BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**171 of 2022**
Date of filing complaint:	**27.01.2022**
First date of hearing:	**29.01.2021**
Date of decision :	**18.07.2023**

Mrs. Sumeet Johal, Mr. Adhiraj Singh Johal & Sandeep Singh Johal HUF **All are R/o**: 55-A, DLF colony, Sirhind Road, Patiala-147004.	**Complainants**
Versus	
M/s Vatika Limited M/s Vatika One on One Pvt. Ltd. **address:** A002, Inxt City Centre, GF, Block A, Sector 83, Vatika India Next, Gurgaon-Haryana 122012.	**Respondents**

CORAM:	
Sh. Ashok Sangwan	Member
Sh. Sanjeev Kumar Arora	Member

APPEARANCE:	
Sh. Gaurav Rawat	**Advocate for the complainants**
Sh. Pankaj Chandola	**Advocate for the respondent**

ORDER

1. The present complaint has been filed by the complainant/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in

short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provisions of the Act or the rules and regulations made there under or to the allottees as per the agreement for sale executed inter se.

A. Project and unit related details

2. 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:

S. No.	Heads	Information
1.	Name and location of the project	"One on One", Sector-16, Gurugram, Haryana.
2.	Nature of the project	Commercial complex
3.	Area of the project	12.13 acres
4.	DTCP License	05 of 2015 dated 06.08.2015
	valid upto	05.08.2020
	Licensee name	Keshav Dutt & others
5.	RERA registered/ not registered	**237 of 2017 dated 20.09.2017 valid upto 19.09.2022**
6.	Allotment letter	07.06.2019 (page 24 of written Argument)
7.	Date of Application form	05.10.2018 (Page 46 of complaint)
8.	Unit no.	P-868 admeasuring 500 sq.ft.
9.	Total consideration	Rs. 41,25,000/-
10.	Total amount paid by the complainants	Rs. 27,72,000/-

11.	Date of offer of possession to the complainants	**Not offered**
12.	Occupation certificate	**Not obtained**

B. Facts of the complaint

3. That the complainants while searching for a commercial unit was lured by such advertisements and calls from the brokers of the respondents for buying a house in their project namely "One on One". The respondents total the complainants about the moonshine reputation of the company and the representative of the respondent made huge representations about the project mentioned above and also assured that they have delivered several such projects in the NCR. The respondent handed over one brochure to the complainants which showed the project like heaven and in every possible way tried to hold the complainants and incited the complainants for payments.

4. That relying on various representations and assurances given by the respondent and on belief of such assurances, complainants booked a unit in the project by paying a booking amount of Rs. 27,72,000/- towards the booking of the said unit bearing no. P-868, in Sector 16, having super area measuring 500 sq. ft. to the respondents dated 11.10.2018 and the same was acknowledged by the respondents.

5. That the respondents sent allotment letter dated 07.06.2019 to the complainant providing the details of the project, confirming the booking of the unit dated 11.10.2018, allotting a unit no. P-868 admeasuring 500 Sq. Ft in the aforesaid project of the developer for a total sale consideration of the unit i.e., Rs. 41,25,500/-, which includes basic price, EDC and IDC, car parking charges and other specifications of the allotted unit and providing the time frame within which the next instalment was

to be paid. The complainants vide booking application form dated 11.10.2018 applied for booking of the said unit. Thereafter, repeated reminders and follow ups only that the respondent provide the copy of the said allotment letter in year 2021.

6. As per assurance and on the bases of the above said allotment letter respondents assured of getting the builder buyers agreement/ agreement to sell within 30 days from the date of the above said allotment letter i.e., 07.06.2019. At the time of purchasing the unit, the complainant was assured that the possession of the unit would be delivered within the promised period of 2 years from the date of allotment letter i.e., by 07.06.2021.

7. That as per clause of the allotment letter, the respondents undertake to make the payment of commitment amount/assured return of Rs. 123.45 per Sq. Ft. per Month on super area of 500 Sq. Ft. from the date of allotment letter i.e., 07.06.2019 till the completion of the unit for fit outs. Further, as per clause of the booking application dated11.10.2018 the respondents promised that post the completion of the construction of the said building, the complainant would be paid committed return of Rs. 131/- per Sq. Ft. per month on super area for upto 3 years from the date of completion of construction of said building or the said unit is put on lease, whichever is earlier.

8. That as per clause of the booking application form the respondents agreed to put the said unit on lease @Rs. 131/- per sq.ft. per month and to effectuate the same. But till date respondents has failed to abide and honour the above said clause of the booking application form by not leasing out the above said unit.

9. That as per clause 3 of the allotment letter the respondents guaranteed the complainants, that in event the said unit is leased at a gross monthly rental of less than the commitment amount of Rs. 131/- per sq.ft. per month, then the respondents agreed that the complainant would get refunded amount calculated @Rs. 141.18/- per sq.ft. for every Rs. 1/- by which the achieved rent is less than Rs. 131/- per sq.ft. As per clause 3 of allotment letter, the respondents further agreed that there would be no maintenance charges/ electricity charges/ water charges etc. shall be charges from the complainant for the period unit is on lease and the said charges would be paid by the prospective tenant.

10. That as per the said booking application and allotment letter, the respondents were liable to handover the possession of the said unit on or before 07.06.2021. Therefore, the respondents was liable to pay interest as per the prescribed rate as laid under the Act, 2016 & Rules, 2017 for the delay in the delivery and the complainant as per clause of the application form is also entitled to get the monthly assured amount till the completion of the unit for fit outs and also post the completion of the construction of the said building, complainant would be paid committed return of Rs. 131/- per Sq. Ft. per Month on super area for up to 3 years from the date of completion of construction of said building or the said unit is put on lease, whichever is earlier. As per the demands raised by the respondent, based on the payment plan, the complainant to buy the captioned unit already paid a total sum of Rs.27,72,000/- towards the said unit against total sale consideration of Rs. 41,25,000/-.

11. That it is pertinent to mention here that allotment of the unit was made on 07.06.2019, after coming into force of the RERA Act,2016 and as per

the Act, after coming into force of the Act the respondent can charge only on the carpet area of the unit and not on the super area of the unit. In the present case, the respondent has charged the complainant on the super area i.e., 500 Sq. Ft. @ Rs. 8250 per Sq. Ft. which is against the provisions of the Act, 2016 and Rules 2017 made thereof. Hence, in accordance with the provisions of the RERA Act, necessary penal action is liable to be taken against the respondent and direction may kindly be passed to the respondent to charge on the carpet area instead of the super area of the unit. The respondent has collected approx. Rs. 27,72,000/- till date without executing the buyer's agreement. Further, such acts of the respondents are also illegal and against the spirit of Act, 2016 and Rules, 2017. By falsely ensuring wrong delivery lies and falsely assuring the timely delivery of possession, the complainants has been subjected to unethical/unfair trade practice as well as subjected to harassment in the guise of a biased allotment letter. The above said acts of the opposite parties clearly reveal that the "opposite parties" with prejudice has been indulging the unfair trade practices and has also been providing gross deficient services and thereby causing deficiency in services. All such Act and omissions on the part of the opposite party has caused and immeasurable mental stress and agony to the complainants. By having intentionally and knowingly induced and having falsely mis-represented to the complainants and thereby making them to act in accordance to its misrepresentations, and owing to all the deliberate lapses/delays on the part of the respondent, the respondents are liable to make as being requisitioned/claimed by the complainant

12. It is abundantly clear that the respondents have played a fraud upon the complainant and have cheated them fraudulently and dishonestly with a false promise that they would complete the construction over the project site within stipulated period and shall be paying the monthly assured amount. The respondents have further malalfidely failed to implement the contents of the allotment letter with the complainant. Hence, the complainant being aggrieved by the offending misconduct, fraudulent activities, deficiency and failure in service of the respondents is filing the present complaint.

13. The complainant after losing all the hope from the respondents, having their dreams shattered of owning a commercial office space & having basic necessary facilities in the vicinity of the "One On One" project and also losing considerable amount, are constrained to approach the Authority for redressal of their grievance.

C. Relief sought by the complainants:

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

i. Direct the respondent to pay the monthly assured returns.

ii. Direct the respondent to pay interest at prevailing rate on the amount paid by the complainant.

iii. Direct the respondent to carry out the title registration/ execution of conveyance deed of the unit and to handover physical vacant possession of the unit with immediate effect.

iv. Direct the respondents to execute a builder buyer agreement in respect of the unit in question in favour of the complainant.

15. On the date of hearing, the authority explained to the respondents/ promoters about the contraventions as alleged to have been committed

in relation to section 11(4) (a) of the act to plead guilty or not to plead guilty.

D. Reply by the respondents

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

a. That in the year 2015, the complainant learned about the commercial project launched by the respondent titled as "One on One" situated at Sector 16, Gurugram and visited the office of the respondent to know the details of the said project. the complainants further inquired about the specifications and veracity of the commercial project and were satisfied with every proposal deemed necessary for the development.

b. That after having dire interest in the commercial project constructed by the respondent the complainants booked a unit vide application form dated 05.10.2018 and paid an amount of Rs. 5,00,000/- for further registration on their own judgment and investigation. It is evident that the complainants were aware of each and every terms of the application form and agreed to sign upon the same without any protest or demur.

c. That on 07.06.2019, an allotment letter was issued to the complainants for the unit bearing no. P-868 admeasuring to 500 sq. yards for a total sale consideration of Rs. 41,25,000/- in the aforesaid project. The complainants were well aware of the fact, that the commercial unit in question was subject to be leased out post it completion and the same was evidently mentioned and agreed by the complainants in the allotment letter dated. The said commercial unit in question was deemed to be leased out upon completion. The complainants have

mutually agreed and acknowledgment that upon completion for the said unit the same would be leased out.

d. The said application form clearly stipulated provisions for "lease" and admittedly contained a "lease clause". In the light of the said facts and circumstances it can be concluded beyond and reasonable doubt that the complainants is not a consumer or allottee.

e. That the complainants are trying to mislead the court by concealing facts which are detrimental to the complaint at hand. The complainants have approached the respondent as an investor looking for certain investment opportunities. Therefore, the said allotment of the said unit contained a "lease clause: which empowers the developers to put a unit of complainant along with the other commercial space unit on lease and doe not have possession clause for physical possession.

f. That the complainant has filed the present complainant before the wrong forum. That the complainant is praying for the relief of "Assured Returns" which is beyond the jurisdiction that this Ld. Authority has been dressed with. That from the bare perusal of the RERA Act, it is clear that the said Act provides for three kinds of remedies in case of any dispute between a builder and buyer with respect to the development of the project as per the agreement. That such remedies are provided under Section 18 of the RERA Act, 2016 for violation of any provision of the act. That the said remedies are of "Refund" in case the allottee wants to withdraw from the project and the other being "interest for delay of every month" in case the Allottee wants to continue in the project and the last one is for compensation for the loss

occurred by the Allottee. That it is pertinent to note herein, that nowhere in the said provision the Ld. Authority has been dressed with jurisdiction to grant "Assured Returns".

g. That the respondent cannot pay the "Assured Returns" to the complainant by any stretch of Imagination in the view of prevailing laws. That on 21.02.2019 the Central Government passed an ordinance "Banning of Unregulated Deposits, 2019", to stop the menace of unregulated deposits, the "Assured Returns Scheme" given to the complainant fell under the scope of this Ordinance and the payment of such returns became wholly illegal. That later, an act by the name "The Banning of Unregulated Deposits Schemes Act, 2019" (hereinafter referred to as "the BUDS Act") notified on 31.07.2019 and came into force. That under the said Act all the unregulated deposit schemes such as "Assured Returns" have been banned and made punishable with strict penal provisions.

h. It is also provided that in respect of respondent, "deposit" shall have the same meaning as assigned to it under the Companies Act, 2013. Sub section 31 of section 2 of the companies Act provides that "deposit" includes any receipt of money by way of deposit or loan or in any other form by a respondent but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India.

i. One of the amounts as set out under sub rule (1)(c)(xii)(b) of Rule 2 of the Deposit Rules (i.e. which is not a deposit) is an advance, accounted for in any manner whatsoever, received in connection with

consideration for an immovable property under an agreement or arrangement, provided that such advance is adjusted against such property in accordance with the terms of the agreement or the arrangement

j. Therefore, the agreements or any other understanding of these kinds, may, after 2018, and if any assured return is paid thereon or continued therewith may be in complete contravention of the provisions of the BUDS Act. The BUDS Act provides two forms of deposit schemes, namely Regulated Deposit Schemes and Unregulated Deposit Schemes. Thus, for any deposit scheme, for not to fall foul of the provisions of the BUDS Act, must satisfy the requirement of being a 'Regulated Deposit Scheme' as opposed to Unregulated Deposit Scheme. Hence, the main object of the BUDS Act is to provide for a comprehensive mechanism to ban Unregulated Deposit Scheme.

k. Further, any orders or continuation of payment of any assured return or any directions thereof may be completely contrary to the subsequent act passed post the RERA Act, which, is not violating the obligations or provisions of the RERA Act. Therefore, enforcing an obligation on a promoter against a central Act which is specifically banned, may be contrary to the central legislation which has come up to stop the menace of unregulated deposit.

l. It is pertinent to note that the schemes being harped upon by the complainant would have no foundation in the builder buyer agreement, therefore the concerns arising out of the same cannot be

adjudicated by this authority. The "Assured Returns" scheme has become illegal. It is noteworthy in the present situation, that in order to provide a comprehensive mechanism to ban the unregulated deposit schemes, other than the deposits taken in the ordinary course of business, Parliament has passed an act titled as "The Banning of Unregulated Deposit Schemes Act, 2019" (hereinafter referred to as "BUDS Act").

m. It is pertinent to note herein that the respondents have faced various challenges in the seamless execution of the present project. That the project had deferred due to various reasons beyond the control of the respondent which directly affected the execution of the project. Demonetization and GST resulted in a serious economic meltdown and sluggishness in the real estate sector. That the respondent, with no cash circulation in the market the respondent could not make timely payments to the labourers and the contractors which stalled the construction. Further, the NGT vide its order dated 09.11.2017 a complete ban on construction activities in around Delhi-NCR which further caused serious damage to the project. Despite the various challenges the respondent is trying his level best to complete the said project well within the timeline as declared during the time of registration.

n. That the current covid-19 pandemic resulted in serious challenges to the project with no available labourers, contractors etc for the construction of the Project. The Ministry of Home Affairs, GOI vide notification dated March 24,2020 bearing no. 40-3/2020-DM-I(A)

recognised that India was threatened with the spread of Covid-19 pandemic and ordered a complete lockdown in the entire country for an initial period of 21 days which started on March 25,2020. By virtue of various subsequent notifications, the Ministry of Home Affairs, GOI further extended the lockdown from time to time and till date the same continues in some or the other form to curb the pandemic. Various State Governments, including the Government of Haryana have also enforced various strict measures to prevent the pandemic including imposing curfew, lockdown, stopping all commercial activities, stopping all construction activities. Pursuant to the issuance of advisory by the GOI vide office memorandum dated May 13, 2020 regarding extension of registrations of real estate projects under the provisions of the RERA Act, 2016 due to "Force Majeure", the Haryana Real Estate Regulatory Authority has also extended the registration and completion date by 6 months for all real estate projects whose registration or completion date expired and or was supposed to expire on or after March 25, 2020.

o. In past few years construction activities have also been hit by repeated bans by the Courts/Tribunals/Authorities to curb pollution in Delhi-NCR Region. In the recent past the Environmental Pollution (Prevention and Control) Authority, NCR (EPCA) vide its notification bearing no. EPCA-R/2019/L-49 dt 25.10.2019 banned construction activity in NCR during night hours (6 pm to 6 am) from 26.10.2019 to 30.10.2019 which was later on converted to complete ban from 1.11.2019 to 05.11.2019 by EPCA vide its notification bearing no. R/2019/L-53 dated 01.11.2019.

p. The Hon'ble Supreme Court of India vide its order dated 04.11.2019 passed in writ petition bearing no. 13029/1985 titled as "MC Mehta vs Union of India" completely banned all construction activities in Delhi-NCR which restriction was partly modified vide order dated 09.12.2019 and was completely lifted by the Hon'ble Supreme Court vide its order dated 14.02.2020. These bans forced the migrant labourers to return to their native towns/states/villages creating an acute shortage of labourers in the NCR Region. Due to the said shortage the construction activity could not resume at full throttle even after the lifting of ban by the Hon'ble Apex Court. Even before the normalcy could resume the world was hit by the covid-19 pandemic. Therefore, it is safely concluded that the said delay in the seamless execution of the project was due to genuine force majeure circumstances and the said period shall not be added while computing the delay.

17. 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

18. 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

19. 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

20. 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.*

21. So, in view of the provisions of the Act of 2016 quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside

compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the relief sought by the complainant:

F.I Assured return

22. While filing the petition besides delayed possession charges of the allotted unit as per clause 3 of the application form, the claimant has also sought assured returns on monthly basis as allotment letter at the rates mentioned therein till the completion of the building. It is pleaded that the respondent has not complied with the terms and conditions of the allotment letter. 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.

23. The Act of 2016 defines "agreement for sale" means an agreement entered into between the promoter and the allottee [Section 2(c)]. An agreement for sale is defined as an arrangement entered between the promoter and allottee with freewill and consent of both the parties. An agreement defines the rights and liabilities of both the parties i.e., promoter and the allottee and marks the start of new contractual relationship between them. This contractual relationship gives rise to

future agreements and transactions between them. The different kinds of payment plans were in vogue and legal within the meaning of the agreement for sale. One of the integral part of this agreement is the transaction of assured return inter-se parties. The "agreement for sale" after coming into force of this Act (i.e., Act of 2016) shall be in the prescribed form as per rules but this Act of 2016 does not rewrite the "agreement" entered between promoter and allottee prior to coming into force of the Act as held by the Hon'ble Bombay High Court in case ***Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors., (Writ Petition No. 2737 of 2017) decided on 06.12.2017.*** Since the agreement defines the buyer-promoter relationship therefore, it can be said that the agreement for assured returns between the promoter and allottee arises out of the same relationship. Therefore, it can be said that the real estate regulatory authority has complete jurisdiction to deal with assured return cases as the contractual relationship arise out of agreement for sale only and between the same parties as per the provisions of section 11(4)(a) of the Act of 2016 which provides that the promoter would be responsible for all the obligations under the Act as per the agreement for sale till the execution of conveyance deed of the unit in favour of the allottee. Now, three issues arise for consideration as to:

i. Whether the authority is within its 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 allottee 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 allottee in pre-RERA cases

24. 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" (supra),*** 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 an allotee arises out of the same relationship and is marked by the original agreement for sale. Therefore, it can be said that the authority has complete jurisdiction with respect to assured return cases as the contractual relationship arises out of the agreement for sale only and between the same contracting parties to agreement for sale. In the case in hand, the issue of assured returns is on the basis of contractual obligations arising between the parties. Then in case of Pioneer Urban Land and Infrastructure Limited & Anr. v/s Union of India & Ors. (Writ Petition (Civil) No. 43 of 2019) decided on 09.08.2019, it was observed by the Hon'ble Apex Court of the land that "...allottees who had entered into "assured return/committed returns' agreements with these developers, whereby, upon payment of a substantial portion of the total sale consideration upfront at the time of execution of agreement, the developer undertook to pay a certain amount to allottees on a monthly basis from the date of execution of agreement till the date of handing over of possession to the allottees". It was further held that 'amounts raised by developers under assured return schemes had the "commercial effect of

a borrowing' which became clear from the developer's annual returns in which the amount raised was shown as "commitment charges" under the head "financial costs". As a result, such allottees were held to be "financial creditors" within the meaning of section 5(7) of the Code" including its treatment in books of accounts of the promoter and for the purposes of income tax. Then, in the latest pronouncement on this aspect in case Jaypee Kensington Boulevard Apartments Welfare Association and Ors. vs. NBCC (India) Ltd. and Ors. (24.03.2021-SC): MANU/ SC/0206 /2021, the same view was followed as taken earlier in the case of Pioneer Urban Land Infrastructure Ld & Anr. with regard to the allottees of assured returns to be financial creditors within the meaning of section 5(7) of the Code. Then after coming into force the Act of 2016 w.e.f 01.05.2017, the builder is obligated to register the project with the authority being an ongoing project as per proviso to section 3(1) of the Act of 2017 read with rule 2(o) of the Rules, 2017. The Act of 2016 has no provision for re-writing of contractual obligations between the parties as held by the Hon'ble Bombay High Court in case Neelkamal Realtors Suburban Private Limited and Anr. v/s Union of India & Ors., (supra) as quoted earlier. So, the respondent/builder can't take a plea that there was no contractual obligation to pay the amount of assured returns to the allottee after the Act of 2016 came into force or that a new agreement is being executed with regard to that fact. When there is an obligation of the promoter against an allottee to pay the amount of assured returns, then he can't wriggle out from that situation by taking a plea of the enforcement of Act of 2016, BUDS Act 2019 or any other law.

25. 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.*

26. 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;

27. 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.

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

29. 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.

30. 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.

31. 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.*

32. 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.

33. 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 allottee is an ongoing project as per section 3(1) of the Act of 2016 and, the same would fall within the jurisdiction of the authority for giving the desired relief to the complainant besides initiating penal proceedings. So, the amount paid by the complainant to the builder is a regulated deposit accepted by the later from the former against the immovable property to be transferred to the allottee later on.

34. On consideration of documents available on record and submissions made by parties, the complainants have sought assured return on monthly basis as per one of the provisions of application form at the agreed rates i.e., 120.28/- till the date of completion of building. It is observed by the Authority that the clause dealing with assured return provides for a rate for assured return to be paid till completion of the building. In the instant complaint, the subject unit is booked under assured return plan. However, the application form does not specify any clause wherein providing any rate for payment of assured return to the allottee after completion of the building. Whereas as per similar situated buyer's agreement of similar project it provides a rate of Rs.131/- per sq.ft. per month on super area for upto three years from the date of completion of construction of building or the unit is put on lease

whichever is earlier. Keeping in view the fact that the subject unit was booked under assured return plan and the respondent-builder has been paying assured return at a specified rate even after completion of building, it would be safe to conclude there might be some omission while drafting the said of Rs.131/- per sq.ft.. Therefore, the clause is to be taken from similar situated 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. 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.

35. Accordingly, the promoter is liable to pay assured return of the unpaid period as specified under the clause 3 of the application form dated 05.10.2018.

F.II Conveyance deed

36. Section 17 (1) of the Act deals with duty of promoter to get the conveyance deed executed and the same is reproduced below:

> ***"17. Transfer of title.-***
> *(1). The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws:*
> *Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be*

carried out by the promoter within three months from date of issue of occupancy certificate."

37. As OC of the unit has not been obtained, accordingly conveyance deed cannot be executed without unit come into existence for which conclusive proof of having obtained OC from the competent authority and filing of deed of declaration by the promoter before registering authority.

F.III Execution of buyer's agreement

38. A project by the name of One on One situated in sector 16, Gurugram was being developed by the respondent. The complainant came to know about the same and booked a unit in it for Rs. 41,25,000/-against which they paid an amount of Rs.27,72,000/-. The complainant has approached the Authority seeking relief w.r.t. execution of buyer's agreement *inter se* parties. The Authority observes that since the unit was booked under assured return scheme the complainant has already paid the entire amount towards consideration of allotted unit. The Act of 2016 under section 13(1) lays down that the respondent shall not received more than 10% of sale consideration. The relevant portion reproduce here:

> ***Section 13: No deposit or advance to be taken by promoter without first entering into agreement for sale.***
>
> ***13(1)*** *A promoter shall not accept a sum more than ten per cent of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force*

39. Hence, keeping in view the provision of section 13(1) of the Act, 2016 the respondent is directed to get the buyer's agreement executed between the parties within 15 days of the date of this order.

G. Directions of the authority

40. Hence, the authority hereby passes this order and issue 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 at agreed rate to the complainant(s) from the date the payment of assured return has not been paid till the date of completion of construction of building. After completion of the construction of the building, the respondent/builder would be liable to pay monthly assured returns at agreed rate of the super area up to 3years or till the unit is put on lease whichever is earlier.

ii. The respondent is also directed to pay the outstanding accrued assured return amount till date at the agreed rate within 90 days from the date of order after adjustment of outstanding dues, if any, from the complainant and failing which that amount would be payable with interest @8.70% p.a. till the date of actual realization.

iii. The Authority directs the respondent/builder to get the buyer's agreement executed between the parties within 15 days.

iv. The respondent shall execute the conveyance deed of the allotted unit within the 3 months from the final offer of possession along with OC upon payment of requisite stamp duty as per norms of the state government

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

41. Complaints stand disposed of.

42. File be consigned to registry.

(Sanjeev Kumar Arora)
Member

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram

18.07.2023