BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**3582 of 2021**
Date of filing complaint:		**14.09.2021**
First date of hearing	:	**29.09.2021**
Date of decision	:	**05.04.2022**

1. Renu Wadhwa
2. Anil Wadhwa

Both RR/o:- H. No: J-993, Palam Vihar, Gurugram-122017, Haryana. **Complainants**

Versus

1. M/s Vatika Limited

R/o: Vatika Triangle, 7th floor, Sushant Lok-I, Block A, MG Road, Gurugram-122002. **Respondent**

CORAM:

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

APPEARANCE:

Mr. Daggar Malhotra	Advocate for the complainants
Ms. Dhruv Dutt Sharma	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
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	25.06.2011 (page 21 of BBA)
7.	Unit no.	220A, 2nd floor (page 24 of complaint)
8.	Unit measuring	500 sq. ft.
9.	New unit no.	COM-012, tower F-4-426, admeasuring 500 sq.ft. (page 48 of complaint)
10.	Total consideration	Rs. 24,37,500/- As per clause 1 of BBA (page 24 of complaint being sale consideration)
11.	Total amount paid by the complainants	Rs. 24,37,500/- As per clause 2 of BBA (Page 24 of complaint being sale consideration)

12.	Due date of delivery of possession	25.06.2014 as per clause 2 of the builder buyer's agreement (page 24 of complaint)
13.	Provision regarding assured return (addendum to the agreement dated 25.06.2011)	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 is ready 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 25.06.2011 a. Till completion of the building: Rs. 71.50/- per sq.ft. b. After completion of the building: Rs 65/- per sq.ft. You would be paid an assured return 25.06.2011 on a monthly basis before the 15th of each calendar month. The obligation of the developer shall be to lease the premises 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 then Rs 65/- per sq.ft. Rs 120/- per sq.ft. for every Rs 1/- by which

		achieved rental is less then Rs 65/- per sq.ft. 2. If the achieved rental is higher then Rs. 65/- per sq.ft. then 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/- per sq.ft. for every rupee of additional rental achieved in the case of balance 50% of increased rentals. (page 40 of complaint).
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	7 years 2 month 9 days

B. Facts of the complaint

3. On, 20.06.2011, the complainants made an application for the allotment of the said commercial unit no. 220A in respondent's project "Vatika Trade Centre". Total sum of Rs. 25,00,266/- was paid by the complainants vide one cheque dated 20.06.2011 and the same duly encashed by the respondent. The complainants and respondent executed the BBA dated 25.06.2011 alongwith annexure A (addendum to the agreement). No specific clause dealing with possession date was mentioned 25.06.2014 vide clause 2 mentions as follows: "The Developer will complete the construction of the said complex within 3 years from the date of execution of BBA". As per clause 2, the developer undertook to make assured return payment as per annex A (Rs. 71.50/- per sq.ft. till offer of possession) per month by way of committed return for

the period of construction. Vide the same clause, developer undertook to continue to pay to the allottee the within mentioned assured return until the unit was offered by the developer for possession as the committed returns component.

4. The respondent provided a letter dated 28.12.2011 to the complainants relating to the relocation of the project and change of name of project from "Vatika Trade Centre" to "Vatika INXT City Centre". Addendum to BBA dated 08.02.2012 was signed in view of change of name and location of the project. The terms regarding completion of construction and assured returns remained the same. The unit no. changed to COM-012- Tower-F-4-426. The respondent failed to complete construction by the due date. The due date of completion of construction of the said complex within 3 years from the date of execution of BBA." On 27.03.2018, complainants received communication from the respondent that the construction of the project has been completed and so it would be paying assured returns @Rs. 65/- per sq.ft. That, in reality, there is no completion of construction till date and the respondent unilaterally decided to treat it as completed. Infact, till date only 60% construction has been done. The respondent paid assured return @Rs.65/- per sq.ft. till September 2018. Since October 2018, the respondent has stopped paying any assured returns amount to the complainants at all. The respondent with malafide intention sent across to the complainants a completely lopsided addendum asking the complainants to give away their rights to assured returns, promised lease rentals and completion date of the project and asking the complainants to be liable to maintenance 1st July

onwards all of which is completely illegal and in violation of the BBA. The respondent has been pressurizing the complainants into signing such a one-sided addendum. This addendum has not been signed by the complainants. There is a delay of more than 7 years in completion of construction of the unit and no possession clause is mentioned in the BBA. Even after 10 years, let alone possession even construction has not been completed.

C. Relief sought by the complainants:

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

   i. Direct the respondent to pay interest for delay on the total amount paid by the complainants @prescribed rate of interest for every month of delay, till the date of actual handing over of the possession of the unit.

   ii. Direct the respondent to pay assured returns to the complainants as per clause 2 of the BBA readwith the annexure A i.e., @Rs. 71.50/- per sq.ft. per month from October 2018 till offer of possession.

   iii. Direct the respondent to pay the outstanding balance amount of assured returns from 27.03.2018 till September, 2018 as the respondent unilaterally reduced the rate of assured returns from Rs. 71.50 sq.ft. to Rs. 65/- sq.ft. per month during this period unilaterally treating the project construction complete.

   iv. Direct the respondent to produce proof of completion of construction as alleged by respondent by way of completion

certificate or such other document as this hon'ble authority may deem fit in this situation.

v. Direct the respondent to not illegally charge maintenance from the complainants till the time the unit is complete and possession offered and leased out.

6. 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 respondent

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

a. The complaint filed by the complainants before the ld. authority, besides being misconceived and erroneous, is untenable in the eyes of law. The complainants have misdirected themselves in filing the above captioned complaint before this ld. authority as the relief being claimed by the complainants, besides being illegal, misconceived and erroneous, cannot be said to even fall within the realm of jurisdiction of this ld. authority. It would be pertinent to make reference to some of the provisions of the Act, 2016 and Rules 2017, made by the Government of Haryana in exercise of powers conferred by sub-section 1 read with sub-section 2 of section 84 of 2016 Act. Section 31 of 2016 Act provides for filing of complaints with this ld. authority or the adjudicating officer. Sub-section (1) thereof provides that any aggrieved person may file a complaint with the authority or the

adjudicating officer, as the case may be, for any violation or contravention of the provisions of 2016 Act or the rules and regulations made there under against any promoter, allottee or real estate agent, as the case may be. Sub section (2) provides that the form, manner and fees for filing complaint under sub-section (1) shall be such as may be prescribed. Rule 28 of 2017 Haryana Rules provides for filing of complaint with this ld. authority, in reference to section 31 of 2016 Act. Sub-clause (1) *inter alia*, provides that any aggrieved person may file a complaint with the authority for any violation of the provisions of 2016 Act or the rules and regulations made thereunder, save as those provided to be adjudicated by the adjudicating officer, in form 'CRA'. Significantly, reference to the "authority", which is this ld. authority in the present case and to the "adjudicating officer", is separate and distinct. "adjudicating officer" has been defined under section 2(a) to mean the adjudicating officer appointed under sub-section (1) of section 71, whereas the "authority" has been defined under section 2(i) to mean the real estate regulatory authority, established under sub-section (1) of section 20.

Apparently, under section 71, the adjudicating officer is appointed by the authority in consultation with the appropriate government for the purpose of adjudging compensation under sections 12, 14, 18 and 19 of the 2016 Act and for holding an enquiry in the prescribed manner. A reference may also be made to section 72, which provides for factors to be taken into account by the adjudicating officer while adjudging the quantum of

compensation and interest, as the case may be, under section 71 of 2016 Act. The domain of the adjudicating officer cannot be said to be restricted to adjudging only compensation in the matters which are covered under sections 12, 14, 18 and 19 of the 2016 Act. The inquiry, as regards the compliance with the provisions of sections 12, 14, 18 and 19, is to be made by the adjudicating officer. This submission find support from reading of section 71(3) which *inter alia*, provides that the adjudicating officer, while holding inquiry, shall have power to summon and enforce the attendance of any person and if on such inquiry he is satisfied that the person had failed to comply with the provisions of any of the sections specified in sub-section (1) he may direct to pay such compensation or interest, as the case may be, as he thinks fit in accordance with the provisions of any of those sections. Suffice it is to mention that the sections specified in sub-section (1) of section 71 are sections 12, 14, 18 and 19.

Apparently, in the present case, the complainants are seeking reliefs which, from reading of the provisions of the 2016 Act and 2017 Rules, especially those mentioned hereinabove, would be liable for adjudication, if at all, by the adjudicating officer and not this ld. authority. Thus, on this ground alone the complaint is liable to be rejected.

b. That further, without prejudice to the aforementioned, even if it was to be assumed though not admitting that the filing of the complaint is not without jurisdiction, even then the claim as

raised cannot be said to be maintainable and is liable to be rejected for the reasons as ensuing

c. That the reliefs sought by the complainants appear to be on misconceived and erroneous basis. Hence, the complainants are estopped from raising the pleas, as raised in respect thereof, besides the said pleas being illegal, misconceived and erroneous.

d. That the complainants by way of present complaint is also seeking the relief of recovery of alleged pending assured return amount. However, it is submitted that the ld. authority does not have jurisdiction to decide upon the amount of assured return which the ld. authority has already held in its various judgments. It is crystal clear that the complainants are not 'allottees', but '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. The complainants after its own independent judgment have booked the said unit. The complainants have agreed for leasing arrangement wherein complainants have booked the said commercial unit for earning profit and is meant for leasing only and not for personal occupation.

Therefore, the present complaint does not fall within the purview of the hon'ble authority.

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

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

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

"As already decided by the authority in complaint no.141 of 2018 titled as Brhimjeet Versus M/s Landmark Apartments Pvt. Ltd. no case is made out by the complainant. Counsel for respondent has placed on record a Supreme Court judgment dated 25.7.1997 vide which he has pleaded the doctrine of precedent. Since the authority has taken a view much earlier as stated above, the authority cannot go beyond the view already taken. In such type of assured return schemes, the authority has no jurisdiction, as such the complainant is at liberty to approach the appropriate forum to seek remedy. However, at the instance of the complainant, a direction is issued to the respondent/builder to complete the construction work within the time framed as per MoU and fulfil his committed liability."

In 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, thus, liable to be dismissed on this ground only.

e. That due to the evolving policies, regulations and legal framework governing real estate investments, the company also informed the clients of commercial units that as per the guidelines 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. It is submitted that the respondent duly paid the assured return till September 2018 amounting to Rs. 34,06,958/- and it was only due to the above-mentioned Ordinance and Act, the respondent suspended all return based sales and stopped making payments towards the assured returns. Thus, in view of the above-mentioned Ordinance and Act, the assured return is not payable.

f. That the complainants are not "allottees" within the meaning of the RERA Act. It is submitted that the complainants are real estate investors who have made the booking with the respondent only with an intention to earn assured return from the respondent. As per clause 32.1 and 32.2 of the builder buyer agreement r.w. addendum to the agreement, complainants have agreed for leasing arrangement wherein complainants have booked the said commercial unit for earning profit and is meant for leasing only and not for personal physical occupation or use. Therefore, the present complaint does not fall within the purview of the hon'ble authority.

8. 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

9. 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

10. 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

11. 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 Maintenance charges

12. The complainants have seeking relief of not to illegally charge maintenance from them till the time the unit is complete and possession offered and leased out.

13. The Real Estate (Regulation and Development) Act, 2016 mandates under section 11 (4) (d), that the developer will be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees. Section 19(6) of the RERA also states that every allottee, who has entered into an agreement for sale, to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale/BBA and shall pay within stipulated time and appointed place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent and other charges, if any.

14. The next question arises herein as to from which date the maintenance charges can be charged or made applicable. In this regard the authority places reference to the State Consumer Disputes Redressal Forum decision in ***Shri Anil Kumar Chowdhury vs DLF Ltd.*** on 16th August 2018, wherein it has been held as under:

> *"Maintenance Charge and Holding Charge:-*
> *According to Clause 10 or Clause 14.3 of the Agreement, the apartment allottee shall be liable to pay the maintenance charge on and from the date on which actual physical possession is taken or on the expiry of thirty (30) days from the date of issuance of the Notice of Possession, whichever is earlier.*
> *As per terms of the Agreement, the OP/developer has no authority to demand maintenance for any period prior to actual physical possession being handed over. Equally the OP/developer shall have no authority to demand any holding charge as the delay in giving possession is on their own part and they are wrongfully withholding possession till date. However, the complainant will be liable to make payment on account of government charges only upon receiving physical possession of the flat and car parking space from the OP.*
> *So far as claim of the complainant for common facilities or benefit like - swimming pool, tennis court etc. are concerned, the same cannot be entertained because prior to lodging complaint, no permission was sought for in accordance with Section 12(1)(c) of the Act to file the complaint in a representative capacity. Therefore, there is hardly any reason to discuss about the common areas and facilities of the complex, as alleged by the complainant.....*
> *In view of the discussion above, the complaint is allowed on contest with the following directions:-*
> *The Opposite Party is directed to deliver possession and to execute the Sale Deed in favour of the complainant on payment of stamp duty and registration charges within 90 days from date after obtaining Completion Certificate from the competent authority;*

.....

The Opposite Party is directed not to claim any amount under the head of
(a) cost of increased in area;
(b) pro-rate charges for arranging supply of electrical energy and
(c) Other costs including government charges from final statement of accounts,
(d) maintenance for any period till handing over possession and
(e)any holding charge whatsoever for withholding possession;.....".

15. In yet another judgement titled as ***Dr. Mudit Kumar vs Emaar MGF Land Limited on 28th January, 2020*** passed by the State Commission, Punjab wherein it has been held that the promoter is not entitled to charge maintenance charges till the handing over of the possession of the plot to the allottee post receipt of the OC only. However, the amount accredited towards maintenance charges should be maintained in a corpus and the builder cannot transfer the proceeds or maintenance charges received from allottees to his company's account, because such money received for maintenance is not his income in any way. The logic behind it, is that a builder is only a facilitator for a limited amount of time and the onus of taking up the responsibility of maintenance of the flat and its premises is on the residents' welfare association (RWA).

16. In the light of the above-mentioned reasoning, the allottee shall be liable to pay the maintenance charge on and from the date on which actual physical possession is taken or on the expiry of thirty (30) days from the date of issuance of the notice of possession, whichever is earlier.

F. II Assured return

17. While filing the petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 25.06.2011, the complainants 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 was also agreed as per clause 32.2 that after completion of construction the developer would pay to the buyer Rs. 65/- per sq.ft. super area of the said unit per month as minimum guaranteed rent for the first 36 months after the date of completion of the project or till the date the said unit is put on lease, whichever is earlier. It is pleaded by the complainants 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 they paid the amount of assured return upto the year 2018 but did not pay assured return amount after coming into force of the Act of 2019 as the same was declared illegal.

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 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.

20. It is pleaded on behalf of respondent/builder 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 advarce, 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.

F. II Delay possession charges

29. 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."*

30. The builder buyer agreement dated 25.06.2011 was executed between the parties. As per clause 2 of the builder buyer agreement, the possession was to be handed over by 25.06.2014. The clause 2 of the builder buyer agreement 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 Alloctee 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 .

31. 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.

32. **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.*

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

34. 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%.

35. 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;"

36. 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 clause 2 of the agreement executed between the parties on 25.06.2011, the possession of the subject unit was to be delivered within stipulated time i.e., 25.06.2014. However now, the proposition before it is as to whether an 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?

37. 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 offer of possession. 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. 35,750/- per month whereas the delayed possession charges are payable approximately Rs. 18,890/- per month. By way of assured return, the promoter has assured the allottee that he will be entitled for this specific amount till the completion of building. Accordingly, the interest of the allottee is protected even after the due date of possession is over as the assured returns are payable till offer of possession @Rs. 71.50/- per sq. ft. per month and @ Rs. 65/- per sq. ft. per month of super area as minimum guarantee rent up to 36 months from the date of completion of the said building or the said unit 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 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.

38. 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 offer of possession/till completion of building (as applicable), then the allottee shall be entitled to assured return or delayed possession charges, whichever is higher.

The authority directs the respondent/promoter to pay assured return from the date the payment of assured return has not been paid till the completion of the 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 36 months 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 her interest has been protected by granting assured returns till the completion of the construction of the building and thereafter also upto 36 months at different rate from the date of construction of the said building or the said unit is put on lease whichever is earlier and the authority 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. Since assured returns being on higher side are allowed than delay possession charges so respondent is directed to pay the arrears of amount of assured return at the rate i.e., Rs. 71.50/- per month 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 respondent/builder would be liable to pay monthly assured returns @65/- per sq. ft. of the super area up to 36 months or till the unit is put on lease whichever is earlier.

ii. The respondent is directed to pay assured return @ Rs.71.50/- per sq. ft from March 2018 uptil September 2018 from which the assured return amount was reduced.

iii. 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.

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