BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**700 of 2021**
Date of filing complaint:		**09.02.2021**
First date of hearing	**:**	**07.04.2021**
Date of decision	**:**	**05.04.2022**

Meenakshi Kumar
R/o: Tower 3, 603, Fresco Nirvana Country, Sector 50, Gurgaon **Complainant**

Versus

M/s Vatika Limited
R/o: Vatika Triangle, 5th floor, Sushant Lok-I, Block A, MG Road, Gurugram-122002. **Respondent**

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

APPEARANCE:
Ms. Ritu Kapoor Advocate for the complainant
Mr. Dhruv Dutt Sharma 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 allottee as per the agreement for sale executed inter-se them.

A. Project and unit related details

2. The particulars of the project, the details of sale consideration, the amount paid by the 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	19.04.2012 (page 26 of BBA)
7.	Unit no.	339, 3rd floor, tower-A (page 28 of complaint)
8.	Unit measuring	500 sq. ft.
9.	New unit no.	214, 2nd floor, block D (page 49 of reply)
10.	Total consideration	Rs. 39,00,000/- As per SOA dated 23.07.2019 (Annexure P7/page 48 of complaint)
11.	Total amount paid by the complainant	Rs. 40,43,375/- As per SOA dated 23.07.2019 (Annexure P7/page 48 of complaint)
12.	Due date of delivery of possession	19.04.2015 *Note: Possession clause is not given in file. So, taken from another file of same project

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

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

		super area of the said commercial unit for every one rupee increase in the lease rental over and above the said minimum lease rental of Rs. 65/- per sq.ft. super area per month. This provision is confined only to the first term of the lease and shall not be applicable in case of second and subsequent leases/lease terms of the said commercial unit. *(vii).....* *(viii).....* *(ix).....* *(x).....* *(xi).....* *(xii).....* *(xiii).....* *(xiv).....*
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	7 years 11 month

B. Facts of the complaint

3. The complainant initiated the booking process on 14.02.2012, by presenting a cheque to M/s Vatika Limited, of sum of Rs. 5,00,000/. Thereafter, on 31.03.2012 two more payment of sum of Rs. 27,00,000/- and Rs. 8,00,425/- respectively were made to M/s Vatika Limited, to fulfil payment requirement of the agreed total consideration of the unit and applicable taxes. After the payment made by the complainant builder buyer's agreement, through authorized representative Mr. Gautam Bhalla and Meenakshi Kumar on 19.04.2012, in which unit no. tower A 339. In the BBA unit no. tower A-339, third floor measuring 500 sq.ft. in "India Next City Centre" the commercial project of the company situated in

Sector 83, NH-8, @Rs. 7,800/- per sq.ft. of the entire super area i.e., rupees 39,00,000/- and service tax of rupees 1,00,425/- for the "office space" with the assured return plan @Rs. 65/- (clause 12 sub clause (i) page no. 15 per sq.ft. i.e., 32,500/- per month of super area of the premises was decided in Gurgaon on total price of rupees 40,00,425/-.

4. It is pertinent to mention here that the unit no. tower A 339 was allotted in the allotment letter and in the BBA, it was unilaterally changed to unit no. D/2/214 without informing the complainant. This change was shocking for the complainant as she had booked unit no. tower A339 after making her choice based on the layout plan showed to her at the time of booking.

5. The complainant has submitted that TDS of sum of Rs. 40,950/- was adjusted from the assured return amount by the respondent on dated 29.12.2016. She has paid an amount to Rs. 40,43,375/- including taxes by 29.12.2016 to the respondent. The respondent has paid an amount of assured return of Rs. 29,250/- per month after deducting TDS @10% till 30.01.2018, thereafter the payment was stopped by the respondent. An email was sent by the complainant regarding assured return of unit no. COM-012-TOWER-D-2-214 in reply on 30th November 2018 the respondents promised to clear all the dues by June 2019 which is not received till date. She continuously requested for updated in 2018 and 2019 regarding assured return but received no response. The intention of the respondent and their officers and directors was malafide right from the beginning and has been aimed to cheat her.

6. The respondent is liable for acts and omissions and have misappropriated the said amount paid by the complainant and therefore, are liable to be prosecuted under the provisions of law.

C. Relief sought by the complainant:

The complainant has sought following relief(s):

i. Direct the respondent to clear all dues of assured return with interest.

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

The respondents have contested the complaint on the following grounds.

i. That the complaint filed by the complainant before the ld. authority, besides being misconceived and erroneous, is untenable in the eyes of law. The complainant has misdirected herself in filing the above captioned complaint before this ld. authority as the relief being claimed by her, 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 complainant is seeking relief 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.

ii. 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.

iii. That from perusal of the provisions of 2016 Act and the 2017 Haryana Rules and conjoint reading of the same, it is evident that the 'agreement for sale' that has been referred to under the provisions of 2016 Act and 2017 Haryana Rules, is the 'agreement for sale', as prescribed in annexure 'A' of 2017 Haryana Rules. Apparently, in terms of section 4(1), a promoter is required to file an application to the 'authority' for registration of the real estate project in such form, manner, within such time and accompanied by such fee as may be prescribed. The term 'prescribed' has been defined under section 2(z)(i) to mean prescribed by Rules made under the Act. Further, section 4(2)(g) of 2016 Act provides that a promoter shall enclose, alongwith the application referred to in sub-section 1 of section 4, a proforma of the allotment letter, agreement for sale, and conveyance deed proposed to be signed with the allottee. Section 13 (1) of 2016 Act *inter alia*, provides that a promoter shall not accept a sum more than 10% of the cost of the apartment, plot or building as the case may be, as an advance payment or an application fee, from a person, without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in

force. Sub-section 2 of section 13, *inter alia*, provides that the agreement for sale referred to in sub-section (1) shall be in such form as may be prescribed and shall specify certain particulars as mentioned in the said sub-section. Rule 8 of 2017 Haryana Rules categorically lays down that the agreement for sale shall be as per annexure 'A'. Suffice it is to mention that annexure 'A' forms part of the 2017 Haryana Rules and is not being reproduced herein for the sake of brevity, though reliance is being placed upon the same. Besides the aforementioned sections, a reference may be made to Rule 5 of 2017 Haryana Rules, which *inter alia*, provides that the authority shall issue a registration certificate with a registration number in form 'REP-III' to the promoter. Clause 2(i) of form 'REP-III' provides that the promoter shall enter into agreement for sale with the allottee as prescribed by the government. From the conjoint reading of the aforementioned sections/rules, form and annexure 'A', it is evident that the 'agreement for sale', for the purposes of 2016 Act as well as 2017 Haryana Rules, is the one as laid down in annexure 'A', which is required to be executed *inter se* the promoter and the allottee. It is a matter of record and rather a conceded position that no such agreement as referred to under the provisions of 2016 Act and 2017 Haryana Rules, has been executed between respondent and the complainant. Thus, in view of the submissions made above, no relief much less as claimed can be granted to the complainant. It is reiterated at the risk of repetition that this is without prejudice to the submission

that in any event, the complaint, as filed, is not maintainable before this ld. authority.

iv. The complainant by way of present complaint is 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 complainant is not "allottee but is an investor" who is only seeking assured return from the respondent, by way of present complaint, which is not maintainable under RERA. The complainant after its own independent judgment has booked the said unit. The complainant has agreed for leasing arrangement wherein complainant has 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.

vii. 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. 30,92,491/- 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.

viii. The complainant is not an "allottee" within the meaning of the RERA Act. It is submitted that the complainant is a real estate investor who has made the booking with the respondent only with an intention to earn assured return from the respondent. As per clause 3(iv) r.w. 12 of the builder buyer agreement, complainant has agreed for leasing arrangement wherein complainant has 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 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

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 complainant:

F.I Assured return

10. While filing the petition besides delayed possession charges of the allotted unit as per builder buyer agreement dated 19.04.2012, the claimants have also sought assured returns on monthly basis as per clause 12 of the agreement at the rate of Rs. 65/- per sq.ft. of super area per month till the completion of construction of the said building. It was also agreed as per clause 12 that the developer will pay to the buyer Rs. 65/- per sq.ft. super area of the said commercial unit as committed return for upto three years from the date of completion of construction of the said building or till the said commercial unit is put on lease, whichever is earlier. It is pleaded that the respondents have not complied with the terms and conditions of the agreement. Though for some time, the amount of assured returns was paid but later on, the respondents refused to pay the same by taking a plea of the Banning of Unregulated Deposit Schemes Act, 2019 (herein after referred to as the Act of 2019). But that Act does not create a bar for payment of assured returns even after coming into operation and the payments made in this regard are protected as per section 2(4)(iii) of the above-mentioned Act. However, the plea of respondents is otherwise and who took a stand that though it paid the amount of assured returns upto the year 2018 but did not pay the same

amount after coming into force of the Act of 2019 as it was declared illegal.

11. 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 allottee. Now, three issues arise for consideration as to:

i. Whether authority is within the jurisdiction to vary its earlier stand regarding assured returns due to changed facts and circumstances.

ii. Whether the authority is competent to allow assured returns to the allottees in pre-RERA cases, after the Act of 2016 came into operation,

iii. Whether the Act of 2019 bars payment of assured returns to the allottees in pre-RERA cases

12. While taking up the cases of ***Brhimjeet & Anr. Vs. M/s Landmark Apartments Pvt. Ltd.*** (complaint no 141 of 2018), and ***Sh. Bharam Singh & Anr. Vs. Venetain LDF Projects LLP"*** (complaint no 175 of 2018) decided on 07.08.2018 and 27.11.2018 respectively, it was held by the authority that it has no jurisdiction to deal with cases of assured returns. Though in those cases, the issue of assured returns was involved to be paid by the builder to an allottee but at that time, neither the full facts were brought before the authority nor it was argued on behalf of the allottees that on the basis of contractual obligations, the builder is obligated to pay that amount. However, there is no bar to take a different view from the earlier one if new facts and law have been brought before an adjudicating

authority or the court. There is a doctrine of "prospective overruling" and which provides that the law declared by the court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. A reference in this regard can be made to the case of ***Sarwan Kumar & Anr Vs. Madan Lal Aggarwal Appeal (civil) 1058 of 2003*** decided on 06.02.2003 and wherein the hon'ble apex court observed as mentioned above. So, now the plea raised with regard to maintainability of the complaint in the face of earlier orders of the authority in not tenable. The authority can take 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.

13. 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.

14. A perusal of the above-mentioned definition of the term 'deposit' shows that it has been given the same meaning as assigned to it under the Companies Act, 2013 and the same provides under section 2(31) includes any receipt by way of deposit or loan or in any other form by a company but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India. Similarly rule 2(c) of the Companies (Acceptance of Deposits) Rules, 2014 defines the meaning of deposit which includes any receipt of money by way of deposit or loan or in any other form by a company but does not include.

i. as a advance, accounted for in any manner whatsoever, received in connection with consideration for an immovable property

ii. as an advance received and as allowed by any sectoral regulator or in accordance with directions of Central or State Government;

15. So, keeping in view the above-mentioned provisions of the Act of 2019 and the Companies Act 2013, it is to be seen as to whether an allottee is entitled to assured returns in a case where he has

deposited substantial amount of sale consideration against the allotment of a unit with the builder at the time of booking or immediately thereafter and as agreed upon between them.

16. The Government of India enacted the Banning of Unregulated Deposit Schemes Act, 2019 to provide for a comprehensive mechanism to ban the unregulated deposit schemes, other than deposits taken in the ordinary course of business and to protect the interest of depositors and for matters connected therewith or incidental thereto as defined in section 2 (4) of the BUDS Act 2019 mentioned above.

17. It is evident from the perusal of section 2(4)(l)(ii) of the above-mentioned Act that the advances received in connection with consideration of an immovable property under an agreement or arrangement subject to the condition that such advances are adjusted against such immovable property as specified in terms of the agreement or arrangement do not fall within the term of deposit, which have been banned by the Act of 2019.

18. Moreover, the developer is also bound by promissory estoppel. As per this doctrine, the view is that if any person has made a promise and the promisee has acted on such promise and altered his position, then the person/promisor is bound to comply with his or her promise. When the builders failed to honour their commitments, a number of cases were filed by the creditors at different forums such *as* ***Nikhil Mehta, Pioneer Urban Land and Infrastructure*** which ultimately led the central government to enact the Banning of Unregulated Deposit Scheme Act, 2019 on

31.07.2019 in pursuant to the Banning of Unregulated Deposit Scheme Ordinance, 2018. However, the moot question to be decided is as to whether the schemes floated earlier by the builders and promising as assured returns on the basis of allotment of units are covered by the abovementioned Act or not. A similar issue for consideration arose before Hon'ble RERA Panchkula in case ***Baldev Gautam VS Rise Projects Private Limited*** (*RERA-PKL-2068-2019*) where in it was held on 11.03.2020 that a builder is liable to pay monthly assured returns to the complainant till possession of respective apartments stands handed over and there is no illegality in this regard.

19. The definition of term 'deposit' as given in the BUDS Act 2019, has the same meaning as assigned to it under the Companies Act 2013, as per section 2(4)(iv)(i) i.e, explanation to sub-clause (iv). In pursuant to powers conferred by clause 31 of section 2, section 73 and 76 read with sub-section 1 and 2 of section 469 of the Companies Act 2013, the Rules with regard to acceptance of deposits by the companies were framed in the year 2014 and the same came into force on 01.04.2014. The definition of deposit has been given under section 2 (c) of the above-mentioned Rules and as per clause xii (b), as advance, accounted for in any manner whatsoever received in connection with consideration for an immovable property under an agreement or arrangement, provided such advance is adjusted against such property in accordance with the terms of agreement or arrangement shall not be a deposit. Though there is proviso to this provision as well as to

the amounts received under heading 'a' and 'd' and the amount becoming refundable with or without interest due to the reasons that the company accepting the money does not have necessary permission or approval whenever required to deal in the goods or properties or services for which the money is taken, then the amount received shall be deemed to be a deposit under these rules however, the same are not applicable in the case in hand. Though it is contended that there is no necessary permission or approval to take the sale consideration as advance and would be considered as deposit as per sub-clause 2(xv)(b) but the plea advanced in this regard is devoid of merit. First of all, there is exclusion clause to section 2 (xiv)(b) which provides that unless specifically excluded under this clause. Earlier, the deposits received by the companies or the builders as advance were considered as deposits but w.e.f. 29.06.2016, it was provided that the money received as such would not be deposit unless specifically excluded under this clause. A reference in this regard may be given to clause 2 of the First schedule of Regulated Deposit Schemes framed under section 2 (xv) of the Act of 2019 which provides as under:-

> *(2) The following shall also be treated as Regulated Deposit Schemes under this Act namely:-*
>
> *(a) deposits accepted under any scheme, or an arrangement registered with any regulatory body in India constituted or established under a statute; and*
>
> *(b) any other scheme as may be notified by the Central Government under this Act.*

20. The money was taken by the builder as deposit in advance against allotment of immovable property and its possession was to be offered within a certain period. However, in view of taking sale

consideration by way of advance, the builder promised certain amount by way of assured returns for a certain period. So, on his failure to fulfil that commitment, the allottee has a right to approach the authority for redressal of his grievances by way of filing a complaint.

21. It is not disputed that the 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 allottee 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 complainant besides initiating penal proceedings. So, the amount paid by the complainant 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.

22. 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 19.04.2021, 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 they would be entitled for this specific amount till offer of possession. Accordingly, the interest of the allottee is protected even after the due date of possession is over as the assured returns

are payable from the first 3 years 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 65/- 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 19.04.2012

F. Directions of the authority

23. 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 65/- per sq.ft. super area of the said unit per month 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 3 years or till the unit is put on lease whichever is earlier.

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

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

24. Complaint stands disposed of.

25. File be consigned to registry.

(Vijay Kumar Goyal)
Member

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

Dated: 05.04.2022