BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**5077 of 2021**
Date of filing complaint:		**24.02.2021**
First date of hearing	**:**	**02.02.2022**
Date of decision	**:**	**05.04.2022**

Hanita Kaushal
R/o: - 65, Asopalav Bunglow, behind Zydus Hospital, Sarkhej- Gandhi Nagar Highway, Thaltej, Gujrat, Ahmedabad. **Complainant**

Versus

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

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

APPEARANCE:
Mr. Akhil Dehlan Advocate for the complainant
Ms. Ankur Berry Advocate for the respondent

ORDER

1. The present complaint has been filed by the complainant/allottee 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 complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Name and location of the project	"Vatika 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	01.01.2011 (page 21 of BBA)
7.	Unit no.	235, 2nd floor, tower-A (page 24 of complaint)
8.	Unit measuring	1000 sq. ft.
9.	New unit no.	501, 5th floor, tower F admeasuring 500 sq.ft. (as per letter dated 27.03.2018 at page 33 of reply)
10.	Total consideration	Rs. 50,00,000/- As per clause 1 of BBA (page 24 of complaint being sale consideration)
11.	Total amount paid by the complainant	Rs. 50,00,000/- As per clause 2 of BBA (Page 24 of complaint being sale consideration)
12.	Due date of delivery of possession	01.01.2014 (As per clause 2 of the builder buyer's agreement (page 24 of complaint)

13.	Provision regarding assured return	**Annexure A: Addendum to the agreement dated 01.01.2011** 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 01.01.2011 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 w.e.f. 01.01.2011 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 than Rs. 65/- per sq.ft. than you shall be refunded @ Rs. 120/- per sq.ft. for every Rs. 1/- by which achieved rental is less than Rs. 65/- per sq.ft. 2. If the achieved rental is higher than Rs. 65/- per sq.ft. than 50% of the increased rental shall accrue to you free of any additional sale consideration.

		However, you will be requested to pay additional sale consideration @Rs.120/- per sq.ft. for every rupee of additional rental achieved in the case of balance 50% of increased rentals.
14.	Date of offer of possession to the complainant	**Not offered**
15.	Occupation certificate	**Not obtained**
16.	Delay in handing over till date of decision i.e., 05.04.2022	8 years 3 month 4 days

B. Facts of the complaint

3. The complainant in December, 2010 made an application for allotment of a commercial unit admeasuring 1000 sq. ft. in the upcoming project of the respondent namely "Vatika Trade Centre" being developed at NH-8 with committed return plan and paid a sum of Rs. 2,00,000/- alongwith the application. On 01.01.2011 a builder buyer agreement was executed between the parties whereby the complainant was allotted unit no.235 located on 2nd floor of tower A in "Vatika Trade Centre" for a total consideration of Rs.50,00,000/- The entire consideration was paid by the complainant as recorded and acknowledged in the builder buyer agreement. Since entire consideration stood paid the respondent assured committed return to the complainant in the builder buyer agreement to the following effect:

> *"The Developer will complete the construction of the said complex within three (3) years from the date of execution of this agreement. Further, the Allottee has paid full sale consideration on signing of this agreement, the Developer further undertakes to make payment as per Annex-A 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."

4. The allotment of the complainant however was relocated by the respondent vide letter dated 27.07.2011 to INXT City Centre. The complainant was allotted unit no.501, tower F, Vatika INXT City Centre, Gurugram. The commercial terms and conditions agreed to in the builder buyer agreement dated 01.01.2011 were kept intact and binding between the parties.

5. The respondent has defaulted in payment of the committed returns as assured under the letter/addendum agreement dated 01.11.2011. There have been delays in payment of the amounts till such time they were paid, however, the respondent has defaulted to pay the said amount w.e.f. October, 2018 till date. No reasons whatsoever have been assigned for not paying the assured return despite enjoying/utilizing the 100% sale consideration paid by the complainant against the unit. The complainant made several visits to the office of the respondent to enquire about the completion of the project and also for payment of the committed returns. The complainant did not receive any satisfactory response. It is therefore apparent that the respondent is in breach of their obligations and responsibilities of the terms and conditions of the agreement. The respondent taking advantage of the complainant being a widow and not staying in National Capital Region (NCR) have been requiring the complainant to sign addendums to postpone the payment of the committed returns. The last of such

addendum was made on 04.10.2021, which the complainant did not sign.

6. The respondent has failed to handover the actual possession of the unit to the complainant and execute a conveyance deed in favour of the complainant to assign the complainant a marketable right, title and interest in the unit. The complainant in the absence of any satisfactory response from the respondent are left with no other alternative is filing the present complaint, inter-alia, seeking payment of committed returns in a sum of Rs.71.50/- per sq. ft. per month w.e.f. October, 2018 till the date of completion of the building and handing over possession of the unit to the complainant and transferring a marketable right, title and interest in favour of the complainant by executing a conveyance deed/sale deed.

C. Relief sought by the complainant:

6. The complainant has sought following relief(s):

i. Direct the respondent to pay committed returns of Rs.71.50/- per sq. ft. per month starting from October, 2018 until possession and execution of the conveyance/sale deed of the unit in favour of the complainant.

ii. Direct the respondent to execute the sale deed/conveyance deed of the unit no.501, tower F, Vatika INXT City Centre, Gurugram in favour of the complainant and simultaneously handover possession of the Unit to the complainant; alternatively.

7. 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

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

   a. It is submitted that the present complaint is not maintainable or tenable in the eyes of law. The complainant has misdirected himself in filing the above captioned complaint before this ld. authority as the reliefs being claimed by the complainant cannot be said to fall within the realm of jurisdiction of this ld. authority. 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 Board cannot run, operate, continue an assured return scheme. The implications of enactment of BUDS Act read with the Companies Act, 2013 and Companies (Acceptance of Deposits) Rules, 2014, resulted in making the assured return/committed return and similar schemes as unregulated schemes as being within the definition of "Deposit". 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 have become illegal by the operation of law and the respondents cannot be made to run a scheme which has become infructuous by law. Also, it is important to reply upon clause 35 of the BBA dated 01.01.2011 which specifically caters to situation where certain provisions of the BBA becomes inoperable due to application of law.

b. The complainant has not come before the hon'ble authority with clean hands. That the complaint has been filed by them 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 them 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.

c. It is pertinent to mention that the present complaint is not maintainable before the hon'ble authority as it is apparent from the prayer sought in the complaint. Further, it is crystal clear from reading the complaint that the complainant is 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.

d. 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.

e. 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 hcs no jurisdiction, as such the Complainants are at liberty to approach the appropriate forum to seek remedy".

g. That further in the matter of ***Jasjit Kaur Grewal vs. M/s MVL Ltd.*** (complaint no. 58 of 2018), the hon'ble Real Estate Regulatory Authority, Gurugram has taken the same view of not entertaining any matter related to "collective investment scheme" without the approval of SEBI. That the hon'ble authority in the said order stated.

"Keeping in view the facts and circumstances of the cause, even the basic issue whether it is a real estate project or collective investment scheme has been challenged in the SAT in appeal and the SEBI has already held that this being a collective investment scheme is without their approval. As the matter is

already with the SEBI/SAT, accordingly there is no case left for the present before this authority and to continue further proceedings in the matter. Let the issue be decided by the SEBI/SAT. Once the SAT set aside the order of the SEBI then only allottee may come to us for proceedings under the RERA Act."

h. That the complainant had come before this hon'ble authority with unclean hands. The actual reason for filing of the present complaint stems from the changed financial valuation of the real estate sector, in the past few years and the allottee malicious intention to earn some easy buck. The covid pandemic has given people to think beyond the basic legal way and to attempt to gain financially at the cost of others. The complainant had instituted the present false and vexatious complaint against the respondent who has already fulfilled its obligation as defined under the BBA dated 01.01.2011. It is pertinent to mention here that for the fair adjudication of grievance as alleged by the complainant, detailed deliberation by leading the evidence and cross-examination is required, thus only the civil court has jurisdiction to deal with the cases requiring detailed evidence for proper and fair adjudication.

i. It is submitted that the complainant entered into an agreement i.e., BBA dated 01.01.2011 with respondent owing to the name, goodwill and reputation of the respondent. That according to the terms of the BBA dated 01.01.2011 with respondent owing to the name, goodwill and reputation of the respondent. That according to the terms of the BBA dated 01.01.2011, the construction of unit was completed and the same was duly

informed to the complainant vide letter dated 27.03.2018. That due to external circumstance which were not in control of the respondent, minor timeline alterations occurred in completion of the project. That even though the respondents suffered from setback due to external circumstances, yet the respondents managed to complete the construction. It is extremely pertinent to submit that possession of the units in the commercial complex were never intended to be handed over to the complainant. The BBA dated 01.01.2011 only contemplates "completion of construction' and no 'possession' clause is mentioned in the BBA. Thus, the complainant never intended to take the possession of the unit and the project was intended for virtual possession only.

j. The present complaint of the complainant had been filed on the basis of incorrect understanding of the object and reasons of enactment of the RERA Act, 2016. The legislature in its great wisdom, understanding the catalytic role played by the real estate sector in fulfilling the needs and demands for housing and infrastructure in the country and the absence of a regulatory body to provide professionalism and standardization to the said sector and to address all the concerns of both buyers and promoters in the real estate sector, drafted and notified the Act, 2016 aiming to gain a healthy and orderly growth of the industry. The Act has been enacted to balance the interests of consumer and promoter by imposing certain responsibilities on both. Thus, while section 11 to section 18 of the Act, 2016 describes and prescribes the function and duties of the

developer, section 19 provides the rights and duties of allottees. Hence, the Act 2016 was never intended to be biased legislation preferring the allottees, rather the intent was to ensure that both the allottee and the developer be kept at par and either of the party should not be made to suffer due to act and omission of part of the other.

k. The complainant is 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 respondent by engaging and igniting frivolous issues with ulterior motives to pressurize the respondent. Thus, the present complaint is without any basis and no cause of action has arisen till date in favour of the complainant and against the respondent and hence, the complaint deserves to be dismissed. It is brought to the knowledge of this hon'ble authority that the complainant is guilty of placing untrue facts and is attempting to hide the true colour of the intention of the complainant. That before signing the BBA the complainant was well aware of the terms and conditions as imposed upon the parties under the BBA and only after thorough reading, the said agreement got signed and executed. That further the hurdles faced by the respondent in execution of the development activities were informed to the complainant and nothing was hidden by the respondent.

l. The various contentions raised by the complainant is fictitious, baseless, vague, wrong and created to misrepresent and mislead

this hon'ble authority, for the reasons stated above. It is further submitted that none of the relief as prayed for by the complainant is sustainable, in the eyes of law. Hence, the complaint is liable to be dismissed with imposition of exemplary cost for wasting the precious time and efforts of this hon'ble authority. The present complaint is an utter abuse of the process of law, and hence deserves to be dismissed.

9. 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

10. 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

11. 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 complainant at a later stage.

F. Findings on the relief sought by the complainants:

F.I Assured return

12. While filing the petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 01.01.2011, 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 completion of building. 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 respondents have not complied with the terms and conditions of the agreement. Though for some time the amount of assured returns was paid but later on, the respondents refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019 (herein after referred to as the Act of 2019). But that Act does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act. However, the plea of respondents is otherwise and who took a stand that though they paid the amount of assured return upto the year 2018 but did not pay assured return amount after coming into force of the Act of 2019 as the same was declared illegal.

13. 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

14. 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.

15. 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.*

16. 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;*

17. 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.

18. 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. 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.

24. On consideration of documents available on record and submissions made by the complainant and the respondent, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of addendum to the agreement dated 01.01.2011, the respondent is 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 allottee that he 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 respondent/promoter to pay assured return at the rate of 71.50/- 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 01.01.2011.

G. Directions of the authority

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

i. The respondent is directed to pay the arrears of amount of assured return at the rate of Rs. 71.50/- per sq.ft. of the super area to the complainant 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 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 complainant and failing which that amount would be payable with interest @7.30% p.a. till the date of actual realization.

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

iv. The respondent shall not charge anything from the complainant 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