BENCH NO. 1

THE U.P. REAL ESTATE APPELLATE TRIBUNAL
AT
LUCKNOW

Appeal No : 282/2020

Greater Noida Industrial Development Authority.....Applicant/Appellant

Versus

Laxmi Kant Azad ………………………………………….Respondent.

Hon'ble Mr. Justice (Dr.) D.K. Arora, Chairman
Hon'ble Mr. Sanjai Khare, Judicial Member

1. Heard Sri Rishindra Vikram Singh, learned counsel for the appellant and Sri Srijak Srivastav, holding brief of Sri Nirmit Srivastav, learned counsel for the respondent.

2. The appellant has challenged the order of the Regulatory Authority dated 31.10.2019 whereby the appellant was directed to provide possession of the unit after completing amenities as per allotment letter/brochure by December 2019 and execute conveyance deed after taking necessary stamp fee etc. The appellant was also directed to pay interest from 30.01.2017 till offer of possession @ MCLR+1%.

3. Initially the appeal was filed for the following reliefs:-

   (a) That the Appellate Authority accept the appeal.

   (b) That the Appellate Authority quash the order passed by the Hon'ble UP Real Estate Regulatory Authority Greater Noida on dated in Complaint No. NCR 144/08/0059/2019.

   (c) That to direct respondent to pay the amount of INR 5,41,001.12 on account of default in installment and defer from payment schedule.

4. Subsequently an application was filed for amendment in the prayer clause as well as in interim order as under:-

   (a) That the Appellate Authority accept the appeal.

(b) That the appellant seeks the relief for the penalty and interest on deposited amount by allottee for delay in project, as ordered by the UP Real Estate Regulatory Authority Gautam Buddh Nagar vide their order against the complaint filed by the allottee.

(c) Appellate Tribunal may please to pass the order to restrain the respondent from any kind of recovery from appellant and pass the direction to UP RERA, Gautam Buddh Nagar not to pass any order under Section 63 of the Act 2016 and relevant provisions whatsoever till the present appeal is pending before the Appellate Tribunal and far play the order passed by UP RERA Gautam Buddh Nagar.

(d) Any order or direction which Appellate Tribunal deem just and proper in the circumstances of the case may kindly also be passed in favour of appellant.

5. Learned counsel for the respondent is not aware about proposed amendments in the prayer clause.

6. In the interest of justice we examine the relief claimed by the appellant. The amendment sought is confining to the relief granted by the Regulatory Authority for penalty/interest on the deposited amount for delay in the project.

7. On due consideration we allow the application only with respect to relief sought through amendment application in prayer clause and reject the proposed amendment in the interim relief in para 3 under heading interim order.

8. Learned counsel for the appellant is directed to incorporate proposed amendment in the memo of appeal during course of the day.

9. With the consent of the learned counsels for the parties we proceed to examine the appeal and grounds to challenge the impugned order of the Regulatory Authority.

10. Submission of learned counsel for the respondent is that in pursuance to application dated 24.10.2013, an allotment letter dated 29.01.2014 was issued with respect of Flat 605/D Tower D of Sector OMICRON-1 after draw held on 15.01.2014 for allotment No. BHS171327 and as per clause 'N' of the brochure/registration booklet, the possession of the unit was likely to be given by 29.01.2017.

11. Further submission of learned counsel for the appellant is that the project could not proceeded on account of various difficulties and the orders issued

by the NGT etc and the same was beyond the control of the appellant, hence the direction for grant of interest on account of delay in offering possession is perverse and deserves to be set aside.

12. Counsel for the respondent submitted that the appellant was required to offer possession in pursuance to the allotment letter dated 29.01.2014 by 29.01.2017 but the offer of possession was given on 04.07.2019 without receipt of OC/CC. The respondent has taken possession in the month of December 2019 and as such direction for grant of interest by the Regulatory Authority for delay in possession is in consonance with Section 18 of the Act, 2016. Hence there is no illegality and perversity in the impugned order of the Regulatory Authority and the instant appeal deserves to be dismissed.

13. We have examined the submissions of the learned counsels for the parties and gone through the record. In order to examine the issue involved in the appeal and on the basis of pleadings, record and submissions of the learned counsels for the parties, we deem it proper to frame the following questions:-

(i) Whether the project in question of the promoter/GNIDA is delayed?

(ii) 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 of 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?

(iii) Whether the allottees/complainants are entitled for interest for the delay in completion of the Project under the scheme of Act, 2016 and if yes, what rate of interest is required to be paid by the Promoter to the allottees?

14. Vide Question No. (i) we are required to examine as to whether the project in question of the promoter/GNIDA is delayed?

14.1 From the pleadings on record it is evident that the Greater Noida Industrial Development Authority floated a scheme by the name BHS-17, Lohiya Enclave Omicron-1 on 02.10.2013 for allotment of residential flats in Greater Noida on the terms and conditions contained in the brochure of the said scheme. The respondent applied for allotment of a flat by depositing the requisite registration amount. In the lottery draw the complainant was allotted a residential Flat No. 605/D, Tower-D of Sector Omicron-1, Greater Noida. The complainant was issued allotment letter dated 29.01.2014 by the respondent/promoter containing necessary terms and conditions.

14.2 As per clause N of the brochure the possession was likely to be offered to the allottee within a period of three years from the date of issuance of the allotment letter and the allottee was required to enter into legal documentation (execution and registration of lease deed) and take possession of the Multi Storeyed flat within a period of 60 days from the date of offer of possession. Thus the possession of the flat was to be delivered to the allottee/complainant on or before 29.01.2017. However, the allottee/complainant was never provided possession by 29.01.2017. The letter of offer of possession was issued on 04.07.2019 with a delay of 29 months.

14.3 The GNIDA/Promoter/Appellant has admitted that the built-up housing scheme is delayed due to delay in permission for excavation and ban on ground water exploitation by Central Ground Water Authority and construction ban by NGT in respective years for particular period in each year in Delhi NCR due to pollution. In case any Hon'ble Court or Tribunal passed stay order even for one month that directly impacts upon delay in progress and completion of project from one to two years and the same has happened with this project. In support of its submissions the promoter/GNIDA has not filed any documentary evidence regarding ban on ground water exploitation by Central Ground Water Authority and construction ban by NGT or stay order of any court either before the Regulatory Authority or before this Tribunal.

14.4 We have examined the pleadings on record and come to the conclusion that the project of GNIDA/Promoter/Appellant was delayed. The question no. (i) is answered accordingly.

15. **Question No. (ii)** 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.

15.1 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,-

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"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;"

15.2 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.

15.3 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."

15.4 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.

15.5 Further, Section 11(4)(b) and Section 17 of the Act 2016 mandate the promoter to obtain completion certificate or occupancy certificate or both, as applicable, from the competent authority and make it available to the allottees individually or to the association of allottees, as the case may be, and execute a registered conveyance deed in favour of allottee along 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 possession within three months from the date of issue of occupancy certificate and corresponding obligation has been imposed upon the allottee to take physical possession of the unit within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be, vide Section 19(10) of the Act 2016.

15.6 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.

15.7 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. **Question no. (ii)** is answered accordingly.

16. **Question No (iii)** relates to the entitlement of the appellants 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.

16.1 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.

16.2 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 as under:--

"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 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".

16.3 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.

16.4 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).

16.5 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 belo :-

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.

16.6 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.

16.7 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........."*

16.8 It is important to mention herein that the **Hon'ble Supreme Court in Civil Appeal No. 4910-4941/2019 DLF Homes Panchkula Pvt. Ltd. Versus D. S. Dhanda 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."

16.9 Further, an allottee deposits amount under the hope and trust that he/she will get the flat 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 and/or compensation for delayed delivery of possession, as the allottees have parted with money which was earning interest. If an allottee chooses to remain in the project and in case the allottee seeks refund then he is entitled for interest on the deposited amount and/or compensation in accordance with the provisions of the Act 2016, which in our considered view will be in accordance with the principles of equity as well.

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.

16.10 On the basis of aforesaid analysis the **question no. (iii)** is answered in affirmative in favour of allottee/complainant/respondent.

17. The Hon'ble Supreme Court vide its judgments (i) Civil Appeal No. 3182 of 2019 ***Kolkata West Industrial City Pvt. Ltd. Vs. Devashish Rudra***, (ii)Civil Appeal No. 3207 & 3208 of 2019 ***Marvel Omega Builders Pvt. Ltd. & others Vs. S. Wiharis Gokhale & others***, (iii)(2018)5 SCC 442 ***Fortune Infrastructure and another Vs. Trevor D. Lima & others,*** (iv)(2007)6 SCC 711 ***Bangalore Development Authority Vs. Syndicate Bank*** and (v) Civil Appeal Nos. 3581-3590 of 2020 ***M/s Imperia Structure Ltd. Vs. Anil Patni and others*** was pleased to observe that it would be unreasonable to require the allottee to wait indefinitely for possession of the unit and the allottee is entitled to seek refund of the amount paid by him along with compensation.

18. The Promoter/GNIDA/Appellant vide application dated 28.06.2023 placed on record completion certificate dated 29.05.2023 issued by its competent authority. The perusal of the same reveals that though the certificate was issued on 29.05.2023, but the project has been recorded to be completed with effect from 19.01.2021. A query was made from the learned counsel for the promoter/GNIDA as to under what provision of the rules and regulations of the Greater Noida Industrial Development Authority, a completion certificate can be issued from back date, but the learned counsel for the promoter/GNIDA neither made any submissions nor placed before us the regulations of the Greater Noida Industrial Development Authority regarding issuance of completion/occupancy certificate.

19. The Greater Noida Industrial Development Authority, vide Notification No. 2159/77-4-10-284bha/91 dated 20th December 2010 has notified its regulations to regulate the erection of buildings within Greater Noida Industrial Development Area. Regulations 20.1.1 and 20.1.2 of the Greater Noida Industrial Development Area Building Regulation, 2010 provide procedure for issuance of occupancy certificate. These regulations read as under:--

"20.1.1 Occupancy certificate necessary for occupation*—No building erected, re-erected, shall be occupied in whole or part until the issue of occupancy certificate by the Chief Executive Officer in the Form given in Appendix-11. Provided that if the Chief Executive Officer fails to issue the occupancy certificate or send any intimation showing his inability to issue such certificate within 90 days of the date of receipt of application for occupancy certificate an intimation to this effect shall have to be sent to the Authority by the owner for occupying the building.*

In case objections are intimated by the Chief Executive Officer or by an authorized officer showing inability to issue occupancy certificate the owner shall take necessary action to remove the objections. If the objections remain un-removed for a period of 6 months the application for issue of occupancy certificate shall stand automatically rejected. Thereafter the Chief Executive Officer shall take suitable action for removal of unauthorized construction with fee. Thereafter, the applicant has to apply afresh with fee for occupancy certificate, and in such case time extension shall not be required.

20.1.2 Issue of occupancy certificate regarding Multi Storey Buildings- *Without prejudice to the provisions of regulation 20.1.1, in case of multi storeyed buildings, the work shall also be subjected to the inspection of the Chief Fire Officer, Uttar Pradesh Fire Service and the occupancy certificate shall be issued by the authority only after the clearance from the Chief Fire Officer regarding the completion of work from the fire protection point of view. Other certificates such as fees, structural safety, water harvesting, etc. also have to be submitted along with the completion drawings.*

A perusal of the above regulations makes it clear that there is no provision in the Regulations of the Greater Noida Industrial Development Authority to issue occupancy certificate from back date.

20. However, it is important to mention herein that the Promoter/GNIDA/Appellant was to offer possession within a period of three years from the date of issue of allotment letter dated 29.01.2014 i.e. on or before 29.01.2017. Hence on account of delay in offering possession, the allottee is required to be paid interest for every month of delay till handing over of the possession at such rate as may be prescribed in pursuance to the proviso to Section 18 (1) of the Act 2016.

21. Admittedly, the appellant was required to offer the possession of the allotted unit by 29.01.2017 but the offer of possession was given by the appellant to the respondent on 04.07.2019. Regulatory Authority taking into consideration that the offer of possession has already been issued by the appellant to the respondent, but the possession has not been given directed for providing possession by December 2019 and payment of interest from 30.01.2017 till offer of possession (i.e. 04.07.2019), we do not find any illegality & perversity in the impugned order of the Regulatory Authority.

22. The grounds taken by the appellant are not sustainable in the eyes of law. The instant appeal is, accordingly, **dismissed.**

23. Now the question arose as to what is to be done with respect to the amount deposited by the appellant i.e. Greater Noida Industrial Development Authority under Section 43(5) of the Act, 2016.

24. The aims and objects of the Act is to provide for regulation and promotion of the real estate sector in an efficient and transparent manner and to protect the interests of the consumers in real estate sector. Proviso to Section 43(5) of the Act specifically provides that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained without the promoter first having deposited with the Appellate Tribunal at least 30% of the penalty, or such higher percentage as determined by the Appellate Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him before the said appeal is heard. The intent of the legislature is quite clear from the wording of proviso to Section 43(5) of the Act that the interest of the consumers i.e. allottees/buyers be protected.

25. The intent of the legislature in laying down the provision of pre-deposit of the amount of penalty or any other amount payable to the allottee by the promoter before the appeal can be heard in the Appellate Tribunal, has been elucidated by the **Hon'ble Apex Court in paragraph 127** of its judgment in the **Civil Appeal Numbers 6745-6749 of 2021 M/s Newtech Promoters and Developers Pvt. Ltd. Vs. State of UP** and others, the same reads as under:-

"127. It may further be noticed that under the present real estate sector which is now being regulated under the provisions of the Act 2016, the complaint for refund of the amount of payment which the allottee/consumer has deposited with the promoter and at a later stage, when the promoter is unable to hand over possession in breach of the conditions of the agreement between the parties, are being instituted at the instance of the consumer/allottee demanding for refund of the amount deposited by them and after the scrutiny of facts being made based on the contemporaneous documentary evidence on record made available by the respective parties, the legislature in its wisdom has intended to ensure that the money which has been computed by the authority at least must be safeguarded if the promoter intends to prefer an appeal before the tribunal and in case, the appeal fails at a later stage, it becomes difficult for the consumer/allottee to get the amount recovered which has been determined by the authority and to avoid the consumer/allottee to go from pillar to post for recovery of the amount that has been determined by the authority in fact, belongs to the allottee at a later stage could be saved from all the miseries which come forward against him."

26. The Hon'ble Apex Court has clearly held that the legislature in its wisdom intended to ensure that the money which has been computed by the Authority at least must be safeguarded if the promoter intends to prefer an appeal before the Tribunal and in case, the appeal fails at a later stage, it should not be difficult for the consumer/allottee to get the amount recovered which has been determined by the Authority. It is in order to avoid the consumer/allottee to go from pillar to post for recovery of the amount that has been determined by the Authority that the legislature has in its wisdom laid the condition of pre-deposit by the promoter under Section 43(5) of the Act.

27. Section 40(1) of the Act of 2016 provides for a mechanism for recovery of interest or penalty or compensation and enforcement of orders etc. of the A.O. or the Regulatory Authority, or the Appellate Tribunal and the same shall be recoverable in such manner as may be prescribed as an arrears of land revenue. The **Hon'ble Apex Court** vide **paragraph 140** in **M/s Newtech Promoters and Developers Pvt. Ltd. Vs. State of UP** (supra) was pleased to observe that:-

"140. It is settled principle of law that if the plain interpretation does not fulfill the mandate and object of the Act, this Court has to interpret the law in consonance with the spirit and purpose of the statute. There is indeed a visible inconsistency in the powers of the authority regarding

refund of the amount received by the promoter and the provision of law in Section 18 and the text of the provision by which such refund can be referred under Section 40(1). While harmonizing the construction of the scheme of the Act with the right of recovery as mandated in Section 40(1) of the Act keeping in mind the intention of the legislature to provide for a speedy recovery of the amount invested by the allottee along with the interest incurred thereon is self-explanatory. However, if Section 40(1) is strictly construed and it is understood to mean that only penalty and interest on the principal amount are recoverable as arrears of land revenue, it would defeat the basic purpose of the Act."

28. As can be seen from the above observations, Hon'ble Supreme Court has held that even the principal amount invested by the allottee can be recovered as arrears of land revenue under Section 40(1) of the Act. It is further clarified by Hon'ble Supreme Court that the intention of the legislature is to provide a mechanism for early recovery of the amount invested by the allottee along with the interest incurred thereon.

29. Rule 23 of the U.P. Real Estate (Regulation and Development) Rules, 2016 provides that subject to the provisions of Section 40(1), the recovery of the amounts due as arrears of land revenue shall be carried out in the manner provided in the local laws. As Rule 23 has been framed under the provisions of Section 40(1) of the Act, the observations of Hon'ble Supreme Court on Section 40(1) shall equally apply to Rule 23 of the Rules 2016.

30. Although Section 40(1) of the Act of 2016 gives powers to the Appellate Tribunal to enforce its decisions, but the Tribunal does not have adequate infrastructure and the required sufficient human resource to determine and certify the amount due from the appellant/promoter to be paid to the respondent/allottee.

31. It is our considered view that as per provisions of the Act and as per the observations made by the Hon'ble Apex Court, it is the duty of the Tribunal to arrange to transfer the pre-deposited money to the concerned allottee/consumer in case the promoter's appeal is dismissed. However, since the promoter might not have paid the full payable amount or there being a prospect of some amount having already been recovered from the promoter under execution proceedings at the level of the Authority or AO, it is just and lawful that the Tribunal transfers the amount to the Authority for transferring the same to the allottee/consumer after due diligence at its end and to recover any additional amount which could be due to be paid by the promoter; or

return to the promoter any amount that could be in excess of the entitlement of the allottee/consumer.

32. The calculation of the exact amount due to be paid to the respondent/allottee normally is to be determined up to the date of actual payment. As the facts and figures are available with the Regulatory Authority, which is executing its or A.O.'s original order, therefore, due diligence is required while calculating the amount payable, interest thereon, as well as verification of the payments made by the allottee from time to time, etc.

28. In the instant case, this Tribunal while upholding the order of Regulatory Authority dated 31.10.2019 has **dismissed** the appeal filed by the promoter (Greater Noida Industrial Development Authority). We, therefore, direct the Registry to transfer the entire amount deposited by the appellant/promoter under the provisions of Section 43(5) of the Act to the concerned account of the U.P. Real Estate Regulatory Authority (U.P. RERA). Further, we direct the Regulatory Authority to dispose of this amount during the execution proceedings in accordance with its order dated 31.10.2019.

29. The functioning of the Tribunal became paperless from January 2022, but the system for depositing payment through online mode by the litigants under different heads could not be made operational and the same was to be deposited by the litigants in the shape of Bank Draft, but subsequently NIC and State Bank of India succeeded in providing solution for making payment under all the heads through online mode and the State Bank of India also agreed to convert the amount deposited by the promoter under Section 43(5) of the Act into fixed deposit indicating complaint number, appeal number etc. within 24 hours for a period of 60 days with auto renewal thereafter, so that after decision in the appeal the amount be released as per direction of the Tribunal along with accrued interest on the said fixed deposit.

30. Discussion was made with the officials of the State Bank of India regarding providing benefit of interest on the deposited amount in the pending appeals. SBI also agreed to convert the amount deposited in different appeals, on the details provided by the Tribunal, into Fixed Deposits for a period of 60 days with auto renewal thereafter in the pending appeals. Accordingly, in all the pending appeals of the promoters, the amount deposited in pursuance to the provisions of Section 43(5) of the Act has been converted in fixed deposit in the month of June, 2023.

31. The Registry is directed to take steps for redemption of the amount of the fixed deposit in the instant appeal and send the same to the Regulatory Authority to be taken care as per the directions hereinabove.

32. It will be the liability of the beneficiary to pay the income tax on the interest earned on the deposited amount, if any.

Dated: 29.02.2024 **(Sanjai Khare)** **(D.K. Arora)**
M. Singh/-