THE NATIONAL COMPANY LAW TRIBUNAL
CHANDIGARH BENCH, CHANDIGARH
(Exercising powers of Adjudicating Authority under the Insolvency and Bankruptcy Code, 2016)

CP (IB) No. 663/Chd/Hry/2019

Under Section 7 of the Insolvency & Bankruptcy Code, 2016

In the matter of:
Ravi Luthra and 12 Ors.
(Represented through Ravi Luthra) ….Petitioners-Financial Creditors

Vs.

Vatika Limited
Having its Registered Office at:
Vatika Triangle, 4th Floor,
Sushant Lok Phase I, Block A,
Mehrauli - Gurgaon Road,
Gurgaon HR 122002

…Respondent

Judgment delivered on: 07.06.2024

Coram: HON'BLE MR. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
HON'BLE MR. L. N. GUPTA, MEMBER (TECHNICAL)

Present:

For the Petitioner-Financial Creditor : Mr. S.P. Singh Chawla, Advocate
Mr. S. Shishir, Advocate

For the Respondent-Corporate Debtor : Mr. Anand Chhibbar, Senior Advocate
Mr. Vaibhav Sahni, Advocate
Mr. Shikhar Sarin, Advocate

PER: Sh. HARNAM SINGH THAKUR, MEMBER (JUDICIAL)
Sh. L.N. GUPTA, MEMBER (TECHNICAL)

JUDGMENT

The present petition has been filed by Ravi Luthra & 12 (twelve) Ors. (hereinafter referred to as **'Petitioners/Financial Creditors'**) under Section 7 of the Insolvency and Bankruptcy Code, 2016 (**hereinafter referred to as 'Code'**) read with Rule 4 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 to initiate the Corporate Insolvency Resolution Process ('CIRP') against **Vatika Limited** (hereinafter referred to as 'Respondent/Corporate Debtor'). The petition is signed by Ravi Luthra, with the affidavit verifying the contents of the application, appended thereto. The Power of Attorney in favour of Ravi Luthra has been executed by all the home buyers-petitioners and submitted vide IA No. 249/2021 which was disposed of vide order dated 18.05.2023 of this Adjudicating Authority. **The list of Applicants is appended as Annexure-1 to the judgment.**

2. The Corporate Debtor is stated to be incorporated on 02.07.1998. The company has its registered address at Vatika Triangle, 4th Floor, Sushant Lok Phase 1, Block A, Mehrauli-Gurgaon Road, Gurgaon, HR-122002. Therefore, the jurisdiction lies with this Bench of the Tribunal. The master data of the corporate debtor is attached as Annexure A-2 of the petition.

3. It is averred that the Respondent is engaged in the business of acquisition and development of real estate and construction of buildings etc. as a developer. The Corporate Debtor, in the year 2016-17, had started advertising for a project namely, High Street at INXT (Phase I), situated in Sector 83, Gurugram in 3.34 acres of commercial space. The Petitioners/ Allottees were allured by saying that the project will be an ultra-modern architecture with a shopping centre, 14-screen PVR Movie Theatre with a unique design and with a promise to pay the attractive committed charges assured returns on investment made by the petitioner till the first lease on completion of the project. The Financial Creditor, Mr. Ravi Luthra booked

a Shop unit in the above-mentioned project. Similarly, as per the Allotment Letters (attached as annexure A6 of Dairy No. 00332/2 dated 15.09.2023), the Applicants were allotted a commercial space unit in the above-mentioned project against full and final payment. In terms of the clauses of the Allotment letter, the petitioners were entitled to payment of "Committed Monthly Return" from the Corporate Debtor. As per the Allotment Letters, after receipt of the Occupation Certificate/Completion of the Project, the Corporate Debtor had to put the shop on lease to suitable tenants with minimum assured lease rent.

4. The Corporate Debtor post-execution of the Allotment Letters continued to pay the commitment charges till October 2018 but thereafter, the Corporate Debtor stopped paying the commitment charges to the Financial Creditors. The Corporate Debtor further failed to complete the construction of the project. Thereafter, the Corporate Debtor cancelled the Builder Buyer Agreement stating an excuse of impossibility in performing the duties under the Allotment Letter/ Builder Buyer Agreement by issuing the cancellation of Builder Buyer Agreement cum Refund Letter dated 12.08.2019. The reply was sent by the Financial Creditors for the Letter.

5. Aggrieved by the same, complaint was filed by the financial creditors before the ***National Consumer Dispute Redressal Commission, New Delhi bearing Complaint Case No. 360 of 2020 on 18.03.2020*** claiming regular payments of assured returns. The complaint is still pending. Moreover, a writ petition was filed by the corporate debtor before the ***Hon'ble High Court of Punjab and Haryana bearing CWP No. 26740 OF 2022 tilted "Vatika Limited v. Union of India & Ors*** wherein vide order dated 22.11.2022, court took cognizance in respect of Banning of Unregulated Depoists Schemes ACT, 2019 and restrained the Union of India and State of Haryana from taking coercive steps in criminal cases registered against the company for non-payment of assured returns to its allottees, till next date of hearing.

The State of Haryana also notified the appointment of the competent authority under the BUDS Act who will decide the question of law whether such deposits are covered under the BUDS Act or not. The writ petition is still pending before the Hon'ble High Court. Aggrieved by the order dated 22.11.2022 of the Hon'ble Punjab and Haryana High Court, the financial creditor filed an ***LPA No. 264 of 2023 (O&M)***, the said LPA was disposed of being not maintainable vide order dated 14.03.2023 with the suggestion to approach before the single judge bench***.*** The Financial Creditors have prayed for payment of the commitment charges/assured return along with delayed interest at the rate of 18% and not seeking refund of the whole consideration amount.

6. As stated in Part-IV of the amended Form No.1 filed vide Dairy No. 332/2 dated 15.19.2023, the total amount claimed to be in default is Rs. 8,54,76,383.18/- (Rupees Eight Crores Fifty-Four Lakhs Seventy-Six Thousand Three Hundred and Eighty-Three Paisa Eighteen) only including interest starting from 01.11.2018 till the date of the application i.e. 09.12.2019, refiled on 16.12.2019. The date of default indicated is 01.11.2018 i.e., as the last payment was received in October 2018. Copy of Form 26AS of applicant for amount of TDS deposited by the corporate debtor on payment of committed returns to the applicant (Annexure-A4), the amount of Financial Creditors as mentioned in respective statement of accounts (Annexure-A5), allotment letter of financial creditors as issued by the corporate debtor (Annexure-A6), Letter of corporate debtor (Annexure-A8), reply of financial creditor (Annexure-A9) are attached with the main petition.

7. Upon the issuance of notice, the Respondent filed its reply vide Diary No. 00332/3 dated 04.12.2023, wherein it is stated that as per the agreement, the respondent company had to remit the assured monthly return of Rs. 163.33 per sq. ft. till completion of the building. The petitioners were fully satisfied with the quantum

of their returns along with the safety of their returns. The petitioners booked their units with the company with an objective of receiving agreed returns and profits on their investments in the project. It was an investment venture with attached risks and rewards which was communicated to the allottees. Allottees were receiving handsome assured returns till October 2018. Thereafter, the stoppage of assured returns was due to the introduction of the Banning of Unregulated Deposit Schemes Act 2019 w.e.f. 21.02.2019 and certain amendments made to the SEBI Act vide which Assured returns scheme was banned for projects not registered with SEBI.

7.1 The respondent company is not registered with SEBI. There is concealment of facts as the emails dated 09.11.2018 and 01.12.2018 are not disclosed by the petitioners, wherein all the petitioners were intimated regarding the legal and regulatory changes and stoppage of assured rental schemes. Further, it also intimated about the statutory reasons for not paying the assured returns and their decision of not selling any units further in the project. The option was given to the petitioners for a refund of their money or switching to another project. The present petition is not maintainable.

7.2 Due to the above-mentioned fact the respondent was constrained to cancel the Builder Buyer Agreement by refunding the entire amount invested by petitioners' subject to the return of original documents (Cancellation of Builder Buyer Agreement cum Refund Letter dated 12.08.2019 attached as Annexure A-8 of the amended Form 1 of petition). Therefore, the Financial creditors are not even allottees of the Respondent, therefore, they have no locus standi. The petitioners neither returned the original documents nor accepted the proposal to get the refund. Further, the respondent company offered to refund back the money and crossed the Builder Buyer Agreement (blank), which is attached as annexure R10 of the reply.

7.3 The financial creditors have picked and chose the clauses of the agreement as they have only referred to clause 4 of the agreement and ignored clause 2 of the agreement. As per clause 2 of the agreement, it is mentioned that,

"*the said allotment is provisional and subject to remittance of payments in terms of the payment plan/ schedule of payment, as agreed / opted by the Allottee. In the event the applicant does not pay the balance amount or defaults in execution of Builder Buyer Agreement within stipulated time, the present allotment letter shall stand withdrawn and 30% of the total sales consideration, as earnest money, along with other non-refundable amounts shall stand forfeited and the remaining amount, if any, shall be refunded to the Allottee*."

7.4 No property has been sold to the financial creditors. The financial creditors do not qualify to be the allottees even either under the RERA Act or under IBC,2016. Further, till the filling of the present application, the cancellation of Builder Buyer Agreement was not challenged by the financial creditors before any court of law. Subsequently, a complaint was filed by the financial creditors before the NCDRC, New Delhi bearing Complaint Case No. 360 of 2020 on 18.03.2020 claiming regular payments of assured returns which is still pending and this fact has not been disclosed before this Adjudicating Authority.

7.5 It is further submitted that Force Majeure is a valid clause in every agreement/contract and this clause is required to be enforced on events beyond the control of parties which can affect the performance of either party without their fault and the same was included in Clause 7 and 11 of the Builder Buyer Agreement. Therefore, there is no debt and default on the part of the corporate debtor.

8. The petitioners-financial creditors filed the rejoinder vide Dairy No. 00332/4 dated 01.01.2024, wherein it is stated that the outstanding dues were not paid as the Corporate Debtor refrained from making payments based on the introduction of

the 'Banning of Unregulated Deposit Schemes (BUDS) Act 2019'. Further, another reason for the non-release of payment was that certain amendments were made to the SEBI Act vide which the Assured Returns Scheme was banned for projects not registered with SEBI. However, till the date of filing of the present petition, no such reasons were ever pleaded by the Corporate Debtor nor intimated the same properly to the financial creditors/petitioners.

8.1 The Corporate Debtor on its own has self-proclaimed and declared commitment charges/ assured returns as illegal after the enactment of the BUDS Act, 2019. The Corporate Debtor has mentioned about email communications dated 09.11.2018 and 01.12.2018 but in fact it has never communicated in the mail any such bogus issues related to the enactment of the Banning of Unregulated Deposit Schemes Act, 2019. The Corporate Debtor nowhere mentioned stopping the project or stopping the payments of assured returns to the Financial Creditors. In the letter dated 12.08.2019 it was stated by the Corporate Debtor that due to the unwillingness of the Lead Financial Creditor, they are cancelling the captioned booking. However, the Corporate Debtor duped the Financial Creditors on false assurances. The Financial Creditors have not been paid their respective dues / financial debt which were promised by the Corporate Debtor and indeed admitted, in terms of the Allotment Letters/ Builder Buyer Agreements.

8.2 Further, various Courts including RERA Benches have made it clear that Assured Returns do not come under the definition of Deposits under Section 2(4)(g) of the BUDS Act 2019. The order of Hon'ble Punjab & Haryana High Court is not applicable to the present case as it is not a Criminal complaint matter. The corporate debtor never made the Builder Buyer Agreement even after taking payment for registration of the Builder Buyer Agreement of Rs. 23,600/- from the financial creditors and returned one crossed agreement and later on informed that the Builder

Buyer Agreement is lost. The project is only 15-20% complete and no further construction is taking place.

8.3 Further, the case before NCDRC was with respect to the arbitrary cancellation made by the corporate debtor of the lead financial creditors. The corporate debtor on one hand seeks no default and on the other hand seeks invocation of the 'Force Majeure' clause.

9. The Short Written Submissions were filed by the petitioner vide Diary No. 00332/5 dated 17.01.2024 and by the Respondent vide Diary No.00332/10 dated 18.03.2024 reiterating the above-mentioned facts.

10. We have heard the submissions of both the parties carefully and perused the documents placed on record by both the parties, including their Written Submissions. The Respondent has objected towards the admission of the Application, inter alia, on the grounds that the Petition is not maintainable as the Allotments of the Applicants were cancelled and there was no builder-buyer agreement executed between the parties, therefore they cannot be considered as an "allottee" under Section 5(8)(f)(ii) of IBC, 2016. It is further contended by the Respondent that it had stopped the payment of Assured Return due to the introduction of the BUDS Act (Banning of Unregulated Deposit Schemes Act, 2019), which was introduced in the Parliament on 18.07.2018, and was referred to the Standing Committee on Finance (SCF). The report of SCF was submitted to the parliament on 03.01.2019 after which it was passed by the Lok Sabha on 13.02.2019 but could not be passed by the Rajya Sabha. Since, the Parliament was not in session, an Ordinance was issued by the President of India vide notification dated 21.02.2019. Subsequently, The Banning of Unregulated Deposits Bill, 2019 was passed by the Parliament. The Banning of Unregulated Deposits Act, 2019 was enacted on 31.07.2019 but was deemed to have come into force from 21.02.2019

as per Section 1(3) of the Act. The BUDS Act defines the term "Unregulated Deposit Scheme" in Section 2(17), which highlights that if there is a scheme/arrangement, under which deposits are accepted/solicited by any deposit taker by way of business and which is not a Regulated Deposit Scheme, as specified under Column (3) of the First schedule, is specifically banned by the Section 3 of the Act, which made the Scheme inoperable as it was not registered with any authority as perused in Column (3) of the First Schedule.

11. Per contra, the Applicants have contended that the explanations and reasons as per the Corporate Debtor only came into existence after service of the Demand Notice. It is pertinent to note that prior to that there was no communication regarding any of the reasons mentioned by the Corporate Debtor in their reply. There was no communication between the Respondent and Financial Creditors. It is pertinent to note that the Respondent at the start gave two Builder Buyer Agreements to the Financial Creditors stating that he will register the one which would be accepted by RERA and return the other one to the Financial Creditors. It is further pertinent to note that the Respondent never made the Builder Buyer Agreement even after taking payment for registration of the Builder Buyer Agreement of Rs. 23,600/- from the Financial Creditors and returned one crossed agreement and informed the Financial Creditors that the Builder Buyer Agreement was lost. Other Builder Buyer Agreement was also supposed to be destroyed as it was not according to RERA format.

12. Now, we would like to examine the contentions raised by both the parties. The First issue which emerges for determination is whether the Applicants are “allotees” in terms of Section 5(8)(f)(ii) of IBC, 2016 as on the date of filing of the Petition. In this context, we refer to one of the Allotment letters annexed with the Application by the Applicants, the contents of which reads thus:

vatika®
creating lasting value

Registered Office
Vatika Limited
Vatika Triangle, 4th Floor
Sushant Lok, Phase I, Block A
Mehrauli - Gurgaon Road
Gurgaon 122 002, Haryana
INDIA

T 91.124.4177 777
F 91.124.4177 700
E info@vatikagroup.com

www.vatikagroup.com

Ref: 16-10-0274764/016/05082016
Date: 05th Aug 2016

Mr. Anil Aggarwal
Mr. Arun Kumar Agarwal
H. No. 394, 1st Floor
Near Ryan Intl. School
Gurgaon 122003,

Subject : 'Letter of Allotment'

Reference: Unit No. 016 in High Street at INXT, Gurgaon

Dear Sir/Madam,

Please refer to your application for booking of Unit in our Commercial Project 'High Street at INXT. We are pleased to provisionally allot you Unit, of description detailed mentioned below.

Unit Number:	016
Floor:	Ground Floor
Sector:	83
City	Gurgaon
Super Area	1385 Sq ft.
Basic Sale Price	12465000/-

Payment Plan	
Rate	**Rs. 9000 Per sq.ft.**
Booking Amount	**5% of the Basic Sale Consideration**
Within 60 days from the date of Booking	**54% of the Basic Sale Consideration**
On completion of construction of the Building	**41% of the Basic Sale Consideration**

- **Definition of Super Area:** Super Area comprises of the sum total of following area (A+B)
  - C) Covered Area of the Unit (inclusive of walls and column line within)
  - D) Proportionate share of common area and services including but not limited to Lobby, Entrance Foyer, Staircases, Elevators, Atrium, Corridors, Plant & Machinery rooms in basement, services installed on terrace, toils, service shafts etc.

- The Total Sale Consideration for the units are inclusive of Government or Municipal Charges / E.D.C/ I.D.C at rates prevailing as on the time of booking. In the event there is revision/increase in these charges henceforth, the same shall have to be borne by the Applicant (on pro-rata basis in proportion to the unit size).

- The Total Sale Consideration does not include Interest Free Maintenance Security Deposit (IFMSD) towards maintenance security and the Service tax/other taxes.

- In the event the Allottee does not pay the instalment amount within seven (7) days of the stipulated time mentioned in this Letter of Allotment/payable as per payment plan/Schedule of Payments/Terms and Conditions mentioned below then penal interest @ 18% per annum shall be payable along with the amount due. If the default continues beyond 90 days from the stipulated time then Developer/Vatika Limited, shall have the right to cancel/withdraw this Letter of Allotment and refund the amount paid by the Allottee, till date, after deducting 10% of the total sales consideration as earnest money along with other non refundable amounts.

- The Allotment is subject to the below mentioned terms and conditions:

vatika
creating lasting value

TERMS AND CONDITIONS:-

1. The final sizes of the units may vary from the sizes indicated in this 'Letter of Allotment' on account of either design or statutory conditions. Any variation of + \ - 10 % shall be deemed to be within acceptable range and the 'Allottee' shall be bound to accept the change in area. The cost of the unit shall be adjusted (the applicant refunded excess amount or be required to pay additional sale consideration), on pro-rata basis based on the change (decrease or increase) in the commercial unit's area based upon the price at which the unit has been booked under this Letter of Allotment.

2. The said allotment is provisional and subject to remittance of payments in terms of the payment plan/ schedule of payment, as agreed /opted by the Allottee. In the event the applicant does not pay the balance amount or defaults in execution of Builder Buyer Agreement within stipulated time, the present allotment letter shall stand withdrawn and 10% of the total sales consideration, as earnest money, along with other non-refundable amounts shall stand forfeited and remaining amount, if any, shall be refunded to the Allottee.

3. The developer shall remit an assured monthly return of Rs. 131.04 Per sq. ft. till completion of the building. It is stated that the project is in advance stages of construction and the developer based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said Building /said commercial unit soon.

6. The Allottee authorizes the developer to lease out the said unit, which is part of the commercial complex (mention name of the project) and agrees that the obligation of the developer shall be to lease the said unit along with the other commercial spaces in the commercial complex. The developer shall lease the unit along with the premises @ Rs140/- per sq.ft. However, in the eventuality the achieved lease return being higher or lower than Rs140/- per sq.ft. the following would be applicable.

   a If the achieved rental is less then Rs 140/- per sq.ft. then you shall be refunded @ Rs. 133.34/- per sq.ft. (Rupees One Hundred Thirty Three & Thirty Four Paisse) for every Rs.1/- by which achieved rental is less then Rs 140/- per sq.ft.

   b If the achieved rental is more then 140/- per Sqft shall be liable to pay additional sales consideration @ Rs. 66.67/- Per Sqft. for every rupee of additional rental achieved.

4. It is further clarified that the Rental Security Deposit / Rental Advance as would be received from the incoming lessees shall be passed on the Allottee, subject to the receipt of payments, as per the payment plan/ schedule of payments or any other outstanding amounts/dues payable as in terms of clause 4 etc.

6. On execution of Builder Buyer Agreement, in case there is any contradiction between the terms and conditions of this Letter of Allotment and that of the Builder Buyer Agreement then the terms and conditions of Builder Buyer Agreement shall prevail.

Please find enclosed herewith a cheque towards Commitment Charges for the month of till Dec-16 w.e.f. 27/10/16

Cheque No & Bank	Date	Commitment Charges (Rs.)	TDS@ 10%	Net Commitment Charges (Rs.)
170976	07/12/16	196197/-	19613/-	176512.79
170977	"	"	"	"

We welcome you to our family of Vatika Group projects.

Thanking you

Yours faithfully,
For Vatika Ltd.

Gautam Bhalla
Managing Director

From a plain reading of aforesaid Allotment letter, it is observed that the Allotment was provisional in nature and the execution of the Builder Buyer agreement was a condition precedent to make the Allotment conclusive, which is not the case herein. Though the Registration charges were paid by the Applicant and a draft cancelled Buyer Agreement was sent to the Applicant, however, the same was cancelled by

the Respondent vide its cancellation letter dated 17.06.2019. Admittedly, aggrieved by the same, the Applicants had filed a complaint before the ***National Consumer Dispute Redressal Commission, New Delhi bearing Complaint Case No. 360 of 2020 on 18.03.2020***, challenging cancellation of allotment letters and claiming regular payments of assured returns. The Respondent has contended that the said complaint was filed during the pendency of the present petition.

14. From the record, it is seen that the Applicant No.1 had sent a "Demand notice" to the Respondent on 17.06.2019. We would like to examine whether it was issued in the capacity of an "allottee". Accordingly, we refer to the demand notice 17.06.2019 sent on behalf of Mr. Ravi Luthra (Applicant No. 1), the contents of which reads thus:

Annexure A-7

CorpLit Consultants

Advocates and Advisors

BY COURIER/E-MAIL

17th June, 2019

WITHOUT PREJUDICE

To:

VATIKA LIMITED
Vatika Triangle, 4th Floor,
Sushant Lok Phase I, Block A,
Mehrauli - Gurgaon Road,
Gurgaon HR 122002

Our Client: Mr. Ravi Luthra
C-47, Inder Puri
New Delhi - 110012

SUBJECT: Demand notice for payment of Rs. 14,37,304/- along with interest @18% p.a.

Dear Sir,

Acting under the instructions of, and on behalf of "Our Client" above named, Mr. Ravi Luthra, we serve upon you the following notice and call upon you as under:

1. Our Client Mr. Ravi Luthra is an individual resident of C-47, Inder Puri, New Delhi – 110012 who had purchased a commercial unit bearing 071 under the project named "High Street at INXT" situated at Sector 83, Gurgaon by issuing a Letter of allotment dated 25th June, 2017 (hereinafter referred to as 'Unit') for a total consideration of Rs. 99,00,000 (Rupees Ninety Nine Lakhs).

2. That in acceptance of your Offer, Our Client had paid Rs. 1,02,46,500/- (Rupees One Crore Two Lakhs Forty Six Thousand and Five Hundred Only) which is inclusive of service tax amount and after deducting TDS amount amount to your credit in terms of the said Letter of Allotment. Further, in terms of clause 4 of the said Letter of Allotment, you Noticee

Address: W-104, LGF (Rear), Greater Kailash - 1, New Delhi - 110048, Tel: 91-11-40342603
Mob: 9911338808, Email: corplitconsultants@gmail.com/ spsinghchawla@hotmail.com

True Copy
Advocate

CorpLit Consultants
Advocates and Advisors

were supposed to pay assured monthly returns of Rs. 163.33 Per sq. ft. till completion of the project. The said clause is reproduced here under –

" 4. The developer shall remit an assured monthly return of Rs. 163.33 Per sq. ft. till completion of the building. It is stated that the project is in advance stages of construction and the developer based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said Building/ said commercial unit soon"

3. The Payment of Rs. Rs. 1,02,46,500/- (Rupees One Crore Two Lakhs Forty Six Thousand and Five Hundred Only) and the same has never been disputed without any demur.

4. It has been further assured by you the Noticee that they shall further pay lease rentals of Rs. 140 sq. ft after completing of the project in terms of Clause 5.

5. That in terms of clause 4 of the said Letter of Allotment, you Noticee started paying the assured monthly returns from 27.06.2017 for a monthly amount of Rs.1,79,300/- and deducting TDS comes to Rs. 1,61,697/- and kept on to paying till 12.10.2018. However, post October, 2018, no such assured monthly returns has been paid to our client.

6. That despite making many efforts by our client and following up with your representatives, you Noticee have on one or the other pretext sought time to pay the said assured monthly rent and never made any genuine efforts of paying the said amount.

7. In the said facts and circumstances as explained herein above, we on behalf of our above-named Client serve you with this notice and demand

True Copy

Address: W-104, LGF (Rear), Greater Kailash - 1, New Delhi - 110048, Tel: 91-11-40342603,
Mob: 9911338808, Email: corplitconsultants@gmail.com/ spsinghchawla@gmail.com

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you to unconditionally repay the unpaid admitted debt in the form of assured monthly returns (in default) of Rs. 14,37,304/- (after deducting applicable TDS) along with interest @ 18% p.a. (Assured Returns from November, 2018 to June, 2019) to our Client, through cheque/ demand draft in full within 15 (fifteen) days from the receipt of this notice failing which we have pre-emptory instructions to initiate a corporate insolvency resolution process in respect of you Noticee, under Insolvency and Bankruptcy Code, 2016 and rules made thereunder. This is without prejudice to any other remedy available to Our Client in accordance with law.

8. Further, it is stated that a future monthly payment of assured returns on regular basis in terms of clause 4 of the said Letter of Allotment, till the project is complete and an Occupation Certificate is issued by the competent authority. Thereafter, payment of Rs. 154000/- per month as rent @ Rs. 140/- per square feet per month for the next 36 months be also paid.

9. Without prejudice to our client's rights & contentions, your conduct of illegally not adhering to the terms of the said Letter of Allotment entitles our client to commence proceedings before a court of law, seeking criminal sanctions as well as injunction and specific performance.

10. In event of failure on your part to comply with the present legal notice, as stated above within the prescribed time, our client shall also be constrained to institute appropriate criminal proceedings under Section 405, 409 and 420 of the Indian Penal Code, 1860 and/or civil proceedings against you Noticee, which shall entirely be at your own risk, costs and consequences.

True Copy
Advocate

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11. Further, please note that any attempts to raise frivolous issues or filing retaliatory, pre-emptive of false complaint with different forums/authorities will not save you from the criminal and civil consequences stated above and the liability to pay up the outstanding dues against our Client.

We trust wiser counsel will prevail and each one of you will comply the above without resorting to further dilatory tactics. Failing which, we have peremptory instructions from our Client to initiate appropriate civil and/or criminal proceedings against each one of you in appropriate court/forum having jurisdiction in India without any further notice and entirely at your risk as to costs and consequences which you may please note.

A copy of the present notice is retained in our office for future reference.

Yours Sincerely,

For CorpLit Consultants

CorpLit Consultants New Delhi

(SP Singh Chawla)
Advocate

15. From a perusal of the abovesaid Demand Notice, specifically para 7, it is observed that the demand was raised by the Applicant No. 1 towards the default pertaining to the "payment of assured returns of Rs. 14,37,304/- along with interest @ 18%", and not for the failure of delivery of handing over possession of unit.

16. In view of the fact that no builder buyer agreement(s) could be executed between the parties and the allotment(s) was cancelled; and the fact that the amounts claimed by the Applicants has been arising out of default pertaining to the "assured returns", we are of the view that the Applicants cannot be considered as "allottees". However, we would still like to examine whether the Applicants still maintain the petition as Financial Creditors claiming default towards assured returns.

17. In its submissions, the Respondent has stated that it had informed the Applicants well in advance that it cannot provide any further assured returns in view of the introduction of BUDS Act. However, the Applicants had denied any such intimation. In this context, the Respondent has relied upon the email dated 12.01.2018, the contents of which reads thus:

—— Original message ——
From: Vatika Limited <noreply@vatikagroup.com>
Date: 12/1/18 12:56 (GMT+05:30)
To: noreply@vatikagroup.com
Subject: Update regarding your Property Investment in High Street at INXT

Dear Sir/Ma'am,

Greetings !

This letter is in furtherance to our earlier communication dated 9th November 2018, with respect to the above-mentioned subject and seeks to address and alleviate your concerns regarding your investment.

In this regard, it is pertinent to mention that policies, regulations and the legal framework governing real estate investments have changed rapidly over the last 24 months. For instance, GST and income tax rules have impacted the ways real estate is purchased and sold. Similarly, introduction of RERA Act (2016) not only regulates the sector but also stipulates the conditions attached to marketing, selling and delivering properties based on definitive areas as defined by the Act. Further, the law around the Benami Property and Transactions Act, amended in November 2016, has also been made more stringent and seeks to trace every purchase with the source of funding.

Recent legal precedents, amendments to the SEBI Act, and a proposed Bill # 85 (subsequent to receiving the Cabinet approval) tabled in the LokSabha in July 2018, prohibit any return based sales without registering the product with SEBI. The penalties, punitive and criminal in nature, are severe for the stakeholders.

We want to emphasize that we consider adherence to compliances our moral and legal responsibility and we strongly believe that it reinforces our commitments to our clients as we ensure that their interests are protected at all times.

As a consequence, Vatika will not be selling any properties with commitment of assured returns or that pays returns of any kind. Hereafter, all properties will be sold on a "Down Payment Basis", "Possession Linked Basis" or "Construction Linked Basis."

Construction has commenced in the project. The project is likely to take 12 months.

Your timely payment rebate will accrue to your account, which will be reconciled by June 2019. Tax advantages will also be passed on to you.

We thank you for reposing your trust in us and we once again reiterate that we will always preserve your best interest, within the confines of the current and proposed legal and regulatory frameworks of the country.

://mail.google.com/mail/u/0?ik=dfe57e1b81&view=pt&search=all&permmsgid=msg-f%3A1619195353463562131&simpl=msg-f%3A1619195353463562131

18. From perusal of the aforesaid email, it is observed that the Respondent has used the words viz., "…a Proposed Bill # 85 (subsequent to receiving the Cabinet Approval) tabled in the Lok Sabha in July 2018"…, which indicates that the Respondent had intimated the applicant(s) about Banning of Unregulated Deposit Schemes. Whether the Banning of Unregulated Deposit Schemes Act, 2019, is applicable on the transaction is a question, can only be decided by the Court of appropriate jurisdiction, and which is not this Adjudicating Authority.

However, whether a CIRP can be initiated by an Applicant claiming payment of the Assured Returns has already been decided by the Hon'ble Supreme Court in the **Pioneer Urban Land and Infrastructure Ltd. and Anr. Vs Union of India and Ors., *(2019) 8 Supreme Court Cases 416.*** Similarly, the Hon'ble NCLAT in its judgment dated 31.01.2022 in Company Appeal (AT) (Ins) no. 1035 of 2020 in **Mrs. Nidhi Rekhan Vs M/s. Samyak Projects Private Limited,** held that a Speculative Investor is not a Financial Creditor. The relevant para of the judgement reads thus:

> *"12. We, therefore, now examine the various clauses of the Agreement entered between the Corporate Debtor Samyak Projects Private Limited and Mrs. Nidhi Rekhan who purports to be an allottee. The above-mentioned clauses 3, 4, 5 and 6 of the Agreement are primarily concerned with the "Down Payment" and* ***an assured rate of return of 24% p.a.*** *and the right of the First Party/Mrs. Nidhi Rekhan, to assign the flat to any of her nominees. Clause 7 is about the right of the allottee to cancel the booking after the specified period of one year. There is no clause in the agreement which relates to the construction/completion of the flats, the time stipulated for completion of construction, any penalty to be imposed on the developer/builder for delaying Case Citation: (2022) ibclaw.in 109 NCLAT construction and other such provisions that are pertinent and*

germane to a housing development project and which are necessary for protecting the interest of the allottee. All such provisions are usual and necessary elements of a Builder-Buyer Agreement. We find from the said agreement that there is a "Down Payment" of Rs. 1 Crore with remaining balance of Rs. 11,90,000/- (Rupees Eleven Lakhs Ninety Thousand only) and an assured rate of return @ 24% per annum. In addition, the allottee is given the right, in its absolute discretion, to cancel or rescind the allotment of the flats/units booked through the agreement. The assured rate of return of 24% per annum is a very high rate of interest that a builder would not offer to an allottee even when she is making down payment. The Agreement in this case does not, therefore, have the necessary elements of a Builder-Buyer agreement. On the contrary, it is an agreement which is more in the nature of detailing and protecting an investment made by Mrs. Nidhi Rekhan, who is coming in the garb of an allottee. As has been held by this tribunal in the matter of ***Sudha Sharma versus Mansi Brar & Anr. [Company Appeal (AT) (INS) No. 83 of 2020]*** *and the subsequent order of Hon"ble Supreme Court in* ***Mansi Brar Fernandes versus Sudha Sharma and Anr. [Civil Appeal No. 3826/2020]*** *which affirms the order of this Tribunal in Company Appeal (AT) (INS) No. 83 of 2020,* ***we find that the purported allottee Mrs. Nidhi Rekhan, is actually a speculative investor earning a high rate of interest on her investment and is by no means interested in the construction, completion and possession of the said flats no. A–1201 and E–1301. Therefore, we have no hesitation in holding that Mrs. Nidhi Rekhan/Appellant cannot claim to be a "financial creditor" as defined under explanation (i) of section 5(8)(f) of the IBC. The facts in the matter of Pioneer Urban Land and Infrastructure (supra) support the facts of this case as in this case the Appellant is not a genuine allottee but an investor***

who has come as allottee with no intention of possessing the flats. *The Ld. Counsel for Appellant has also referred to* ***Pioneer Urban Land and Infrastructure (supra)****, particularly paragraph 67 wherein it is held that "…The expression "borrow" is wide enough to include an advance given by the home buyers to a real estate developer for "temporary use" i.e. for use in construction project so long as it is intended by the agreement to give "something equivalent" to money back to the home buyers." It is noted by us that the Appellant in the instant case is not a genuine home buyer but someone who has invested a certain amount but is coming before us as a home buyer. We distinguish the above observation made in the* ***Pioneer Urban Land and Infrastructure (supra)*** *judgment* ***as the Appellant is not a genuine home buyer and hence he cannot claim benefit as an "allottee" in a real estate project and hence will not be considered a financial creditor by taking recourse to Explanation (i) of section 5(8)(f) of the IBC****."*

XXXX

XXXX

"17. Thus, in our clear opinion, ***the Appellant, who is a speculative investor, cannot claim status and benefits as financial creditor under Explanation (i) of Section 5(8)(f) of the IBC****, and is not interested in the financial well-being, growth and vitality of the Corporate Debtor, but is just interested in her investment and has come in the garb of an allottee. In such a situation, the Appellant is certainly not a financial creditor holding financial debt, which is in default of payment by the Corporate Debtor, and consequently we conclude that the Impugned Order does not require any interference. The appeal is, therefore, dismissed. There is no order as to costs."*

(Emphasis placed)

19. As we have already noted from the pleadings, the Applicants in the present case are claiming assured returns @ Rs. 163.33 per sq. feet, and over and above, they have claimed 18% interest on their claims. The clause 4 of the allotment letter, though cancelled as on date, regarding assured return @ Rs. 163.33 per sq. feet along with delivery of unit and the claims of the Applicants towards the assured returns along with exorbitant interest, reflects that the Applicants are the Speculative Investors, who have invested their money to get return on monthly basis. As we have found in the previous paragraph, the Hon'ble NCLAT in **Mrs. Nidhi Rekhan (Supra)**, while relying on the Judgement of the Hon'ble Supreme Court in **Pioneer Urban Land and Infrastructure Ltd. and Anr.v Union of India and Ors.** has clearly held that a Speculative Investor is not a Financial Creditor.

20. In view of the above, we conclude that Applicants herein claiming assured returns are not "allottees" and rather "Speculative investors" and therefore, not "Financial Creditors". Hence, we have no other option but to dismiss the Application.

21. **Accordingly, the present CP(IB) No. 663/Chd/Hry/2019 is dismissed.**

Sd/-
(L.N. Gupta)
Member (Technical)

Sd/-
(Harnam Singh Thakur)
Member (Judicial)

June 07, 2024
TB

ANNEXURE-1
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& Mr. Rohit Sachdeva

& Mr. Anil Sachdeva

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(APPLICANTS REPRESENTED THROUGH RAVI LUTHRA)