RESERVED JUDGMENT

BENCH-1

THE UTTAR PRADESH REAL ESTATE APPELLATE TRIBUNAL, AT LUCKNOW.

APPEAL NO.127 /2019

Ms. Kavita ……………..Appellant.

Versus

M/S Gardenia Aims Developers Pvt. Ltd. ……………Respondent.

Hon'ble Mr. Justice (Dr.) D. K. Arora, Chairman.
Hon'ble Mr. Rajiv Misra, Administrative Member.

1. The present appeal has been preferred by Ms. Kavita (hereinafter referred to as the 'appellant') under Section 44(1) of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as 'the Act 2016') against the order dated 27.02.2018 passed by the Real Estate Regulatory Authority, Lucknow (hereinafter referred to as the 'Regulatory Authority') in Complaint No.920171510 whereby the respondent was directed to deliver possession of the allotted flat to the appellant by 31.12.2018 after obtaining completion certificate from Noida Industrial Development Authority and pay penalty at the rate of Rs.5/- per sq.ft. of the super area from 01.01.2013.

2. The facts of the case, in brief, as culled out from the memo of appeal, are that the appellant booked a residential flat No. A-5/803 on 8th Floor, at Tower A-5, admeasuring super area of 950 sq.ft. in Project 'Glory' situated at Plot No. GH-01, Sector 46, Noida, Uttar Pradesh being developed by the respondent.

2.1 A Flat Allottee(s)'s Agreement was executed between the appellant and the respondent on 02.04.2010. As per Flat Allottee(s)'s Agreement the total cost of the flat was Rs.23,97,800/-. This cost was inclusive of all applicable taxes, facilities etc. In the payment details enclosed with the

Agreement it is nowhere mentioned that the appellant shall pay any cot towards any head.

2.2 Against total agreed sale consideration, the appellant has paid Rs.22,77,910/-. The remaining last installment of the payment is required to be paid at the time of legal possession.

2.3 At the time of booking of the above flat, the respondent agreed and assured the appellant that possession of the booked flat shall be handed over to the appellant in the month of October, 2012.

2.4 The respondent deliberately and intentionally failed to deliver legal possession of the flat to the appellant.

2.5 The appellant visited the office of the respondent on various occasions and requested the respondent to hand over legal possession and execute registry of her flat but the respondent did not take care of the request of the appellant and completely failed to comply its part of the agreement.

2.6 The appellant came to know that the respondent has not obtained completion certificate, occupancy certificate and other necessary certificates and no objections from the competent authorities which are mandatory requirements for execution of Registry.

2.7 The respondent has taken huge amount of money from the appellant is enjoying the same. From the act and behavior of the respondent it is clear that the respondent has no intention to execute registry of the flat.

2.8 Aggrieved against the aforesaid acts of the respondent the appellant filed Complaint No. 920171510 before the Regulatory Authority which was decided vide impugned order dated 27.02.2018 in the manner mentioned in para 1 above.

3. The appellant has challenged the impugned order dated 27.02.2018 passed by the Regulatory Authority, on the following grounds:--

A. The Regulatory Authority vide order dated 27.02.2018 partially allowed the complaint of the appellant and did not consider the other prayers made by the appellant and has not given any findings on other prayers.

B. The Regulatory Authority has ordered for penalty from 01.01.2013 instead of November, 2012. The respondent completely failed to put any evidence to show any force majeure due to which delay in handing over possession occurred. Therefore, the appellant is entitled for penalty from November, 2012.

C. The Regulatory Authority has not granted any compensation to the appellant for physical harassment, mental agony and financial loss.

D. The Regulatory Authority has not given any finding on the issue of refund of service tax inspite of the fact that in the agreement it is nowhere provided that the appellant shall pay service tax or any tax to the respondent.

E. The Regulatory Authority has not given finding on all the issues which were raised before it and passed the impugned order by allowing the complaint partially.

F. The respondent has collected service tax from the appellant inspite of the fact that there is no provision in the agreement that the respondent shall collect service tax. The service tax collected by the respondent is illegal and beyond the agreement and the appellant is entitled to get back the entire deposited amount towards service tax with interest.

G. The respondent has enjoyed the money of the appellant for more than 6 years, therefore, the appellant is also entitled to get interest on the deposited amount for the delay period with interest @ 24% per annum.

4. The appellant has prayed for the following reliefs:--

(a) Modify the order of penalty by granting penalty to the appellant from November, 2012 till handing over of actual physical possession @ Rs.5/- per sq.frt. on super area.

(b) Direct the respondent to pay interest on penalty amount during delay period.

(c) Award the cost of litigation in favour of the appellant and against the respondent.

(d) Grant compensation to the appellant for physical harassment, mental agony and financial loss as per provisions of the Act 2016.

(e) Direct the respondent not to charge service tax from the appellant.

(f) Direct the respondent to pay interest on the deposited amount for delay period @ 24% per annum till its realization.

5. The respondent filed its reply/objection to the memo of appeal and submitted that the appellant was allotted Flat No. 803, in Tower A-5, in the above mentioned project of the respondent on 02.04.2010 and a Flat Allottee(s)'s Agreement was executed between the appellant and the respondent on the same day.

5.1 The respondent has already completed construction inspite of various hurdles and delays and has applied to the Noida Authority for issuance of completion certificate which is expected to be issued shortly.

5.2 The appellant has filed unjustifiable complaint against the respondent wherein the impugned order dated 27.02.2018 has been passed.

5.3 The construction work in the said project was hampered because a Writ Petition No. 32812/2011 was filed before the Hon'ble Allahabad High Court challenging the acquisition of land, which formed part of total land allotted to the respondent for construction of the said project. The Hon'ble High Court passed an order of stay of construction on 31.05.2018 in the said writ petition.

5.4 Again the respondent was constrained to stop the construction work of the said project in compliance of NGT order dated 17.09.2013 passed in Petition No. 158/2013 in re: Amit Kumar Vs. Union of India.

5.5 Further a Writ Petition No. 61567/2015 was filed before the Hon'ble Allahabad High Court in which vide order dated 03.03.2016 the Hon'ble High Court passed an order to maintain strict status quo with regard to nature and possession over the plots in dispute which involved the said project of the respondent also.

5.6 Due to aforementioned force majeure reasons, which were beyond control of the respondent, the construction work of the project was affected for certain time.

5.7 As per clause 25 of the agreement, the appellant is not entitled for any of the reliefs sought, as not only the appellant defaulted in making the payments to the respondent but the respondent was also constrained to stop the construction work of the said project in compliance of Hon'ble High Court's order dated 31.05.2012 and also in compliance of NGT order dated 17.09.2013.

5.8 Even after the difficulties faced by the respondent, it made every effort to complete the project in the stipulated time frame but due to a number of other factors pertaining to regulatory and shift in Government policies, the progress of the project was affected.

5.9 Inspite of aforementioned unavoidable circumstances, the respondent has given access of the respective units to the allottees and many of the allottees have started inhabitating the flats.

5.10 The appellant breached Clause 16 of the Flat Buyer Agreement which specifically provides that it is agreed by the flat allottee(s) that timely payment of installments and other allied charges indicated therein is the essence of the agreement and the appellant defaulted in making timely payment due to which the respondent faced financial crisis and difficulties in completing the project.

5.11 The appellant did not come before the Regulatory Authority with clean hands and concealed the material fact about outstanding amount payable by her to the respondent and thus is not entitled for any relief in the appeal.

5.12 In Clauses 4 and 5 of the Flat Buyer Agreement and in various other clauses the respondent has clearly specified the other charges imposed by the government and service tax etc. payable by the allottee.

5.13 The respondent has still not received the OC/CC in respect of its project 'Glory-46' as there is a case pending before the Hon'ble Supreme Court with regard to waiver of interest during zero period that was declared by the National Green Tribunal.

5.14 The Flat Buyer Agreement provides that the construction of the complex is likely to be completed as early as possible subject, however, to force majeure, regular and timely payment by the allottee(s), availability of building material etc., change of laws by Government/local authorities etc. No claim by was of damage or compensation shall lie against the developer in case of delay in handing over the possession on account of the aforesaid reasons or any other reasons beyond the control of the developer.

5.15 In terms of the provisions of Section 19(6) of the Act 2016 the flat buyer is in default if he/she fails to pay installments.

5.16 The respondent is liable for any action under the Act 2016 if it fails to meet the new deadline furnished with the UP RERA at the time of registration.

5.17 The Act 2016 came into operation with effect from May 1, 2017 in the State of Uttar Pradesh and the Regulatory Authority did not have jurisdiction to pass the impugned order since the matter related to the period prior to enforcement of the provisions of the Act 2016.

5.18 The respondent had issued cheque no. 145282 dated 08.04.2019 amounting to Rs. 3,42,000/- in pursuance of recovery certificate dated 25.03.2019.

5.19 For the facts, reasons and circumstances mention hereinabove, the appeal is devoid of merits and is liable to be dismissed with cost.

6. The appellant filed her reply to the objections of the respondent denying the averments made in the objections of the respondent and reiterating the averments made in the memo of appeal. The appellant further submitted that the respondent has revised the sanctioned map without taking consent of 2/3rd flat buyers, in 2012 though the flat was booked on the sanctioned map of 2009-2010.

6.1 The respondent has changed the project totally and commercial towers have been added.

6.2 The project is incomplete and various facilities like firefighting system, boundary wall, basement parking, swimming pool etc. are not ready and STP is not functional.

6.3 The respondent has not paid land dues of the Noida Authority.

6.4 The respondent is pressurizing the appellant to opt for 'Fit out' and 'Sub-Lease' options which is not at all acceptable to the appellant as it is not a legal possession.

6.5 The appellant has paid the entire demand raised by the respondent on time. The respondent has raised an illegal demand of Rs.4,74,220/- vide letter dated 10.04.2018 which included interest only whereas the appellant has made entire payments to the respondent as per payment plan.

6.6 The respondent is trying to wash his hands from liability to make payment to the Noida Authority and has malafide intention in not completing the project as he has already diverted the funds of the subject project to other projects. Basic/promised amenities are missing in the project.

6.7 From April 2011 to October 2011 the construction of the project was in progress. During this period the casting of slabs from 6^{th} floor to 10^{th} floor was done and payments were collected from buyers. The flat hand over date, as per agreement, was October 2012. The NGT order came on 17.09.2013.

6.8 As per agreement the delay penalty was payable monthly from the date of delay in delivery of possession but the respondent did not pay single penny to the appellant. Therefore, the appellant is entitled for interest on penalty amount @ 24% per annum from due date till its realization.

6.9 Para 17 of the agreement clearly mentions that for any delay in payment the respondent shall charge interest @ 24% per annum, therefore, the appellant is also entitled for same rate of interest on the recoverable amount from the respondent from due date till its realization.

7. Heard Sri Shailesh Kumar Srivastava, learned counsel for the appellant and perused the record.

8. On examination of the pleadings, record and submissions of learned counsel for the appellant, the admitted facts are that the appellant booked a residential flat No.A-5/803 on 8th Floor, at Tower A-5 admeasuring super area of 950 sq.ft. in Project 'Glory' situated at Plot No. Gh-01, Sector-46, Noida, being developed by the respondent. As per Flat Allottee(s) Agreement dated 02.04.2010 (hereinafter referred to as 'the agreement') the total cost of the flat was Rs, 23,97,800/- inclusive of all applicable taxes and facilities etc. Against total agreed sale consideration, the appellant paid Rs.22,77,910/-. The remaining payment of last installment of sale consideration was to be paid at the time of legal possession.

8.1 At the time of booking of the above flat, the respondent agreed and assured the appellants that possession of the booked flat shall be handed over to the appellants in the month of October 2012.

8.2 The respondent failed to deliver legal possession of the flat in question to the appellants. The appellants visited the office of the respondent on various occasions and requested the respondent to handover legal possession and execute registry of her flat but the respondent did not take care of the request of the appellant and completely failed to comply its part of the agreement.

8.3 The respondent has not obtained completion certificate, occupancy certificate and other necessary certificates and no objection from the competent authorities which are mandatory requirements for execution of conveyance deed.

8.4 Aggrieved against the act of the respondent the appellants approached the Regulatory Authority by means of Complaint No. 920171510 dated 19.09.2017 praying for immediate legal delivery and possession of the flat along with payment of penalty for delay as per provision of RERA. The Regulatory Authority decided the aforesaid complaint with a direction to the respondent to deliver possession of the allotted flat to the appellant by 31.12.2018 after obtaining completion certificate from Noida Industrial Development Authority and pay penalty at the rate of

Rs.5/- per sq.ft. of the super area from 01.01.2013. Feeling aggrieved against the impugned order of the Regulatory Authority the appellant has come up before this Tribunal by means of the present appeal.

9. Before we proceed to examine the grievance of the appellant and correctness of the impugned order dated 27.02.2018, we deem it proper to extract the relevant provisions of the agreement dated 02.04.2010 which is as under:--

FLAT ALLOTTEE (S)'S AGREEMENT

This Agreement is made at Noida on this 2nd day of April, 2010

Between

Mrs Kavita

And

Gardenia Aims Developers Pvt. Ltd.

NOW, THEREFORE, THIS AGREEMENT WITNESSETH AND IT IS HEREBY AGREED AND DECLARED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

1. *That the Developer hereby agree/s to sell and the Flat Allottee (s) hereby agrees to purchase the Flat as described in Annexure-"A" to this Agreement in the said Complex as per plans and specifications inspected, seen, agreed and accepted by him for a basic sale price plus other applicable additional charges as described in Annexure-"B" annexed to this Agreement in respect of the said Flat.*
2. *That the Flat Allottee (s) hereby agree/s to pay to the Developer the basic sale price and other development/ preferential charges and additional charges as per the payment plan opted by the Flat Allottee (s) and described in* ***Annexure-"B".***
3. *That the Flat Allottee (s) hereby agree/s that he shall pay the price of the said Flat and other charges calculated on the basis of super area, which is understood to include pro-rata share of the common areas in the Complex. It is further understood and agreed by the Flat Allottee (s) that the super areas given in this Agreement is tentative and subject to change upon approval of final building plan(s) and/or on completion of construction of the*

Complex. The Flat Allottee (s) hereby agree/s that no claim, monetary or otherwise will be raised in case of any change.

4. *That both the parties have agreed that the cost of development and construction of the said Flat is escalation-free, save and except increases, which the Flat Allottee (s) hereby agree/s to pay due to increase in Flat area, and increase in Govt. rates, taxes, cesses etc., and/or any other charges which may be levied or imposed by the Govt./ Statutory Authorities from time to time. If any provisions of the existing and future Laws, guidelines, directions etc., of any Government or the Competent Authorities made applicable to the said Flat / said Complex requiring the Developer to provide pollution control devices, effluent treatment plant, water harvesting system etc. in the said Complex, then the cost of such additional devices, equipments etc. shall also be borne and paid by the Flat Allottee (s) in proportion to the area of his/their Flat to the total area of all the Flats in the said Complex, as and when demanded by the Developer.*
5. *That the Flat Allottee (s) specifically agree/s to pay directly or if paid by the Developer then reimburse to the Developer on demand, all government charges, levies, service tax, any other charges, fees, taxes etc., leviable in future on the said Land and/ or said Complex to be constructed on the said Land or the said Flat as the case may be, as assessable/ applicable from the date of allotment of the said Flat to the Flat Allottee (s) and the same shall be borne and paid by the Flat Allottee (s) in proportion to the super area of the said Flat. If such charges are increased (including with retrospective effect) after the sale deed has been executed, the, such charges hall be treated as unpaid sale price of the said Flat and the Developer shall have the first charge/ lien on the said Flat for recovery of such charges from the Flat Allottee (s).*
6. *That the Super Area of the said Flat means the covered area of the said Flat including the entire area enclosed by its periphery walls including area under walls, columns, balconies and lofts etc. and half the area of common walls with other premises/ Flats which form integral part of said Flat and proportionate Common*

areas. The common areas shall mean all such parts/ areas in the entire said Complex which the Flat Allottee (s) shall use by sharing with other occupants of the said Complex including entrance lobby, lift lobbies, lift shafts, electrical shafts, fire shafts, plumbing shafts and service ledges on all floors, common corridors and passages, staircases, mumties, services areas including but not limited to, lift area, machine/pumping set room, security/ fire control rooms, maintenance offices/ stores, guards Cabin etc./ if provided.

7. *That it is further understood and agreed by the Flat allottee(s) that the area of the said Flat given in this Agreement is tentative and subject to change as per direction of the Sanctioning Authority or Architect or Structural Engineers of the Developer which result in change (decrease/increase) in the area of the said Flat, change in its dimensions, size, location, number, boundaries etc. The final area, size, location, number, boundaries etc., shall be confirmed by the Developer on completion of the Complex. In case of increase in the area of the said Flat, the Flat Allottee (s) shall pay at the prevailing Developer's rate/ market rate for the increased area. In case of decrease of the allotted area of the said Flat, the amount received in excess over and above the total cost of the said Flat based on the changed area, shall be refunded/ adjusted (as the case may be) by the Developer to the Flat Allottee (s) along with interest @ 6% p.a. from the date of receipt of the full amount till the date of payment.*

9. *That the Developer is responsible for providing internal development within the said Complex which inter-alia includes (i) laying of roads, (ii) laying of water lines, (iii) laying of sewer lines (iv) laying of electrical lines. However, it is understood that external or peripheral services such as trunk water and sewer lines, storm water drains, roads, electricity, horticulture etc., are to be provided by the Govt. or the concerned authority up to the periphery of the said Complex.*

10. That it is agreed by the parties, that the Fire fighting equipment and/ or preventive measures may be installed by the Developer in the common area if require by any law/ byelaw order or directions or guidelines of the Govt./ any Statutory Authority/ Body or if deemed necessary by the Flat Allottee (s) and the costs thereof shall be chargeable extra from the Flat Allottee (s) on pro-rata basis.

11. That the Developer has defined the standard of internal development and in case of any change at a later stage in the specifications of internal development thereby resulting in the Developer incurring any extra expenses on account of such changes, the same shall be recovered on pro-rata basis from the Flat Allottee (s) and shall be payable as and when demanded by the Developer.

25. The construction of the complex is likely to be completed as early as possible subject, however, to force major regular and timely payments by the all, availability of building material etc., change of laws by Government/local authorities etc. No claim by way of damage or compensation shall lie against the Developer in case of delay in handing over of the possession on account of the aforesaid reasons or any other reasons beyond the control of the Developer. The Complex is proposed to be completed by October 2012. However, if there is delay in possession beyond due date due to any other reason, the Developer will pay the allottee(s) (after a grace period of ± 3 months,) a sum at the rate of Rs. 5/- (Rs. Five only) per sq.ft. of Super area per month for the period of delay to the Flat Allottee (s), provided however, that the Flat Allottee (s) has made payment of all installments towards the sale consideration of the said Flat in time and without making any delay to the Developer.

10. In order to examine the grounds taken by the appellant and the averments made by both the parties, we deem it proper to frame the following issues based on the grounds pressed by the learned counsel for the appellant:--

(1) Whether the Regulatory Authority had no jurisdiction to examine and decide the complaint of the appellant as the matter relates to the period prior to the enforcement of the Real Estate (Regulation and Development) Act 2016?

(2) Whether under the scheme of the Act 2016 and Rules 2016 any mechanism has been provided for determination of the interest or compensation for delay in handing over possession of the apartment/plot to the allottee and/or refund with interest, if allottee does not want to continue/wish to withdraw from the project?

(3) Whether the project in question of the respondent is delayed?

(4) Whether it is necessary and mandatory for the Promoter to have first Completion Certificate (C.C.) and Occupation Certificate (O.C.) under the provisions of the Act 2016 and Rules of 2016 read with the U.P. Apartments (Promotion of Construction, Ownership and Maintenance) Act 2010 before offering possession as well as asking the allottee to settle the account and satisfy the final demand?

(5) Whether the appellant is entitled for interest for the delay in completion of the Project under the scheme of Act 2016? If yes, what rate of interest is required to be paid by the Promoter to the allottee?

(6) Whether the allottee is bound to make payment of the installments without there being any development or achieving milestone of the project by the promoter and if any allottee stops payment of the installments, he will fall in the category of defaulter?

(7) Whether it is obligatory on the part of the Promoter to provide all the assured facilities, amenities and other features promised vide advertisement/allotment letter/agreement?

11. Vide **Issue No. (1)** we are required to examine as to whether the Regulatory Authority had no jurisdiction to examine and decide the complaint of the appellant as the matter relates to the period prior to the

enforcement of the Real Estate (Regulation and Development) Act 2016.

11.1 The respondent in its objections challenged the jurisdiction to the Regulatory Authority for entertaining the complaint of the appellant on the ground that the Act 2016 became fully operational with effect from May 2017 in the State of Uttar Pradesh, but the matter relates prior to enforcement of the Act 2016 and, therefore, the Regulatory Authority had no jurisdiction to entertain the complaint of the appellant. This issue has been raised by the respondent for the first time in its objection to the grounds of appeal and no appeal has been filed by the respondent challenging the impugned order.

11.2 The issue raised by the respondent is no more res integra as the **Hon'ble Supreme Court** in its judgment passed in **Civil Appeal No(s). 6745-6749 of 2021** ***M/s Newtech Promoters and Developers Pvt. Ltd. Vs. Stte of U.P. and others etc.*** framed a question ***"Whether the Act 2016 is retrospective or retroactive in its operation and what will be its legal consequence if tested on the anvil of the Constitution of India?"*** and vide paras 53 and 54 of the said judgment the Hon'ble Supreme Court observed that from the scheme of the Act 2016, its application is retroactive in character and it can safely be observed that the projects already completed or to which completion certificate has been granted are not under its fold and therefore, vested or accrued rights, if any, in no manner are affected. At the same time it will apply after getting the on-going projects and future projects registered under Section 3 to prospectively follow the mandate of the Act 2016. Paras 53 and 54 of the said judgment are reproduced as under:--

> *53. That even the terms of the agreement to sale or home buyers agreement invariably indicates the intention of the developer that any subsequent legislation, rules and regulations etc. issued by competent authorities will be binding on the parties. The clauses have imposed the applicability of subsequent legislations to be applicable and binding on the flat buyer/allottee and either of the parties, promoters/home buyers or allottees, cannot shirk from their responsibilities/liabilities under the Act and implies their challenge to the violation of the provisions of the Act and it negates the contention advanced by the appellants regarding contractual terms having an overriding effect to*

> *the retrospective applicability of the Authority under the provisions of the Act which is completely misplaced and deserves rejection.*
>
> *54. From the scheme of the Act 2016, its application is retroactive in character and it can safely be observed that the projects already completed or to which the completion certificate has been granted are not under its fold and therefore, vested or accrued rights, if any, in no manner are affected. At the same time, it will apply after getting the on-going projects and future projects registered under Section 3 to prospectively follow the mandate of the Act 2016.*

Thus the project of the respondent being on-going and registered with the UPRERA is fully covered under the provisions of the Act 2016 and thus, the Regulatory Authority had jurisdiction to examine and decide the complaint of the complainant/appellant. Issue no. (1) Is decided accordingly.

12. **Issue No. (2)** is regarding, whether under the scheme of the Act, 2016 and Rules, 2016 any mechanism has been provided for determination of the interest or compensation for the delay in handing over possession and/or refund with interest if allottee chooses to withdraw from the Project.

12.1 The Act envisages adjudication by the Regulatory Authority in terms of the powers under Chapter V of the Act and in particular Sections 31, 32, 34, 35 and 40 of the Act, and for adjudging compensation by the Adjudicating Officer in terms of the power under Chapter VIII of the Act and in particular Sections 71 and 72 thereof.

12.2 The Act spells out the obligations of the promoter of a real estate project and the consequence of the promoter failing to fulfill those obligations. Some of those obligations are enumerated in Section 11, 12 to 18 of the Act.

12.3 Section 18 of the Act talks of the consequence of the failure by the promoter to complete or to be unable to give possession of an apartment, plot or building either in terms of the agreement for sale or failure to complete the project by the date specified therein or on account of discontinuance of his business either on account of suspension or revocation of the registration under the Act or for any other reason. In the event of either of the above contingencies under Section 18 (1) (a) of the Act, the promoter is made liable on the demand of the allottee:

(i) In the event that the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by the promoter in respect of that apartment, plot, building, as the case may be, together with "interest at such rate as may be prescribed", "including compensation in the manner as provided under this Act";

(ii) Where an allottee does not intend to withdraw from the project, the promoter shall pay him for every month's delay in the handing over of the possession "interest at such rate as may be prescribed". Section 18 (2) of the Act mandates that in case loss is caused to allottee due to the defective title of the land, on which the project is being developed or has been developed, the promoter shall compensate the allottee and that such claim for compensation under Section 18 (2) shall not be barred by limitation provided under any law for the time being in force.

12.4 Section 18 (3) of the Act states that where the promoter fails to discharge any other obligations under the Act or the Rules or Regulations made there under or in accordance with the terms and conditions of the agreement for sale, the promoter shall be liable to pay "such compensation" to the allottees, in the manner as provided under the Act.

12.5 It is apparent on a reading of Section 18 of the Act as a whole that upon the contingencies spelt out therein, (i) the allottee can either seek refund of the amount by withdrawing from the project; (ii) such refund could be together with interest as may be prescribed; (iii) the above amounts would be independent of the compensation payable to an allottee either in terms of Sections 18 (2) or 18 (3) of the Act read with other provisions; (iv) the allottee who does not intend to withdraw from the project will be required to be paid by the promoter interest for every month's delay of handing over possession.

12.6 When one turns to the powers of the Authority, it is seen that under Section 31, the complaints can be filed either with the Authority or with the Adjudicating Officer (AO) for violation or contravention of the provisions of the Act or the Rules and Regulations. Such complaint can be filed against “any promoter, allottee or real estate agent”, as the case may be. Such complaint can be filed by “any aggrieved person”. The Explanation to Section 31 (1) of the Act states that for the purposes of said sub-section “person” shall include an association of allottees or any voluntary consumer association registered under any law for the time being in force. Section 31 (2) states that the form, manner and fees for filing a complaint under sub-section (1) shall be such as may be prescribed.

12.7 Having gone through the relevant Sections of the Act, we find that as per Sections 12, 18 and 19 of the Act, the allottee, in case of default by the promoter, is entitled to refund of his/her entire investment along with "interest at such rate as may be prescribed" and "compensation in the manner provided under the Act". Whereas in Section 12, the part dealing with interest and the part dealing with compensation are joined with the word "and" while in Section "18" they are joined with the word "including". Also, "at such rate as may be prescribed" is suffixed to the word "interest" in the context of refund of investment, but the expression "at such rate as may be prescribed" is neither prefixed nor suffixed to the word "compensation" in any of the Sections of the Act. The term compensation is suffixed by the expression "in the manner as provided under this Act" in Sections 12, 14, 18 & 19 of the Act. However, compensation and interest are qualified by the term "as he thinks fit in accordance with the provisions of any of those sections" in Section 71 of the Act. The Act only lays down for "holding an enquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard" under Section 71. The Act very clearly provides that the quantum of compensation or “interest as he thinks fit” under Section 71 will be decided taking into consideration the factors listed under Section 72 of the Act.

12.8 We further examined Section 31 of the Act and Rule 33 & Rule 34 of the Rules. The relevant portions of Section 31 of the Act and Rule 33 of the Rules are extracted as follows:-

Extract of Section 31 of the Act

"(1) Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of this Act or the rules and regulations made thereunder against any promoter, allottee or real estate agent, as the case may be.

Explanation

For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

(2 The form, manner and fees for filing complaint under sub-section (1) shall be such as may be specified by regulations."

As can be seen from above, Section 31(2) of the Act provides for specifying by regulations, the form, manner and fee for filing complaint under Section 31(1) of the Act. As provided under Section 31(2) of the Act, the U.P. Government has framed Rules, 2016. Rule 33(1) provides for manner of filing a complaint with the Regulatory Authority. Rule 33(1) is extracted as follows:-

Extract of Rule 33(1) of Rules-

(1) Any aggrieved person may file a complaint with the regulatory authority for any violation under the Act or the rules and regulations, made there under, save as those provided to be adjudicated by the adjudicating officer, in Form M which shall be accompanied by a fee of rupees one thousand in the form of a demand draft drawn on a nationalized bank, in favour of regulatory authority and payable at the main branch of that bank at the station, where the seat of the said regulatory authority is situated.

It is evident from Rule 33(1) of the Rules that the complaints filed with the Regulatory Authority should be in Form M, except those complaints which require to be adjudicated by the Adjudicating Officer. On top of Form M, it is clearly written that it is as per provisions of Rule 33(1) and is meant for filing complaint under Section 31 of the Act. Further Column 5 of the Form M specifically requires a complainant to indicate the relief(s) sought.

12.9 We have further examined Rule 34(1) of the Rules which relate to filing of a complaint with the Adjudicating Officer for compensation. Rule 34(1) reads as follows :-

Extract of Rule 34(1)

> *(1) Any aggrieved person may file a complaint with the adjudicating officer for compensation under Section 12, 14, 18 and 19 in Form N, which shall be accompanied by a fee of rupees one thousand in the form of a demand draft drawn on a nationalized bank in favour of regulatory authority and payable at the main branch of that bank at the station, where the seat of the said regulatory authority is situated.*

12.10 It is clear from Rule 34 (1) of the Rules that a complaint for "compensation" under Sections 12, 14, 18 and 19 of the Act is to be filed before the Adjudicating Officer in Form N. It is mentioned on top of Form N itself that it is an application to Adjudicating Officer for claim of compensation under Rule 34(1) of the Rules and under Section 31 of the Act read with Section 71 of the Act. A complainant is required to indicate in Column 5 of Form N, the compensation sought.

12.11 Thus, it is our considered view that Form N is to be filed before an "Adjudicating Officer" for only claiming "compensation" under Rule 34(1); whereas Form M is to be filed before the Regulatory Authority under Rule 33(1) of the Rules for all types of reliefs, barring "compensation", for any violation under the Act, Rules or Regulations.

12.12 We have also examined the provisions of Sections 71 and 72 of the Act. The opening words of Section 71 (1) of the Act make it clear that the scope and functions of the Adjudicating Officer (AO) are only for 'adjudging compensation under Sections 12, 14, 18 and 19 of the Act'. If the legislative intent was to expand the scope of the powers of the AO, then the wording of Section 71 (1) ought to have been different. On the contrary, even the opening words of Section 71 (2) of the Act make it clear that an application before the AO is only for 'adjudging compensation'. Even in Section 71 (3) of the Act, it is reiterated that the AO may direct 'to pay such compensation or interest as the case may be, as he thinks fit' in accordance with provisions of Sections 12, 14, 18 and 19 of the Act. This has to be seen together with the opening words of Section 72 of the Act, which read *"while adjudging the quantum of compensation or interest, as the case may be, under Section 71, the* *adjudicating officer shall have due regard to the following factors, namely,…………….”*

On a collective reading of Sections 71 and 72 of the Act, the legislative intent becomes explicit. This is to limit the scope of the adjudicatory powers of the AO for determining “compensation or interest as he thinks fit” in the event of violation of Sections 12, 14, 18 and 19 of the Act.

12.13 On examination of Section 35 of the Act, we find that the powers of the Regularity Authority under Section 35 of the Act are of a wide nature. While discharging those functions, it will be open to the Authority to even require the AO to conduct the inquiry. Section 35 (2) of the Act also makes it plain that the Regulatory Authority will have the same powers as a Civil Court. The legislative intent is, therefore, not to diminish the adjudicatory functions of the Regulatory Authority, but rather to provide it with all the trappings of a quasi-judicial/judicial authority while inquiring into the complaints and issuing directions, by directing the Adjudicating Officer to adjudicate the compensation or interest. The legislation in its own wisdom has used the word “Authority” as well as “Adjudicating Officer” wherever it is required. Furthermore, the legislation has clearly, intentionally and suitably used the word “penalty” or “interest at such rate as may be prescribed” in case of Authority and “compensation” or “interest as he thinks fit” in case of Adjudicating Officer.

12.14 Further, the Hon’ble Bombay High Court in the case of ***Neelkamal Realtors Suburban Pvt. Ltd. And others Vs. Union of India (2018)1 Bom R 558*** observed as follows:-

> *"Section 18(1)(b) lays down that if the promoter fails to complete or is unable to give possession of an apartment due to discontinuance of his business as a developer on account of suspension or revocation of the registration under the Act or for any other reason, he is liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any remedy available to return the amount received in respect of that apartment with interest at such rate as may be prescribed in this behalf including*

> *compensation. If the allottee does not intend to withdraw from the project he shall be paid by the promoter interest for every month's delay till handing over of the possession. The requirement to pay interest is not a penalty as the payment of interest is compensatory in nature in the light of the delay suffered by the allottee who has paid for his apartment but has not received possession of it. The obligation imposed on the promoter to pay interest till such time as the apartment is handed over to him is not unreasonable. The interest is merely compensation for use of money".*

12.15 From the aforementioned discussion, it is clear that the Act of 2016 provides a mechanism for determination of interest and/or compensation for the delay in handing over possession of the unit to the allottee, if the allottee wishes to stay with the project and/or refund with interest if allottee wants to withdraw from the Project. Issue no. (2) is decided accordingly.

13. **Vide Issue No. (3)** we are required to examine as to whether the project in question of the respondent is delayed?

13.1 On examination of the provisions of clause 25 of the agreement executed between the appellant and the respondent on 02.04.2010 it is evident that the respondent was to complete the project by October 2012 with a grace period of +_ 3 months. The respondent neither completed the project in question nor delivered possession to the appellant within the stipulated period. The sale deed also could not be executed on account of non-availability of no objection certificate along with OC/CC from the competent authority.

13.2 In the objections to the grounds of appeal various reasons have been shown for the delay but they do not fall in the category of force majeure. While filing objection nothing has been mentioned by the respondent about receiving of OC/CC from the competent authority. Therefore, we can safely observe that the respondent failed to comply the order of the Regulatory Authority dated 27.02.2018 regarding providing possession to the complainant/appellant along with OC/CC by 31.12.2018. In absence of OC/CC, conveyance deed cannot be executed and the allottee cannot take legal possession of the booked apartment/flat. Therefore, we hold that the project of the respondent is delayed. Issue no. (3) is decided accordingly.

14. **Issue No. 4** is as to whether offer of possession can be given by a promoter without completion and occupation certificate or is it necessary and mandatory to obtain the same before offering possession and asking the allottee to settle the account and satisfy the final demand, under the scheme of Act & Rules 2016, read with U.P. Apartments Act 2010.

14.1 In order to appreciate the issue, we examine Section 2(q) and Section 2(zf) of the Act of 2016, which defines Completion & Occupancy Certificate, the same are extracted as follows:-

> ***"Section 2:- Definitions - In this Act, unless the context otherwise requires,-***
>
> ………………………………………………………………………………………
> ……………………………………………………………………
>
> ***"Section 2 (q)*** *"completion certificate" means the completion certificate, or such other certificate, by whatever name called, issued by the competent authority certifying that the real estate project has been developed according to the sanctioned plan, layout plan and specifications, as approved by the competent authority under the local laws;"*
>
> ***"Section 2 (zf)*** *"occupancy certificate" means the occupancy certificate, or such other certificate by whatever name called, issued by the competent authority permitting occupation of any building, as provided under local laws, which has provision for civic infrastructure such as water, sanitation and electricity;"*

14.2 On examination of the provisions of Section 2 (q) and Section 2(zf), we find that completion certificate is basically a certificate issued by the competent authority certifying that the Real Estate Project has been developed according to the sanctioned plan, lay out plan and specifications, as approved by the competent authority under the local laws. On the other hand, the occupancy certificate is issued by the competent authority permitting occupation of any building, as provided under local laws, which has provision for civic infrastructure such as water, sanitation and electricity etc.

14.3 Similarly, Section 4(5) of the U.P. Apartments Act, 2010 prescribes for Completion Certificate, which reads as follows:-

> *"**Section 4(5) of the U.P. Apartments Act, 2010**:-An apartment may be transferred by the promoter to any person only after obtaining the completion certificate from the prescribed sanctioning authority concerned as per building bye-laws. The completion certificate shall be obtained by promoter from prescribed authority [within the period specified for completion of the project in the development permit or the building permit as the case may be] Provided that if the construction work is not completed within the stipulated period, with the permission of the prescribed authority;*
>
> *Provided further that if the completion certificate is not issued by the prescribed sanctioning authority within three months of submission of the application by the promoter complete with all certificates and other documents required, the same shall be deemed to have been issued after the expiry of three months.*
>
> *Explanation: For the purposes of this sub-section "completion" means the completion of the construction works of a building as a whole or the completion of an independent block of such building, as the case may be."*

14.4 Section 4(5) of the U.P. Apartments Act 2010 clearly lays down that an apartment may be transferred by the Promoter to any person (allottee) only after obtaining the C.C. from the prescribed sanctioning authority concerned as per building by-laws. The C.C. is required to be obtained by the Promoter, meaning thereby that Allottee has no role to play in obtaining C.C. from the prescribed authority. A Promoter is required to first obtain C.C./O.C. from the prescribed authority, only thereafter register conveyance deed of the real estate in favour of the Allottee(s) and a legal & habitable possession can be offered to the Allottees.

14.5 The issue of offering handing over possession prior to obtaining occupancy certificate was also examined by the Hon'ble Supreme Court in ***Civil Appeal Nos. 1232 and 1443-1444 of 2019 R.V. Prasannakumaar and ors. Vs. Mantri Castles Pvt. Ltd. and ors.decided on 11.02.2019*** wherein it has been observed that possession cannot be handed over prior to obtaining occupancy certificate.

14.6 In view of the aforesaid analysis, we are of the considered view that as per the provisions of the U.P. Apartments Act, 2010 read with the provisions of Act, 2016 a Promoter is required to offer legal and habitable possession to the allottees only after obtaining C.C./O.C. and ask for clearing dues by raising final demand. Issue no. (4) is decided accordingly.

15. **Issue No (5)** relates to the entitlement of the appellant for the interest on account of delay in completion of the Project under the scheme of Act, 2016 and the rate of interest required to be paid by the Promoter to the allottee for delay.

15.1 Section 18 (1) of the Act clearly provides that if an Allottee wishes to withdraw from the Project on the ground that the Promoter is unable to give possession in accordance with the Agreement for Sale within the date specified therein, then the Promoter shall return the amount received from the Allottee in respect of that property with interest and compensation, on the Allottees' demand. The power of exercising the option of either staying in the Project or for withdrawing from it lies only with the Allottees under the provisions of Section 18 (1) of the Act. Further, Section 19(4) of the Act 2016 gives right to the allottees to claim refund along with interest and/or compensation in case the Promoter fails to give possession of the apartment in accordance with the terms and conditions of Agreement for sale.

15.2 The Hon'ble Bombay High Court in the case of ***Neelkamal Realtors Suburban Pvt. Ltd. And others Vs. Union of India (2018)1 Bom R 558*** observed that the requirement to pay interest in pursuance to the provisions of Section 18 (1) (b) of the Act 2016 is not a penalty as the payment of interest is compensatory in nature in the light of the delay suffered by the allottee who has paid for his apartment but has not received possession of it. The obligation imposed on the promoter to pay interest till such time as the apartment is handed over to him is not unreasonable. The interest is merely compensation for use of money.

15.3 Subsequently, in ***Wg. Cdr. Arifur Rahman Khan & Others Vs. DLF Southern Homes Pvt. Ltd., reported in (2020) SCC Online 667*** affirming the view taken in the Judgment in Pioneer's case (Supra) the Hon'ble Supreme Court held that the term of the agreement authored by the Developer does not maintain a level platform between the

Developer and the flat purchaser. The stringent terms imposed on the flat purchaser are not in consonance with the obligation of the Developer to meet the timelines for construction and handing over possession, and do not reflect an even bargain. The failure of the Developer to comply with the contractual obligation to provide the flat within the contractually stipulated period, would amount to a deficiency of service. Given the one-sided nature of the Apartment Buyer's Agreement, the consumer fora had the jurisdiction to award just and reasonable compensation as an incident of the power to direct removal of deficiency in service.

15.4 Recently the Hon'ble Supreme Court, while dealing with the provisions of Section 18 of the Act, 2016, in the case of ***M/S Imperia Structures Ltd. Vs. Anil Patni and another***, Civil Appeal Nos. 3581-3590 of 2020, decided on 02.11.2020, vide para 23, was pleased to observe that the right so given to the allottee is unqualified and if availed, the money deposited by the allottee has to be refunded with interest at such rate as may be prescribed and the proviso to Section 18(1) contemplates a situation where the allottee does not intend to withdraw from the Project. In that case he is entitled to and must be paid interest for every month of delay till the handing over of the possession. It is upto the allottee to proceed either under Section 18(1) or under proviso to Section 18(1).

15.5 U.P. Government framed "Uttar Pradesh Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018" (hereinafter referred to as Rules, 2018), wherein under Rule 9.2(ii) and 9.3(i), the rate of interest payable by the promoter or by the allottee respectively are defined in case of default by either of the party. These Rules are extracted below :-

Rule 9.2(ii)

The Allottee shall have the option of terminating the Agreement in which case the Promoter shall be liable to refund the entire money paid by the Allottee under any head whatsoever towards the purchase of the apartment, along with interest at the rate equal to MCLR (Marginal Cost of Lending

Rate) on home loan of State Bank of India + 1% unless provided otherwise under the Rules, within forty-five days of receiving the termination notice:

Provided that where an Allottee does not intend to withdraw from the Project or terminate the Agreement, he shall be paid, by the Promoter, interest at the rate prescribed in the Rules, for every month of delay till the handing over of the possession of the Apartment/Plot, which shall be paid by the Promoter to the Allottee within forty-five days of it becoming due.

Rule 9.3

The Allottee shall be considered under a condition of Default, on the occurrence of the following events :

Rule 9.3(i)

In case the Allottee fails to make payments for 2(two) consecutive demands made by the Promoter as per the Payment Plan annexed hereto, despite having been issued notice in that regard the Allottee shall be liable to pay interest to the promoter on the unpaid amount at the rate equal to MCLR (Marginal Cost of Lending Rate) on home loan of State Bank of India + 1% unless provided otherwise under the Rules. The Promoter must not be in default to take this benefit.

15.6 On examination, we find that these Rules-2018 notified by U.P. Government are in consonance with the definition of interest as provided in Section 2(za) of the Act, in as much as that the interest chargeable from the allottee by the promoter, in case of default in payment as per demand, is equal to the rate of interest which the promoter is liable to pay to the allottee, in case of default/delayed possession on the part of promoter.

15.7 We have come across various orders of the Regulatory Authority wherein it had granted interest at the rate of MCLR+1% per annum in case of delayed projects and had an occasion to examine the issue of rate of interest at MCLR+1% awarded by the Regulatory Authority in ***Appeal No. 295 of 2019 (U.P. Avas Vikas Parishad Vs. Devesh Kumar Tiwari) decided on 20.02.2020*** and held as under:--

> *"We feel that this imbalance is on account of the fact that the buyer/allottee has much less bargaining power as compared to the seller in the real estate market and therefore the buyers/allottees have no choice but to sign on such "dotted line", "one sided, unfair and unreasonable" terms and conditions/Agreements. We are therefore of the view that the rate of MCLR +1% , as prescribed by the Government and as being ordered by the Regulatory Authority, be payable from the date of deposit of money in case the allottee wishes to withdraw from the project; and from the specified/expected date of possession in case the allottee wishes to stay in the project, would balance the equities and are just and fair and will fall within the term "interest at such rate as may be prescribed" as used in Sections 12, 18 & 19........."*

It is our considered view that drawing light from the Rules of 2018, and the fact that often an allottee/buyer has to supplement his savings by taking loan at the MCLR percent interest (compound), the simple rate of interest at MCLR+1 percent balances the equities and is in line with the word and spirit of the Act and can be taken as "interest at such rate as may be prescribed" as mentioned in Sections 12,18 and 19 of the Act, till the rate of interest for the purpose is notified by the State Government.

15.8 It is pertinent to mention here that the **Hon'ble Supreme Court** in ***Civil Appeal No. 4910-4941/2019 DLF Homes Panchkula Pvt. Ltd. Versus D. S. Dhanda etc. etc.*** while examining the issue of compensation, was pleased to observe as under;-

> *"If compensation comprises of two parts, (i) by way of interest on the deposited amount from the assured date (milestone date) of completing construction and handling over possession to the actual date of handling over possession, and, (ii) lumpsum amount, we find nothing wrong in it. We do not agree with the builder co.'s contentions that interest on the deposited amount should not be provided since it is not a case of refund but a case of delay in possession. The interest on the deposited amount has to be viewed in the light of the purpose for which it is intended. It is but a way of computing compensation for delay in possession that is commensurate with the amount deposited by the*

complainant, and here it has been computed after adopting a milestone date as per the builder co.'s own (unfair and deceptive) letter of 05.06.2013. There can be and is no question of not agreeing to an endorsing the award of interest from the said milestone date. Here we may however add that the rate of interest also cannot be arbitrary or whimsical, some reasonable and acceptable rationale has to be evident, subjectivity has to be minimized, a logical correlation has to be established. Albeit detailed arithmetic or algebra is not required. Logical (to the extent feasible) objective parameters should be adopted. Rounding off simplification etc. to make the computation doable could be adopted. We feel it appropriate that, considering that the subject units in question are dwelling units, in a residential housing project, the rate of interest for house building loan for the corresponding period in a scheduled nationalized bank (take, State Bank of India) would be appropriate and logical, and , if 'floating'/ varying/different rates of interest were/ are prescribed, the higher rate of interest should be taken for this instant computation."

15.9 On the basis of aforesaid analysis the issue no. (5) is decided in affirmative in favour of appellant.

16. Vide **Issue no. (6)** the Tribunal is required to examine as to whether the allottee is bound to make payment of the installments without there being any development or achieving milestone of the project by the promoter and if any allottee stops payment of the installments, he will fall in the category of defaulter.

16.1 In order to examine the issue it would be necessary to examine the scheme of the Act 2016 relating to functions and duties of the promoter as well as right and duties of the allottees. The entire Act is divided into 10 chapters.

16.2 Chapter II deals with registration of real estate project and registration of real estate agents. A reading of the provisions of Chapter-II demonstrates how a promoter is expected to commence/register a project after having title, sanctioned plan, permissions and source of funding etc. Chapter III spells out the functions and duties of promoter and the consequences if the promoter fails to fulfill those obligations.

16.3 Section 11 mandates the promoter to make available to the allottee information such as (i) sanctioned plans, layout plans along with specifications approved by the competent authority by display at the site or as specified by the authority; (ii) the stage wise time schedule of completion of the project including the provisions for civic infrastructure.

16.4 Section 12 emphasizes obligation on the promoter regarding veracity of the advertisement or prospectus and provides that where any person makes an advance or a deposit on the basis of the information contained in the notice, advertisement or prospectus, or on the basis of any model apartment, plot or building , as the case may be, and sustains any loss or damage by reason of any incorrect, false statement included therein, he shall be compensated by the promoter in the manner as provided under the Act.

16.5 Section 13 relates to "no deposit of advance to be taken by promoter without first entering into agreement for sale". The promoter shall not accept a sum more than 10% of the cost of the apartment, plot or building, as an advance payment or an application fee from a person without entering into a written agreement for sale, as per law in force.

16.6 Section 14 mandates the promoter for adherence to sanctioned plans and project specifications and also bars a promoter from any additions and alterations in the sanctioned plans, layout plans and specifications and the nature of fixtures, fittings and amenities described therein in respect of the apartment, plot or building, as the case may be, which are agreed to be taken, without the previous written consent of at least 2/3rd allottees.

16.7 Chapter IV deals with rights and duties of allottees. Section 18 deals with the return of amount and compensation. This section relates to return of amount and compensation. If the promoter fails to complete or is unable to give possession of an apartment, plot or building in accordance with the terms of the agreement for sale or duly completed by the date specified therein or due to discontinuance of his business as a developer on account of suspension or revocation of the registration under the Act or for any other reason, he shall be liable on demand of the allottees, in case the allottee wishes to withdraw from the project, to return the amount received by him in respect of that apartment, plot or building, with interest including compensation in the manner as provided under the Act. Where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed. This section further provides that the promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land on which the project is being developed or has been developed, in the manner as provided under the Act and claim for compensation shall not be barred by limitation provided under any law for the time being in force. In case the promoter fails to discharge any other obligations imposed on him under the Act or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees in the manner as provided under the Act.

16.8 Section 19 of the Act provides that the allottee shall be entitled to obtain the information relating to sanctioned plans, layout plans along with specifications, approved by the competent authority and such other information as provided under the Act, Rules and Regulations made thereunder or the agreement for sale signed with the promoter. The allottee shall also be entitled to know stage-wise time schedule of completion of the project including other amenities and services as agreed to between the promoter and the allottee in accordance with terms and conditions of the agreement for sale. The allottee shall be entitled to claim the possession of apartment, plot or building. The allottee shall be entitled to claim refund of amount paid along with interest at such rate as may be prescribed and compensation as provided under the Act from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of registration under the provisions of the Act. The allottee shall also be entitled to have necessary documents and plans after handing over the physical possession of the apartment or plot or building by the promoter.

16.9 On deeply examining the provisions of Chapters II,III and IV it is evident that the allottee is entitled to know the time period at the time of booking/issuance of allotment letter regarding sanctioned plans, layout plans along with specifications approved by the competent authority and such other information as provided under the Act, Rules and Regulations made thereunder or the agreement for sale signed with the promoter, like water supply, electricity and obtaining of OC or CC or both.. The allottee is also entitled to know stage-wise time schedule of completion of the project including other amenities and services as agreed to between the promoter and the allottee in accordance with terms and conditions of the agreement for sale. The allottee is also entitled to claim the possession of apartment, plot or building. The allottee shall be entitled to claim refund of amount paid along with interest at such rate as may be prescribed and compensation as provided under the Act from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of registration under the provisions of the Act. The allottee is also entitled to have necessary documents and plans after handing over the physical possession of the apartment or plot or building by the promoter. For the purpose of registration of project the promoter is also required under Section 4(*l)*(D)l to submit a declaration supported by an affidavit to the effect that seventy percent of the amounts realized for the real estate project from the allottees, from time to time, shall be deposited in a separate account to be maintained in a scheduled bank to cover the cost of construction and the land cost and shall be used only for that purpose provided that the promoter shall withdraw the amounts from the separate account , to cover the cost of the project, in proportion to the percentage of completion of the project and the promoter shall get his accounts audited within six months after the end of every financial year by a chartered accountant in practice.

16.10 If any promoter is not informing the progress of the project to its allottees and the withdrawal from the separate account is also not proportionate to the percentage of completion of the project, then an allottee can always stop payment to the promoter till the milestones disclosed by the promoter have not been achieved and he cannot be said to be a defaulter in such situation. Similar issue was examined by NCDRC in CC 189/2017 (Pradeep Kumar Gupta Vs. Irio Grace Realtech Pvt. Ltd.). The relevant portion of the judgment is being reproduced as under:--

> *"In my opinion, since the Ops were already in default as far as the offer of possession was concerned, when the 5th, 6th, 7th and 8th installments were demanded, the complainants were under no obligation to pay the said installments. As far as the default in payment of the 4th installment by the complainants in CC No. 1999/2016 & CC No. 2000/2016 is concerned, it would be seen that the said installment was raised at the stage of casting of roof slab of the lower basement. The demand was raised about two weeks before the last date for offering possession of the flats to the said complainants. Since the construction was still at the stage of casting roof slab of the lower basement at that time, the complainants knew that even if they pay the 4th installment, it was impossible for the Ops to deliver possession of the apartments to them by the last date stipulated in this regard i.e. 23.01.2017 or within six months thereafter, to them. When a flat buyer who is saddled with a demand applicable at the stage when the construction is at a very initial stage and the demand is raised just two weeks before the last date for offer of possession, he is not expected to sink more money with the builder despite knowing that the builder will not be able to honour his contractual obligation even if the benefit of grace period of six months which was otherwise available only in case of unforeseen circumstances, is given to him. Therefore, even the complainants in CC No.1999/2016 and CC No.2000/2016 cannot be said to be defaulters, in the sense that they would lose their legal right to claim refund of the amount paid by them and the*

compensation for the defect/deficiencies on the part of the builder in rendering services to them."

16.11 On the basis of the aforesaid analysis we are of the considered view that an allottee cannot be said to be a defaulter, if he stops making payment of installments, if the promoter fails to achieve the target/milestone disclosed/declared in the advertisement, allotment letter or agreement. Issue no (6) is decided accordingly.

17. Vide **Issue no. (7)** we are required to examine as to whether it is obligatory on the part of the Promoter to provide all the assured facilities, amenities and other features promised vide advertisement/allotment letter/agreement.

17.1 The examination of clauses 6,9,10,23 etc. of the agreement imposes various obligations on the promoter regarding facilities, amenities, maintenance etc. and in case of any deficiency, the promoter is bound to rectify and provide the assured amenities and facilities as per Brochure/Allotment Letter/Agreement.

17.2 The features, amenities and services advertised by the respondent through its brochure, attracted the appellant and other home buyers and they have invested their hard earned money to buy homes of their dreams and the respondent is required to fulfill the promised amenities etc. The Hon'ble Supreme Court in the recent case of ***Wg. Cdr. Arifur Rahman Khan and Aleya Sultana and Ors. Vs. DLF Southern Homes Pvt. Ltd and Ors.*** (supra) while examining the issue of non-fulfilling the promise and providing features, amenities and services as mentioned in the brochure, in para -43 was pleased to observe as follow:-

> *"43. In other words, what the developer holds out as a defence is that though there has been a failure on their part to provide the amenities, the flat buyers have the benefit of facilities in the surrounding area which has become urbanised. We cannot agree with this line of submissions. The reply of the developer seeks to explain the failure to construct the facilities on the ground that the "existing population cannot sustain these facilities" – a school, commercial complex and health care facilities. This is a case involving an experienced*

> *developer who knew the nature of the representation which was being held out to the flat purchasers. Developers sell dreams to home buyers. Implicit in their representations is that the facilities which will be developed by the developer will provide convenience of living and a certain lifestyle based on the existence of those amenities. Having sold the flats, the developer may find it economically unviable to provide the amenities. The flat purchasers cannot be left in the lurch or, as in the present case, be told that the absence of facilities which were to be provided by the developer is compensated by other amenities which are available in the area. The developer must be held accountable to its representation. A flat purchaser who invests in a flat does so on an assessment of its potential. The amenities which the builder has committed to provide impinge on the quality of life for the families of purchasers and the potential for appreciation in the value of the flat. The representation held out by the developer cannot be dismissed as chaff. True, in a situation such as the present it may be difficult for the court to quantify the exact nature of the compensation that should be provided to the flat buyers. The general appreciation in land values results in an increase in the value of the investment made by the buyers. Difficulties in determining the measure of compensation cannot however dilute the liability to pay. A developer who has breached a clear representation which has been made to the buyers of the amenities which will be provided to them should be held accountable to the process of law. To allow the developer to escape their obligation would put a premium on false assurances and representations made to the flat purchasers. Hence, in factoring in the compensation which should be provided to the flat buyers who are concerned in the present batch of appeals, we would necessarily have to bear this issue in mind."*

17.3 In view of the aforesaid analysis, we are of the view that the amenities, facilities and services advertised by the respondent in its Brochure are required to be fulfilled and provided to the allottees of the project. Accordingly, the issue no. (7) is decided in favour of the appellant.

18. Further, the allottees deposit amount under the hope and trust that they will get the flats within the time schedule advertised at the initial stage. There may be certain cases where allottees might be residing in rented houses and they might have managed their financial position in such a manner that after deposit of amount, they will get flats of their own and thereafter they will be free from payment of rent as then they will shift

from rented houses to allotted flats but on account of inordinate delay in delivery of possession of allotted flats, their financial calculations and legitimate expectations stand frustrated causing various types of financial losses to them. On the other hand once the promoter/builder made offers and same are accepted by the allottees with legitimate expectation, the obligation cast upon the promoter/builder is to complete the same within the time schedule mentioned in the offer and if they fail to discharge the same the affected allottees are entitled to the interest for delayed delivery of possession, as the allottees have parted with money which was earning interest. To that extent for the delayed period, the allottees are entitled to interest, which in our considered view will be in accordance with the principles of equity.

19. As far as issue of compensation is concerned, it is open for the complainant/appellant to approach the Adjudicating Officer of the Regulatory Authority in accordance with law, if so advised, as the same is not maintainable before the Regulatory Authority in the instant proceeding.

19. On the basis of the aforesaid analysis and examining the impugned order dated 27.02.2018 we modify direction of the Regulatory Auhority as under:--

> *"The Promoter/respondent is directed to provide legal possession of Flat No.A-5/803, 8th Floor, Tower A-5, admeasuring super area of 950 sq.ft. in Project "Glory" situated at Plot No. Gh-01, Sector 46, Noida, after obtaining OC/CC from the competent authority expeditiously and pay interest at the rate of MCLR+1% per annum with effect from January 2013 till providing legal offer of possession to the complainant/allottee in accordance with law.*
>
> *The Promoter/respondent is further directed to provide all the features, amenities and services advertized/provided in the Brochure/Allotment Letter/Agreement expeditiously.*
>
> *The Promoter/respondent is also directed to provide the details of the demand raised towards taxes/charges etc. along*

with documentary proof of payment of the same by the Promoter/respondent to the concerned authorities after getting the same certified from the Chartered Accountant."

20. With the aforesaid directions **the appeal is partly allowed.**

21. No order as to costs.

(Rajiv Misra) **(D.K.Arora)**

Dated: March 21, 2022.
Shakir