and frivolous allegations made against the respondents are nothing but an afterthought hence the present complaint filed by the complainants deserves to be dismissed with heavy costs. It is pertinent to mention here that complainant's act is also violative of the provisions of Banning of Unregulated Deposit Act,2019 as the complaint falls within the definition of "deposit takers", as per the Section 2(6) of 'Banning of Unregulated Deposit Schemes Act, 2019 and the said ordinance bans such deposits, thereby also bars such assured returns.

l. The BBA dated 28.02.2009 & addendum dated 27.02.2011, never intended to give possession to the complainants and the said fact is ample clear due to absence of clause of possession in the BBA. The BBA dated 28.02.2009 & addendum dated 27.02.2011 do not contain a single clause as to the due date of delivery of possession and rather the only clause is of leasing arrangements. Thus, the prayer of the complainants seeking possession, is illegal and the present complaint ought to be dismissed. Further, the prayer of compensation as demanded in the complaint, does not fall within the jurisdiction of the hon'ble authority and that too deserves to be dismissed.

14. 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

15. The respondents have raised preliminary objection regarding jurisdiction of authority to entertain the present complaint. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

16. 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

17. While filing the petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 28.02.2009, the claimants have also sought assured returns on monthly basis as per clause 2 of the agreement of Rs 32000/- per sq. ft. of super area per month till the date of offer for handing over or completed unit to the allottee. It is pleaded that the respondents have not complied with the terms and conditions of the agreement. Though for some time, the amount of assured returns was paid but later on, the

respondents refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019 (herein after referred to as the Act of 2019). But that Act does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act. However, the plea of respondents is otherwise and who took a stand that though 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.

18. 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

19. 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 treatment in books of accounts of the promoter and for the purposes of income tax. Then, in the latest pronouncement on this aspect in case ***Jaypee Kensington Boulevard Apartments Welfare Association and Ors. vs. NBCC (India) Ltd. and Ors.*** (24.03.2021-SC): MANU/ SC/0206 /2021, the same view was followed as taken earlier in the case of ***Pioneer Urban Land Infrastructure Ld & Anr.*** with regard to the allottees of assured returns to be financial creditors within the meaning of section 5(7) of the Code. Then after coming into force the Act of 2016 w.e.f 01.05.2017, the builder is obligated to register the project with the authority being an ongoing project as per proviso to section 3(1) of the Act of 2017 read with rule 2(o) of the Rules, 2017. The Act of 2016 has no provision for re-writing of contractual obligations between the parties as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors.,*** (supra) as quoted earlier. So, the respondents/builders can't take a plea that there was no contractual obligation to pay the amount of assured returns to the allottee after the Act of 2016 came into force or that a new agreement is being executed with regard to that fact. When there is an obligation of the promoter against an allottee to pay the amount of assured returns, then he can't wriggle out from that situation by taking a plea of the enforcement of Act of 2016, BUDS Act 2019 or any other law.

20. 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.*

21. 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;

22. 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.

23. 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.

24. 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.

25. 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.

26. 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.

27. 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.

28. It is not disputed that the respondents are 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.

29. On consideration of documents available on record and submissions made by the complainants and the respondents, the authority is satisfied that the respondents are in contravention of the provisions of the Act. By virtue of addendum to the agreement dated 28.02.2009, the respondents are liable to pay assured returns. The assured return in this case is payable from the date of making 100% of the total sale consideration till completion of the building. By way of assured return, the promoter has assured the allottees that they would be entitled for this specific amount till offer of possession. 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 36 months after the date of completion of the project or till the date of unit is put on lease whichever is earlier. The authority directs the respondents/promoters to pay assured return at the rate of Rs.32,000/- per sq.ft. till completion of the building from the date of assured return has not been paid i.e., October 2018 as per the terms and conditions of buyer's agreement dated 28.02.2009.

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 respondents are directed to pay the arrears of amount of assured return at the rate of Rs. 32,000/- per month (i.e., 64/- per sq.ft. of the super area) to the complainants from the date

the payment of assured return has not been paid i.e., October 2018 till the date of completion of the building. After completion of the construction of the building, the respondents/builders would be liable to pay monthly assured returns @64/- per sq. ft. of the super area up to 36 months or till the unit is put on lease whichever is earlier.

ii. The respondents are 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 respondents are directed to execute the conveyance deed within a period of 3 months from the date of receipt of occupation certificate obtained by the competent authority.

iv. The respondents 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