BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Order pronounced on: 02.12.2022

Name of the Builder		Vatika Limited	
Project Name		Vatika City INX City Centre	
1.	CR/5131/2021	Tanuja Vardhan Krishnatray V/s Vatika One on One Private Ltd. & Ors.	Mr. Vivek Singh Bishnoi Ms. Ankur Berry
2.	CR/5133/2021	Radhika Krishnatray V/s Vatika One on One Private Ltd. & Ors.	Mr. Vivek Singh Bishnoi Ms. Ankur Berry

CORAM:	
Shri. Vijay Kumar Goyal	Member
Shri. Sanjeev Kumar Arora	Member

ORDER

1. This order shall dispose of both the complaints titled as above filed before this authority under section 31 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred as "the Act") read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred as "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 its obligations, responsibilities and functions to the allottees as per the agreement for sale executed inter se between parties.

2. The core issues emanating from them are similar in nature and the complainant(s) in the above referred matters are allottees of the project, namely, One on One-Phase I (commercial complex) being developed by the same respondent/promoter i.e., Vatika One on One Pvt. Ltd. The terms and conditions

of the builder buyer's agreements fulcrum of the issues involved in both the cases pertains to failure on the part of the promoter to deliver timely possession of the units in question, seeking award of assured return, etc.

3. The details of the complaints, reply status, unit no., date of agreement, assured return clause, assured return rate, possession clause, due date of possession, total sale consideration, amount paid up, and relief sought are given in the table below:

Project: One on One Phase-1, Sector 16, Village Silokhera, Gurugram
Assured return clause in complaint bearing nos. 5131/5133 of 2021 **Clause 15. Assured Return** *The Developer may, where the buyer has paid 100% of the total sale consideration and other charges for the Commercial Unit, upon signing of this,* ***Agreement pay Rs. 151.65/-*** *(Rupees one hundred and fifty and sixty-five paise only) per sq. ft. it super area per month by way of assured return to the Buyer, of certain category(ies) of commercial Unit as per its policy,* ***from the date of execution of this agreement till the construction of the Said Commercial Unit is complete.*** *Such Policy of the Developer may change from time to time where the Developer may withdraw the assured return scheme.* **Clause 16. Leasing Arrangement** *At the request of the Buyer as aforesaid, the Developer agrees to put the Said Unit, individually or in combination with other adjoining units, on lease, for and on behalf of the Buyer, as and when the said unit is ready and fit for occupation. The Buyer has clearly understood the general risk is involved in giving any premises on lease lo third parties and has undertaken to bear the sold de exclusively without any liability whatsoever on the part of the Developer, it is further agreed that* *The developer will pay to the* ***buyer Rs. 130/-*** *per sq. it. super area of the said unit per month as committed* ***return for up to three years from the date of completion of***

***construction of the said Building or the said Unit is put on Lease, whichever is earlier**. The Buyer will start receiving lease rental in respect of the said Unit in accordance with the lease document as may be executed and as described hereinafter from the date of commencement of lease rental. If there is a provision in the lease document for any rent-free period on account of fit out by the lessee or any other account, then the Buyer shall not be entitled for any rent during the same.*

Unit related details

1	2	3	4	5	6	7	8
Sr. no	Complaint no./title/reply status	Unit no. & area admeasuring	Allotment letter	Date of agreement	Due date of possession	Total sale consideration/ Amount paid	Occupation certificate
1.	CR/5131/2021 Tanuja Vardhan Krishnatray V/s Vatika One on One Limited & Ors.	Unit no. 436, 4th floor, block 3 (page 62 of complaint)	31.05.2016	31.05.2016	31.05.2020	Rs.42,77,955/ Rs.42,77,955/-	06.09.2021
2.	CR/5133/2021 Radhika Krishnatray V/s Vatika One on One Limited & Ors.	Unit no. 437, 4th floor, block 3 (page 63 of complaint)	31.05.2016	31.05.2016	31.05.2020	Rs.42,77,955/ Rs.42,77,955/-	06.09.2021

4. The aforesaid complaints were filed by the complainants against the promoter on account of violation of the builder buyer's agreement executed between the parties *inter se* in respect of said unit for not handing over the possession by the due date, seeking award of assured return.

5. It has been decided to treat the said complaints as an application for non-compliance of statutory obligations on the part of the promoter/ respondent in terms of section 34(f) of the Act which mandates the authority to ensure compliance of the obligations cast upon the promoters,

the allottee(s) and the real estate agents under the Act, the rules and the regulations made thereunder.

6. The facts of all the complaints filed by the complainant(s)/allottee(s)are also similar. Out of the above-mentioned case, the particulars of lead case ***CR 5131/2021 titled as Tanuja Vardhan Krishanatray Vs. M/s Vatika One on One ltd. & Anr.*** are being taken into consideration for determining the rights of the allottee(s) qua delay possession charges, assured return, execution of conveyance deeds.

A. **Project and unit related details**

7. The particulars of the project, the details of sale consideration, the amount paid by the complainant(s), date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

CR 5131/2021 titled as Tanuja Vardhan Krishanatray Vs. M/s Vatika One on One ltd. & Anr.

S. No.	Heads	Information
1.	Name and location of the project	One on One Phase- 1, Sector- 16, Village Silokhera, Gurugram
2.	Nature of the project	Commercial complex
3.	Area of the project	12.13125 acres
4.	DTCP License	05 of 2015 dated 06.08.2015
	valid upto	05.08.2020
	Licensee name	Keshav Dutt & 2 others.
5.	Allotment letter	31.05.2016 (As alleged by the complainant on page no. 20 of the complaint)

6.	Date of execution of builder buyer's agreement	31.05.2016 (As per annexure P-5 on page no. 61 of the complaint)
7.	Unit no.	Unit no.- 436 on 4th floor of block 3 (As per annexure P-5, BBA on page no. 62 of the complaint)
8.	Total consideration	Rs. 42,77,955/- (As alleged by the complainant on page no. 20 of complaint)
9.	Total amount paid by the complainants	Rs. 42,77,955/- (As per clause 2(b)(i) of BBA at page 63 of complaint)
10.	Due date of delivery of possession	31.05.2020 (Calculated from date of agreement i.e., 31.05.2016)
11.	Date of offer of possession to the complainants	**Not offered**
12.	Occupation certificate	06.09.2021 (As per annexure R-3 on page no. 35 of reply)
13.	Calculation of assured return	**Till construction of said unit is complete.** (Since the builder-promoter has applied for obtaining occupation certificate on 12.08.2021 & 01.09.2021, it shall be presumed that by that time the construction of the tower must be completed) Assured return from date of execution of BBA i.e., 31.05.2016 till completion of construction i.e., 01.09.2021 Rs. 72,825 per month * 64 months = Rs. 46,60,800/- (Assured return already paid= Rs.6,82,425/-)

B. Facts of the complaint

8. That the respondents approached the complainant for investment in commercial unit in 'Vatika One on One' of approximately 500 sq. feet super area and handed over the prospectus enticing him to invest in the project.
9. The respondents assured the complainant payment of monthly return at the rate of Rs. 151.65/- per sq. ft. per month on super area on the investment made in the project upon receipt of full down payment. The said assured return was to be paid till the completion of the construction of the said building and thereafter, lease rental of Rs. 130/- per sq. ft. per month was to be paid on super area for up to three years from the date of completion of construction of the said building or till the said unit is put of lease, whichever is earlier.
10. That a buyer's agreement was executed between the parties on 31.05.2016 and a unit bearing no. 436 on the 4th floor of block no. 3 admeasuring 500 sq. ft. was allotted in his favour, for a total sale consideration of Rs. 42,77,955/- against which he has already paid the entire amount.
11. That it is submitted that as per clause 15 of a builder buyer agreement dated 31.05.2016, the complainant was entitled to assured return at the rate of Rs. 151.65/- per sq. ft. per month till the completion of the construction of the building. Further as per clause 16.1 of a builder buyer agreement, he was entitled to an amount @ Rs. 130/- per sq. ft. per month on super area for upto three years from the date of completion of construction of the said building or the said unit is put of lease, whichever is earlier.

12. That, as per the terms of the aforesaid builder buyer agreement the respondents started paying the complainant, assured return amounting to Rs. 75,825.00 /- per month from 08.12.2014 and continued to pay the same. However, it lastly paid the said assured return on 07.08.2018.
13. That it as per the terms of the aforesaid agreement for the unit, the respondents have duly made payments of assured return to the complainant till September 2018. However, abruptly, since October 2018 it has stopped making payments towards the assured returns in contravention with the agreed terms and conditions. Further, in terms of a builder buyer agreement entered by the complainant with respect to, the respondents were under obligation to pay him assured return from the date of execution of this agreement till the construction of the said commercial unit is complete. However, they have failed to pay the assured return since October 2018 till December 2021 amounting to Rs. 29,57,175/- calculated @ Rs. 75.825/-per month.
14. That the complainant received an email dated 31.10.2018 from the respondents informing about suspension of all return-based sales. Thereafter, in 2019, the respondents started pressurising him to sign a fresh builder buyer agreement, which illegally and wrongfully sought to omit the assured return promised under agreement, without explaining the terms and conditions of the same and implications of the same.
15. That the respondents vide email dated 22.04.2019, sent an addendum to a builder buyer agreement. However, illegally and wrongfully sought to omit the assured return promised under the builder buyer agreement.

Thereafter, several emails were exchanged between the parties including the reminders wherein he sought settlement of accounts qua assured returns. But they failed to settle the accounts towards the assured returns despite various assurances.

16. That the respondents vide email dated 06.12.2019 sought the signed copy of the addendum. The said addendum was rejected by complainant vide separate email dated 08.12.2019 and the original agreements therefore continue to remain in force and the respondents are fully bound by the same.

17. That the complainant finds it rather shocking that after having paid assured return for two years as per the agreed terms and understanding the respondents are abusing their dominant position and are unilaterally seeking to coerce the complainant to sign an addendum without assured return.

18. That the action of the respondents for non-payment of assured returns is completely unfathomable since they have already received full consideration as down payment for the said unit.

19. Further, it is also clear that the respondents wish to renege on the executed builder buyer agreement in order to deprive the complainant of assured return and lease rental as promised. Almost all buyers have been sent either fresh builder buyers agreement or addendums after stopping payments of assured returns in order to stop payment of assured returns completely which form the fundamental term of investment.

20. That the complainant is entitled for an assured returns with interest at the rate of 18 % p.a., in as much as the same rate of interest was being charged for delay in payment in terms of the already executed builders buyer agreement, and keep paying further payments of assured returns in terms of a builder buyer agreement already executed as the unit is still under construction.

21. That the fresh builder buyer agreement does not mention about the down payment plan made by complainant and instead only mentioned of construction milestones linked plan of payment, whereas in terms of the allotment letter and previously signed buyer agreement, he has paid full amount by way of down payment plan. Further, it does not mention about assured return to be given by the respondents as provided in terms of the allotment letter and builder buyer agreement already signed by him and the same has in fact been paid to him for almost two years i.e. up to September, 2018. Thus, by way of fresh builder buyer agreement, the respondents are seeking to renege on the agreed terms as contained in the said two documents w.r.t. assured return & lease rentals.

22. That the present complaint is without prejudice to the rights of the complainant to approach appropriate forum seeking compensation for delay in completion of construction and handing over the unit by the respondents within the time period specified in the already executed builder buyer agreement in as much as the construction has not been completed within the said time limit.

23. That the complainant is constrained to file this present complaint to secure and ensure the payment of the amount of Rs. 29,57,175/- along with interest @ 18% per annum due and payable by the respondents to him which is duly acknowledged by it towards the assured return and further continue to pay the assured return in terms of the agreement dated 31.05.2016. In view of the aforesaid facts and circumstances, he is left with no other alternative but to file the present complaint.

24. That the present complaint is within the prescribed period of limitation since despite repeated requests made by the complainants, the respondents have failed to pay the amount of Rs. 29,57,175/- outstanding since October, 2018 to him till date. Further, in view of the directions of the Hon'ble Supreme Court of India passed in SMW(C) No. 3 of 2020, the limitation period from 15.03.2020 till 02.10.2021 is excluded from commuting the period of limitation and limitation period is further extended for 90 days w.e.f. 03.10.2021 vide order dated 23.09.2021. Therefore, there is no impediment in filing the complaint as such, the complaint is filed within the limitation period in terms of the suo-moto orders passed by the Hon'ble Supreme Court of India.

C. **Relief sought by the complainants**:

The complainants have sought following relief(s):

i. Direct the respondents to refrain from cancelling the builder buyer agreement/ cancellation of the unit of the complainant.

ii. Direct the respondents to pay the committed assured returns as per builder buyer agreement from October 2018 till the 3 years/the first lease from the date of completion of the project.

iii. Direct the respondents to get OC by the competent authority.

29. On the date of hearing, the authority explained to the respondent/ promoter about the contraventions as alleged to have been committed in relation to section 11(4) (a) of the act to plead guilty or not to plead guilty.

D. **Reply by the respondents**

The respondents have contested the complaint on the following grounds.

a. That the complainant has got no locus standi or cause of action to file the complaint. The complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the BBA dated 31.05.2016.

b. That at the very outset it is submitted that the complaint is not maintainable or tenable in the eyes of law. The complainant has misdirected themselves in filing the above captioned complaint before the authority as the reliefs being claimed by him cannot be said to fall within the realm of jurisdiction of the authority. As the enactment of the Banning of Unregulated Deposit Schemes Act, 2019, the 'assured return' and or 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".

c. That as per section 3 of the BUDS Act, all unregulated deposit scheme has 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 can only be run and operated by a registered person. Hence, the assured return schemes have become illegal by the operation of law and the respondent cannot be made to run a scheme which has become infructuous by law. It is also important to rely upon clause 35 of the BBA dated 21.07.2011 which specifically caters to the situation where certain provisions of the agreement become inoperable due to application of law. Thus, the complaint deserves to be dismissed at the very outset, without wasting precious time of this authority.

d. The complainant has not come before the authority with clean hands. The complaint has been filed by them just to harass the respondent and to gain the unjust enrichment. It is pertinent to mention here that for the fair adjudication of grievance as alleged by them require 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. Further, it is crystal clear from reading the complaint that the complainants are not 'allottees', but purely 'investors', who are only seeking assured return from the respondent, by way of present petition, which is not maintainable as the unit is not meant for personal use and rather, it is meant for earning rental income.

e. That in view of the judgment and order dated 16.10.2017 passed by the Maharashtra RERA Authority in the complaint titled *Mahesh* ***Pariani*** **vs.** ***Monarch Solitaire*** in, complaint no: ***CC006000000000078 of 2017***, wherein it has been observed that in case where the complainant hasinvested 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 an '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 could not and ought not have filed the present complaint being a co-promoter.

f. In a matter of ***Brhimjeet & Anr. Vs. M/s landmark Apartment Pvt. Ltd. (complaint no. 141 of 2018),*** decided on 07.08.2018 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. Further in the matter of ***Bharam Singh & Ors* vs. *Venetian LDF Projects LLP*** **(Complaint No. 175 of 2018)**, decided on 27.11.2018, the Authority, Gurugram upheld its earlier decision of not entertaining any matter related to assured returns in the said order stated as under:

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

g. It is submitted that the assured return of Rs. 151.65/- per sq. ft. was to be payable till completion of the building thereafter committed return was to be paid to the complainant post completion of the building @ of Rs. 130/- per sq.ft. of super area per month, up to three years from the date of completion of construction of the commercial unit or till the same is put on lease, whichever is earlier.

h. That even though the respondents suffered from setback due to external circumstances, yet the respondents have completed the construction work with full vigour reply. The complaint thus, not having a speck of truth and genuineness ought to be dismissed and heavy cost be imposed upon the complainant for wasting the precious time of the authority.

i. That the present complaint has been filed on the basis of incorrect understanding of the object and reasons of enactment of the 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 sections 11 to section 18 of the RERA Act, 2016 describes and prescribes the function and duties of the promoter/developer, section 19 provides the rights and duties of allottee. Hence, the RERA Act, 2016 was never intended to be biased legislation preferring the allottee, 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 or omission of part of the other.

30. 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

31. 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

32. 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 complete territorial jurisdiction to deal with the present complaint.

E. II Subject-matter jurisdiction

33. 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.

34. 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 objection raised by the respondents.

F.I Objection regarding entitlement of assured return on ground of complainants being investors.

35. The respondent submitted that the complainants are investor and not consumer/allottee, thus, the complainants are not entitled to the protection of the Act and thus, the present complaint is not maintainable.

36. The authority observes that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that preamble is an introduction of a statute and states

main aims and objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that under section 31 of the Act, any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the buyer's agreement, it is revealed that the complainants are an allottee/buyer and they have paid total price of Rs.42,77,955/- to the promoter towards purchase of the said unit in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

> *"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

37. In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the buyer's agreement executed between respondent and complainants, it is crystal clear that the complainants are allottees as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The

Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as ***M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.*** has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the complainants-allottees being investors are not entitled to protection of this Act stands rejected.

G. Findings on the relief sought by the complainants:

38. The common issues with regard to delayed possession charges, assured return and litigation charges are involved in **both the cases.**

F.I Assured return

39. The complainant has sought assured returns on monthly basis as per clause 15 at the rate of Rs. 151.65/- per sq.ft. of super area per month till the completion of construction of the said building. It was also agreed as per clause 16 that the developer will pay to the buyer Rs. 130/- 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 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 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.

40. 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

38. 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 allottee 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.

39. 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.*

40. 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;*

41. 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.

42. 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 <u>to protect the interest of depositors</u> and for matters connected therewith or incidental thereto as defined in section 2 (4) of the BUDS Act 2019 mentioned above.

43. 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.

44. 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.

45. 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.*

46. 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.

47. It is not disputed that the respondent is a real estate developer, and it had not obtained registration under the Act of 2016 for the project in question. However, the project in which the advance has been received by the developer from the allottees is an ongoing project as per section 3(1) of the Act of 2016 and, the same would fall within the jurisdiction of the authority for giving the desired relief to the complainants besides initiating penal proceedings. So, the amount paid by the complainants to the builder is a regulated deposit accepted by the later from the former against the immovable property to be transferred to the allottee later on.

48. On consideration of documents available on record and submissions made by the parties, the assured return of Rs. 151.65/- per square feet per month is to be paid till the construction of the said commercial unit is complete. The respondent has obtained the occupation certificate on 06.09.2021. Accordingly, the promoter is liable to pay assured return of the unpaid period i.e., October 2018 till September 2021 at the rate of Rs. 151.65/-per sq.ft. per month of the super area.

49. The due date of possession is 31.05.2020. Keeping in view the fact that OC has been obtained on 06.09.2021, the promoter is liable to pay assured return @151.65/- per sq. feet. of the super area till September 2021.

50. The counsel for the respondents submitted that assured return has been paid uptil September 2018, the assured return thereafter be paid as ordered above.

51. It is further provided under clause 16 of the buyer's agreement that developer would also pay to the buyer Rs. 130/- per sq.ft. per month of super area of the allotted unit as committed return upto three years from the date of completion of the construction of the said building or the said unit is put on lease whichever is earlier. The buyer would start receiving lease rental in respect of the said unit in accordance with lease document as may be executed with prospective tenant. If there is any rent-free period on account of fit out or otherwise, then the buyer shall not be entitled for rent during the same. So, in view of that agreement between the parties, the developers are also under an obligation to pay

to the allottee committed return @130/- per sq.ft. per month for 3 years from the date of completion of the construction of building or the unit is put on lease whichever is earlier.

F.II Direct the respondents to refrain from cancelling the builder buyer agreement/cancellation of the unit of the complainant.

52. The complainant alleged that in 2019, the respondents pressured the complainant to sign a fresh BBA wherein omitting the clause of assured return, but she has refused to sign the same.

53. Upon perusal of documents on record, it was observed that the complainant has not signed the addendum agreement (fresh agreement) and the same is evident from page no. 135 of the complaint. It is pertinent to note that any addendum agreement can be regarded as an addition to the original agreement but not an instrument to alter the substantive part of the original agreement. The promoter- builder has misused its dominant position and tried to take advantage of innocent allottee(s) after taking 100% of the total sale consideration. Such practice is not acceptable. The original agreement holds its validity, and the respondent is directed to not to force any fresh agreement over the complainant.

F. III Litigation cost

54. The complainant is also seeking relief w.r.t. litigation expenses & compensation. Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as ***M/s Newtech Promoters and Developers Pvt Ltd Versus State of U.P. and Ors., 2021-2022(1) RCR (C) 357*** has held that

an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, the complainants amay approach the adjudicating officer for seeking the relief of litigation expenses

G. Directions of the authority

55. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

    i. The respondent is directed to pay the arrears of amount of assured return amount from September 2018 till September 2021 as per clause 15 of the buyer's agreement. Further, the respondent/ builder would also be liable to pay monthly lease rentals at agreed rate 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(s) and failing which that amount would be payable with interest @8.35% p.a. till the date of actual realization.

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

56. This decision shall *mutatis mutandis* apply to cases mentioned in para 3 of this order.

57. Complaints stand disposed of. True certified copy of this order shall be placed in the case file of each matter. There shall be separate decree in individual cases.

58. Files be consigned to registry File be consigned to the registry.

Sanjeev Kumar Arora
Member

V.l –
Vijay Kumar Goyal
Member

Haryana Real Estate Regulatory Authority, Gurugram
02.12.2022