RESERVED JUDGMENT

BENCH-1

THE UTTAR PRADESH REAL ESTATE APPELLATE TRIBUNAL,
AT
LUCKNOW.

APPEAL NO. 912/2021

Valencia Homes. ……Appellant.

Versus

Subodh Goel HUF. ……Respondent.

Hon'ble Mr. Justice (Dr.) D. K. Arora, Chairman.
Hon'ble Mr. Kamal Kant Jain, Technical Member.

1. The present appeal has been preferred by Valencia Homes (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 21.08.2019 passed by the Real Estate Regulatory Authority, Regional Office, Gautam Budh Nagar (hereinafter referred to as the 'Regulatory Authority') in Complaint No. NCR144/04/0994/2019 whereby the following directions were issued:-

   (1) The appellant was directed to ensure delivery of possession of the unit to the complainant within 3 months from the date of uploading the order on the portal.

   (2) Simultaneously, the respondent is further directed that with regard to delayed period, the respondent would pay the penal interest at the rate of MCLR+1% from the due date of handing over the possession as per terms of the agreement till the date of handing over the possession by the promoter.

   (3) It is also ordered that if the complainant has given advance maintenance charges to the respondent, then the same will be adjusted towards the maintenance charges which would be due after handing over the possession.

(4) It is also clarified that under Section 2 (za) (i) of the Act 2016 it has been defined that if any rate of interest is charged by the promoter for default of allottee, then the same rate of interest will be paid for default by promoter to the allottee.

(5) The appellant is further directed that with regard to the demand of additional amount under different heads, the promoter shall provide detailed calculation sheet to the complainant and should recover the equivalent amount/proportionate amount as per terms and conditions of the agreement.

2. The facts of the case, in brief, as culled out from the memo of appeal, are that the appellant along with respondent (being Director in M/s Corporate Realtors Pvt. Ltd.) was in joint partnership vide Partnership Deed dated 24.04.2010 and they were engaged in the business of real estate.

2.1 During the partnership, the partners (i.e. appellant and respondent) launched a Group Housing Project "Valencia Homes" and the respondent on its own sold one flat bearing No. E-904 having total area of 935 sq.ft. situated at Plot No. GH-07B, Sector-1, Greater Noida, U.P., to Smt. Arti Dargan wife of Sri Ashok Dargan (hereinafter referred to as the original allottee) at very special discounted rate of Rs.1950/- per sq.ft., all inclusive, for a total consideration of Rs.18,23,250/- (exclusive of other agreed charges), without the consent of the appellant.

2.2 Smt. Arti Dargan deposited Rs.50,000/- against the booking of the said flat vide booking request form dated 22.09.2010 and chose to pay the installments as per Construction Linked Plan. The respondent himself, being the partner in the appellant-firm, permitted Smt. Arti Dargan to deposit only Rs.50,000/- as earnest money, irrespective of the fact that for booking of flats at least 10% amount needed with the booking request form.

2.3 Thereafter Reconstitution Deed of Partnership dated 14.10.2010 was made thereby inducting M/s Civitech Housing India Private Limited, as another partner in the appellant-firm. Mr. Subodh Goel is also the director in the said inducted company.

2.4 Since the booking of aforesaid flat, Smt. Arti Dargan did not pay any amount regardless of receiving several demand letters and reminders sent by

the appellant for payment of installments and interest making the total amount of Rs.22,43,133/- i.e. (Rs.17,35,359/- towards sale consideration and Rs.5,07,774/- towards interest of late payment).

2.5 From July 2013 till January 2015 the appellant regularly asked the original allottee to pay installments with interest or else the booking of said flat shall be cancelled.

2.6 Thereafter a dispute arose between the partners of appellant-firm, hence notice dated 30.03.2015 was sent by Mr. Subodh Goel on behalf of M/s Civitech Housing India Private Limited to the appellant regarding retirement from the appellant-firm w.e.f. 30.06.2015. Thereafter the entire Group Housing Project has been taken over by the appellant.

2.7 On 05.05.2015, the appellant came to know that the request for endorsement of said flat in the name of Subodh Goel HUF was made and has been agreed smartly by Mr. Subodh Goel and the appellant has to sign the No Objection Certificate for effecting the said endorsement. The date of possession as per allotment letter is June 2016.

2.8 At that time the market price of said flat was more than Rs.3500/- per sq.ft. (i.e. sale consideration was Rs.32,72,500/-), despite this the appellant agreed to endorse the said flat in the name of Subodh Goel HUF at the earlier rate. Further, all the pending interest on the said flat was adjusted towards the late delivery of said flat, only upon payment of outstanding dues immediately.

2.9 Thereafter the said flat was endorsed in the name of respondent vide allotment letter dated 16.03.2015 by Mr. Subodh Goel himself under the capacity of partner in the appellant-firm along with other partner.

2.10 The respondent deliberately failed to pay the outstanding amount at the time of endorsement and paid the installments as per its own will, irrespective of the agreed verbal terms.

2.11 The project land being part of village Patwari, in Noida Extension Region, has been regularly hindered by the farmers from December 2012 to May 2015 because of order of Hon'ble Allahabad High Court dated 21.10.2011 and several SLPs filed against the said order before Hon'ble Supreme Court, till their disposal in May 2015. This fact was in the knowledge of respondent being a partner in the appellant-firm. During this period the

construction work was regularly hindered by the farmers of Patwari village and nothing could be done despite having approval of sanctioned map.

2.12 Despite regular agitation by farmers on site, the appellant completed the project in November 2016 and also applied for obtaining Completion/ Occupancy Certificate before the G.M. (Planning & Architecture) Greater Noida Industrial Development Authority (GNIDA) on 05.12.2016.

2.13 The GNIDA on receiving the said request for granting Completion/ Occupancy Certificate, sent its last observation letter dated 02.05.2017 which has been duly replied on 29.05.2017. The GNIDA has not granted the Completion/Occupancy Certificate to the appellant despite being fully satisfied in all respects.

2.14 The GNIDA vide letter dated 31.07.2017 asked the appellant to register its project under the Act 2016 for obtaining Completion/Occupancy Certificate. The appellant registered its project with UPRERA on 11.08.2017 just for obtaining Completion/Occupancy Certificate. The GNIDA granted Occupancy Certificate to the appellant on 28.08.2017.

2.15 The appellant has already applied for release of permission of Tri-partite Sub-lease Deed on 04.09.2017, in favour of appellant which was pending till January 2018.

2.16 Due to unprofessional behavior and deliberate negligence on the part of GNIDA, the appellant could not offer the ready flats to its prospective buyers for possession as per rules of GNIDA.

2.17 The appellant issued offer for fit out possession to the respondent on 14.04.2018, wherein the respondent has already been given benefit of late possession charges of 10 months. The appellant is only liable to pay penalty charges till 05.12.2016 as per terms of the allotment letter, as the appellant has cleared all dues of GNIDA.

2.18 There is no delay in handing over possession of the flat on the part of the appellant and this fact was also known to the respondent since June 2015 when the said flat was endorsed in the name of respondent against the waiver of more than Rs.5,00,000/- of pending interest towards payment of outstanding balance in May 2015.

2.19 Upon receiving the offer for fit out, the respondent paid the outstanding amount in July 2018. Thereafter the respondent paid the stamp duty for registration of the said flat against which the stamp papers were purchased on 10.10.2018. The Tripartite Sub-lease Deed was signed on 01.11.2018.

2.20 On 02.01.2019, the respondent inspected the said flat and satisfied himself in all aspects. Thereafter the respondent got the Tripartite Sub-lease Deed registered on 01.02.2019 before the Sub-Registrar Sadar, Gautam Budh Nagar.

2.21 After execution of Tri-partite Sub-lease Deed, the respondent did not visit the appellant's office either to collect the Title Deed or to deposit the documents which are needed to generate No Dues Certificate, but on the contrary the respondent is continuously sending vague and immaterial mails threatening the appellant for consequences of civil as well as criminal nature, if the said flat is not handed over to the respondent. The said emails were duly replied by the appellant stating that the respondent can take original Title Deed along with keys of the flat at the earliest otherwise holding charges shall be applicable.

2.22 Thereafter, the respondent filed a complaint before the Regulatory Authority on 27.04.2019 praying for immediate physical possession, delay penalty and compensation. The said complaint was registered as Complaint No. NCR144/04/0994/2019 and was decided by the Regulatory Authority vide impugned order dated 21.08.2019 in the manner mentioned in para 1 above.

3. The appellant has challenged the impugned order dated 21.08.2019 passed by the Regulatory Authority on the following grounds:--

(A) Because the Regulatory Authority ignored the fact that an offer for fit out possession had already been issued to the respondent by the appellant on 14.04.2018.

(B) Because the Regulatory Authority mechanically passed the impugned order without specifying the relevant clauses under which the appellant was held liable.

(C) Because the impugned order was passed without referring to terms of allotment letter.

(D) Because the impugned order was passed without considering the practical delay caused by the orders of Hon'ble National Green Tribunal and Uttar Pradesh Pollution Control Board for stopping the construction work on various occasions.

(E) Because in accordance with Section 18(1)(a) of the Act 2016, any delay whatsoever in handing over possession according to the terms of the allotment letter has to be specifically attributed to the appellant. Any delay on account of the Authority had to be excluded as the same is an instrumentality of the State.

(F) Because primarily the dispute is stemmed from the partnership and taking over of the entire Group Housing Project by the appellant which was completely left untouched by the Regulatory Authority.

(G) Because the dispute in the instant matter is regarding delay in handing over the possession to the respondent, in terms of which a specific period of delay had to be worked out for the purpose of penal interest.

(H) Because the Regulatory Authority wrongly decided the complaint of the respondent without giving any consideration to the submissions made by the appellant and further to the actual delay caused by the GNIDA in issuing the Occupancy Certificate and thereafter permission for execution of Tri-partite Sub-lease Deed.

(I) Because the impugned order is liable to be set aside as the actual delay in completing the project on the part of the appellant was 5 months only.

(J) Because the order dated 21.08.2019 passed by the Regulatory Authority leads to breach of principles of natural justice, hence the impugned order is liable to be quashed.

(K) Because the order dated 21.08.2019 is based on surmises and conjunctures, hence the same is liable to be set aside.

(L) Because the impugned order has been passed without adhering to the provisions of the Act 2016, in particular Section 18 (1) (b) without even settling the quantum of the amount received, as also in computing the period of delay in accordance with the agreement.

(M) Because the order passed by the Regulatory Authority is bad in law and has been passed without applying the judicial mind, hence the impugned order is liable to be dismissed.

(N) Because the Regulatory Authority has not given the correct finding of the facts of the case. The Regulatory Authority has passed the impugned order in a hurried manner without going through the defence given by the appellant.

(O) Because the Regulatory Authority has failed to understand that the flat in question is ready for possession since November 2016.

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

(a) To set aside and quash the impugned order dated 21.08.2019 passed by the Regulatory Authority and uploaded on UPRERA portal on 17.10.2019.

(b) To issue any order or direction restraining respondent or any authority/ concerned office for initiating any recovery proceeding against the said impugned order dated 21.08.2019 under Section 40 of the Act 2016.

(c) To issue order or direction to the respondent to take possession of the said flat at the earliest as Tri-partite Sub-lease Deed has already been executed and registered.

(d) To issue order or direction to the respondent to pay the holding charges from 14.04.2018, for not taking the possession of the flat even after receiving the offer of possession for fit-out along with compensation for mental agony, pain, humiliation, time spent, expenditures incurred for litigation and harassment suffered by the appellant.

5. The respondent filed his objection to the memo of appeal and submitted that:

5.1 The appellant in gross violation of the provisions of Act 2016 and Rules 2016 is refusing to pay delay charges and demanding 2 years' advance maintenance charges only to extort money from the innocent allottees/home buyers, whereas as per Act 2016 the appellant is bound to provide

maintenance charges till the handover of physical possession of the flat to the allottee.

5.2 The appellant has also misused its dominant position and under duress the respondent was constrained to sign the possession documents under protest as the appellant made it precondition for execution of sale deed/lease deed. Under such compulsion the respondent was forced to give one year advance maintenance charge to the appellant. Possession of the flat has not been handed over to the respondent till date. As per Section 11(g) of the Act 2016 the promoter shall pay all outgoing until he transfers the physical possession of the real estate project to the allottee or the association of allottees.

5.3 The appellant was carrying grudge against the respondent since the dissolution of partnership, hence to deprive the enjoyment of property, the appellant is raising frivolous issues. The respondent, vide cheque no. 128992 dated 01.05.2015 for Rs.17,35,359/-, had paid the entire sale consideration to the appellant in one go. The transfer of flat no. E-904 in Valencia Homes was done by the appellant in favour of the respondent only after receiving the entire sale consideration on 01.05.2015.

5.4 At no point of time the appellant raised any objection regarding transfer of above flat in favour of respondent on any ground.

5.5 Subodh Goel HUF is a separate legal entity which was at no point of time ever inducted as partner to the appellant-Valencia Homes nor it received any benefit from the appellant.

5.6 The appellant is not only deficient in service but also committed criminal breach of trust by retaining the original documents as well as refusing to hand over physical possession of the flat inspite of registration of sale deed in favour of the respondent on 02.01.2019.

5.7 It is incorrect to say that the respondent on its own sold one flat bearing no. E-904 having total area of 935 sq.ft. At no point of time the appellant raised such issue that the flat was sold without its consent to Mrs. Arti Dargan. The respondent purchased the said flat after paying agreed sale consideration to the appellant. If the appellant was so mindful regarding sale of above flat

in favour of the respondent, then it could have raised objection at the time of execution of documents by refusing to endorse it.

5.8 Even today in Greater Noida, the market price is much lower than Rs.3500/- per sq. ft.

5.9 The appellant had demanded balance sale consideration only after effecting the endorsement in favour of the respondent, therefore, balance amount was paid by the respondent according to payment plan.

5.10 The project of the appellant was not affected by the farmers' agitation nor there was any stay on the project by Hon'ble Allahabad High Court or Hon'ble Supreme Court. The Hon'ble NGT only stayed construction in the peripheral of 10 kilometer radius on the ground that the area of 10 km. is falling within the peripheral of bio-sensitive zone, but the project area of the appellant is beyond the above area. Therefore, no stay was operative upon the project.

5.11 The appellant got Part Occupancy Certificate only on 28.08.2017 which shows that the work of development was not completed till then otherwise the competent authority would not have granted Part Occupancy Certificate to the appellant.

5.12 The Act 2016 came into force well before the grant of occupancy certificate to the appellant, therefore, it is the duty of the appellant to get its project registered within stipulated time and follow the statutory provisions.

5.13 In the month of July 2018 the representative of the respondent visited the above flat to find out the exact status of flat to take physical possession and he found that finishing work was going on. Again on 07.10.2018 the representative of the respondent visited the above flat and found that the flat was not ready for possession. The claim of the appellant that the flat was ready, therefore, offer of possession was made to the respondent, is wrong and incorrect.

5.14 As per agreement, the date of possession was December 2015. At the time of endorsement of the flat no waiver of pending interest towards outstanding balance was made by the appellant. As such the claim of appellant is incorrect and after thought in the light of final demand raised by the

appellant on 14.04.2018 which did not mention about any such dues or adjustment of interest.

5.15 The respondent in its successive letters demanded settlement of account after adjusting charges for delay and penalty, from the appellant. The appellant is incorrectly stating that adjustment was made.

5.16 The time between purchase of stamp paper and execution of sale deed/ sub-lease deed was consumed due to persistent demand of the appellant to pay advance maintenance charges for 2 years before execution of sale deed/sub-lease deed. At no point of time the respondent had given any assurance for payment of advance maintenance for 2 years. One year's advance maintenance was given under protest. Due to oblique motive, the appellant put forth 2 years' advance maintenance charges and club charges as precondition for physical possession.

5.17 The relation between the appellant and respondent is strictly governed by the terms and conditions of allotment letter dated 16.03.2015. Any submission by the appellant beyond the terms and conditions of the allotment letter is irrelevant and not necessary for disposal of the present appeal.

6. The appellant filed its reply to the objection of the respondent denying the averments made by the respondent and reiterating the averments made by the appellant in the memo of appeal. The appellant further submitted that:

6.1 The respondent has already accepted possession on 02.01.2019 and has got the sale deed registered in his name on 01.02.2019. At the time of taking possession, the respondent has signed an affidavit on 02.01.2019 whereby he has accepted that he is satisfied about the payments made under different heads including the delay possession charges and penalty interest as mentioned in the outstanding statement provided with the offer of possession. The respondent further agreed not to raise any objection or claim of any nature whatsoever against the appellant in future. After signing the said affidavit and getting the sale deed executed in his favour, the respondent filed the complaint before the Regulatory Authority on 27.04.2019 claiming delay possession penalty for 32 months and challenging the demand of 2 years' advance maintenance charges. The respondent did not raise any dispute or protest at the time of signing the said agreement and the same was not signed under duress.

6.2 Malafide intention of the respondent to extort financial benefits from the appellant is evident from the fact that after giving up his right to raise any claim of any nature whatsoever in future against the appellant, the respondent filed the complaint claiming delay penalty from the appellant, thereby defying its own undertaking.

6.3 At point no. 4 of the request for possession dated 02.01.2019 the respondent has clearly accepted that the physical possession of the apartment shall be handed over only on payment of all dues as well as the dues pertaining to maintenance agency, if any. At point no. 6 of the aforesaid request the respondent undertook to enter into Maintenance Agreement with M/s Valencia Facility Services or any other maintenance agency if required in future, for maintenance work, and further undertook to make payment of maintenance charges and other charges which will be claimed by the maintenance company as and when the same become due against the respondent. The maintenance agreement was executed on 02.01.2019 between the maintenance agency and the respondent wherein it was clearly mentioned that the respondent shall pay maintenance charges in advance for 2 years.

6.4 As per Section 4(7) of the U.P. Apartment Act 2010, the appellant is responsible to maintain the common area and facilities till the association is formed in accordance with the conditions laid down in sub-Section (2) of Section 14 and shall be entitled to levy proportionate maintenance charges as specified in the declaration. In absence of the Association of Apartment Owners, the maintenance of common area and facilities is being done by the appellant. The appellant has collected advance maintenance charge of 2 years from each allottee of the project and it is not the respondent alone who is liable to pay the same.

6.4 The respondent, even after accepting the letter for possession dated 02.01.2019 and getting the sale deed of the apartment executed on 01.02.2019, did not come forward to take physical possession of the apartment and original documents. The appellant sent emails on 25.02.2019 and 11.04.2019 to the respondent asking him to take physical possession of the apartment after completing the formalities, but the respondent did not

come forward to take physical possession and disputed the maintenance charges for two years.

6.5 It is denied that the appellant carried any grudge against the respondent due to dissolution of partnership firm.

6.6 The Regulatory Authority has failed to acknowledge the undertaking signed and accepted by the respondent wherein the respondent has accepted that he is satisfied with the delay possession charges paid to him and shall not claim anything in future. The Regulatory Authority further failed to acknowledge the maintenance agreement dated 02.01.2019 signed by the respondent wherein he has agreed to pay advance maintenance of two years without raising any dispute or protest.

7. Heard Sri Yash Tandon, learned counsel for the appellant and Sri Anurag Singh, learned counsel for the respondent.

8. On the basis of pleadings and the record available on the memo of appeal the admitted facts are that:

8.1 The appellant and M/s Corporate Realtors Private Limited were engaged in the business of real estate. The appellant and M/s Corporate Realtors Private Limited executed a partnership deed through its Director Sri Subodh Goel for carrying out a Group Housing Project under the name and style "Valencia Homes", having its office at 118, Vigyan Vihar, Delhi-110092, or at any other place as may be mutually decided by the partners with effect from 24.04.2010.

8.2 As per averment of the appellant, the respondent on its own sold one flat bearing no. E-904 having total area of 935 sq. ft. situated at Plot No. GH-07B, Secot-1, Greater Noida to Smt. Arti Dargan wife of Sri Ashok Dargan (hereinafter referred to as the original allottee).

8.3 Smt. Arti Dargan deposited Rs.50,000/- against the booking of the said flat vide booking request form dated 22.09.2010.

8.4 A dispute arose between the partners of the appellant-firm and Mr. Subodh Goel took retirement from the appellant-firm w.e.f. 30.06.2015 and thereafter the entire group housing project has been taken over by the appellant.

8.5 A request for endorsement of the said flat in the name of Subodh Goel HUF came to the knowledge of the appellant on 05.05.2015 which had been agreed by Subodh Goel and the appellant issue No Objection Certificate for effecting the said endorsement. As per allotment letter the possession was to be given by June 2016.

8.6 The project land being part of village Patwari, in Noida Extension Region, had been regularly hindered by the farmers from December 2012 to May 2015 because of order of Hon'ble Allahabad High Court dated 21.10.2011 and several SLPs filed against the said order before Hon'ble Supreme Court, till their disposal in May 2015. The appellant, despite regular agitation by farmers, completed the project in November 2016 and applied for obtaining completion/occupancy certificate before G.M. (Planning & Architecture) Greater Noida Industrial Development Authority on 05.12.2016. After being satisfied by the queries and observations the Greater Noida Industrial Development Authority granted occupancy certificate to the appellant on 28.08.2017.

8.7 Thereafter the appellant applied for release of permission of Tri-partite Sub-lease Deed on 04.09.2017 in favour of appellant which was pending till January 2018.

8.8 The appellant issued offer for fit out possession to the respondent on 14.04.2018 already giving benefit of 10 months' late possession charges and as per submission in the memo of appeal, the appellant was liable to pay penalty charges till 05.12.2016 as per terms of the allotment letter, as the appellant has cleared all dues of GNIDA. The respondent, on receipt of offer for fit out possession paid the outstanding dues in July 2018 and also paid the stamp duty for registration of the flat, which were purchased on 10.10.2018. The Tripartite Sub-lease Deed was signed on 01.11.2018 and an undertaking along with affidavit was submitted by the respondent on 02.01.2019 stating therein that the respondent has taken physical possession of the flat/unit in satisfactory condition on 02.01.2019. The Tripartite Sub-lease Deed was registered on 01.02.2019 before the Sub-Registrar Sadar, Gautam Budh Nagar.

8.9 As per averments of the appellant, after execution of Tri-partite Sub-lease Deed, the respondent did not visit the appellant's office either to collect the

Title Deed or to deposit the document which are needed to generate No Dues Certificate, but on the contrary the respondent is continuously sending vague and immaterial mails threatening the appellant for consequences of civil as well as criminal nature, if the said flat is not handed over to the respondent and the said emails were duly replied by the appellant stating that the respondent can take original Title Deed along with keys of the flat at the earliest otherwise holding charges shall be applicable.

8.10 From the pleadings it comes out that it was the delay in handing over possession as well as the documents which compelled the respondent to approach the Regulatory Authority by filing a complaint on 27.04.2019 praying for immediate possession, delay penalty and compensation for delay and the same was disposed of by the Regulatory Authority vide order dated 21.08.2019 directing the appellant to deliver possession of the unit to the complainant/respondent within 3 months from the date of uploading of the order on the portal and to pay delay interest at the rate of MCLR+1% from the date of handing over the possession as per terms of the agreement till the date of handing over the possession. The Regulatory Authority further directed that advance maintenance charges would be due after handing over the possession and the appellant was directed to provide details of additional amount under different heads.

8.11 The appellant, feeling aggrieved against the impugned order, filed the present appeal praying for setting aside the impugned order and directing the respondent to take immediate possession of the flat as Tripartite Sub-lease Deed has already been executed and registered, as well as to pay holding charges from 14.04.2018 for not taking possession of the flat.

8.12 The advance maintenance charges were opposed by the respondent being in violation of Section 11(g) of the Act 2016. The respondent also asserted that vide cheque no. 128992 dated 01.05.2015 for Rs.17,35,359/- the respondent paid the entire sale consideration to the appellant in one go and at no point of time the appellant raised any objection regarding transfer of the said flat in favour of the respondent. Further, Subodh Goel HUF is a separate legal entity which was at no point of time ever inducted as partner of the appellant-Valencia Homes nor it received any benefit from the appellant. The appellant got part occupancy certificate only on 28.08.2017, which

shows that the work of development was not complete till then and even on visit by the representative of the respondent in the month of July 2018 and on 07.10.2018 it was found that the flat was not ready for possession whereas, as per agreement, the date of possession was December 2015. It was also emphasized by the respondent that on 02.01.2019 the possession was given to the respondent only on papers under the pressure of the appellant.

9. Before we proceed to examine the issues involved, we deem it proper to have a glance on the relevant provisions of the Allotment Letter, which are quoted hereinbelow:--

ALLOTMENT LETTER

This Allotment Letter is made on this 16th day of March 2015 against your booking request application dated 22-09-20 between M/s VALENCIA HOMES, a partnership firm duly registered under the Indian Partnership Act, 1932 having its Registered office at 181, Vigyan Vihar Delhi 110092, India, hereinafter referred to as the Company (which expression shall, unless repugnant to the context or meaning thereof shall deem to mean and include its assigns and successors etc.) of the First Part.

AND

MS. ARTI DARGAN
Wife of Mr. ASHOK DARGAN
Resident of 94, GROUND FLOOR SHRESTHA VIHAR
DELHI-110092

3.1 (POSSESSION)
Handing over the Possession

That the possession of the said Unit/Apartment/Flat is likely to be delivered by the Company to the Allottee by December 2015, with a margin of 6 months plus or minus (+/-) subject to force majeure circumstances (including strike of workforce, civil commotion, war enemy action, terrorist action, delayed payments or any act of god or delay in grant of permission by the competent authority or any statutory notification or enactment of law or due to market condition etc.), and on receipt of all payments punctually as per agreed terms and on receipt of complete payment of the Basic Sale Price and other charges due and payable plan, as applicable.

Construction of "VALENCIA HOMES Unit/Apartment/Flat is subject to force majeure clause which includes delay in completion of the project for

any reason beyond the control of the Company e.g. non-availability of any building materials, war or enemy action or natural calamities of any act of God, acts of terrorism, floods, earthquakes, political and civil unrest of such a nature etc. and farmers interruption or local residents of the area. And, in case of delay in delivery of possession as a result of any notice, order, rule, notification of Government, public or other competent authority, the Company shall be entitled to a reasonable extension of time and this extension of time may be for further six months.

That if there is delay in handing over possession of Unit/Apartment/Flat after expiry of "Fit-out- Period due to any other reason(s), the Builder will pay the Allottee delayed possession charges @ Rs.5/-per Sq. Ft. per Month in respect of saleable area of the said Unit/Apartment/Flat for delayed period only (commencing from the date of expiry of "Fit-out- Period) provided that all due installments from the concerned Allottee were received in time and he has complied with requisite formalities viz. obtaining NOC from the Account Department of the Company, registration of Sub-Lease Deed/Transfer Deed.

10. In order to appreciate the controversy on the basis of pleadings on record, grounds pressed by learned counsel for the appellant and submissions of the learned counsel for the parties, we deem it proper to frame the following issues.

(1) Whether the respondent was partner of the appellant in M/s Corporate Realtors Pvt. Ltd.?

(2) Whether the appellant raised any objection to the endorsement of the unit in question by the original allottee, Smt. Arti Dargan, in favour of the respondent?

(3) Whether there was delay in completion of the project?

(4) Whether after execution of the Tripartite Sub-lease Deed on 01.02.2019 actual possession of the unit was given by the appellant to the respondent?

(5) Whether advance maintenance charges can be taken by the promoter from the allottee prior to providing possession?

(6) Whether the appellant is entitled for interest for the delay in completion of the Project under the scheme of the Act, 2016? And if

yes, what rate of interest is required to be paid by the Promote to the allottee?

11. **Vide Issue no. (1)** we are required to examine as to whether the respondent was partner of the appellant in M/s Corporate Realtors Pvt. Ltd.

11.1 On examination of the record and submissions of the parties, it is evident that the appellant and M/s Corporate Realtors Private Limited were engaged in the business of real estate. The appellant and M/s Corporate Realtors Private Limited executed a partnership deed through its Director Sri Subodh Goel for carrying out a Group Housing Project under the name and style "Valencia Homes", having its office at 118, Vigyan Vihar, Delhi-110092, or at any other place as may be mutually decided by the partners with effect from 24.04.2010, whereas the respondent is Subodh Goel HUF. There is no document or record to establish that Subodh Goel HUF was partner of the appellant. Therefore, we hold that the respondent was not partner of the appellant in M/s Corporate Realtors Pvt. Ltd. **Issue no. (1)** is answered accordingly.

12. **Vide Issue No. (2)** we are required to examine as to whether the appellant raised any objection to the endorsement of the unit in question by the original allottee, Smt. Arti Dargan, in favour of the respondent.

12.1 On examination of pleading of the appellant it is evident that the flat, bearing no. E-904 having total area of 935 sq. ft. situated at Plot No. Gh-07B, Sector-1, Greater Noida, U.P. was allotted in the name of Smt. Arti Dargan wife of Sri Ashok Dargan on construction linked plan. On the request of original allottee an endorsement was made in the name of Subodh Goel HUF and the appellant has also signed No Objection Certificate for effecting the said endorsement.

12.2 The respondent in its averments stated that the appellant was carrying grudge against the respondent since the dissolution of partnership, hence to deprive the enjoyment of property, the appellant is raising frivolous issues. The respondent, vide cheque no. 128992 dated 01.05.2015 for Rs.17,35,359/- had paid the entire sale consideration to the appellant in one go and the transfer of flat no. E-904 in Valencia Homes was done by the appellant in favour of the respondent only after receiving the entire sale consideration on 01.05.2015.

12.3 The respondent further submitted that at no point of time the appellant raised any objection regarding transfer of said flat in favour of respondent on any ground. Further, Subodh Goel HUF is a separate legal entity, which was at no point of time ever inducted as partner to the appellant-Valencia Homes, nor it received any benefit from the appellant.

12.4 On examination of the pleadings and record, we do not find any document relating to objection to endorsement by Smt. Arti Dargan in favour of the respondent, rather it is admitted by the appellant that the endorsement was approved and NOC was issued for effecting the endorsement. Therefore, we hold that the appellant did not raise any objection to the endorsement of the unit in question by the original allottee, Smt. Arti Dargan, in favour of the respondent. **Issue no. (2)** is answered accordingly.

13. **Vide Issue No. (3)** we are required to examine as to whether there was delay in completion of the project.

13.1 Clause 3.1 of the Allotment Letter dated 16.03.2015 indicates that the possession of the said unit was likely to be delivered by the appellant to the allottee by December 2015 with a margin of 6 months plus or minus (+/-) subject to force majeure circumstances (including strike of workforce, civil commotion, war enemy action, terrorist action, delayed payments or any act of god or delay in grant of permission by the competent authority or any statutory notification or enactment of law or due to market condition etc.) and if there is delay in handing over possession of the unit after expiry of fit-out period due to any other reason, the builder will pay the allottee delayed possession charges @ Rs.5/- per sq. ft. per month in respect of saleable area of the said unit for delayed period only (commencing from the date of expiry of fit-out period).

13.2 The pleadings and the record further reveals that the appellant applied for Occupancy Certificate before the G.M. (Planning & Architecture) Greater Noida Industrial Development Authority (GNIDA) on 05.12.2016 on which certain queries/objections were raised by GNIDA and the last observation letter dated 02.05.2017 was replied by the appellant on 29.05.2017. The GNIDA vide its letter dated 31.07.2017 asked the appellant to register its project under the Act 2016 for obtaining Completion/Occupancy Certificate. The appellant registered its project with UPRERA on 11.08.2017. The

GNIDA granted Part Occupancy Certificate to the appellant on 28.08.2017. The offer of fit-out possession was issued by the appellant on 14.04.2018 and in pursuance of the same the respondent paid the outstanding amount in July 2018. The stamp papers were purchased from the amount paid by the respondent on 10.10.2018. The Tripartite Sub-lease Deed was signed on 01.11.2018 and the same was registered before the Sub-Registrar Sadar, Gautam Budh Nagar on 01.02.2019.

13.3 The appellant has tried to justify the delay in giving possession due to farmers' dispute from December 2012 to May 2015 because of the order of Hon'ble Allahabad High Court dated 21.10.2011 and several SLPs filed against the said order before Hon'ble Supreme Court, till their disposal in May 2015. The respondent in its response stated that the project of the appellant was not affected by the farmers' dispute nor there was any stay on the project by the Hon'ble Allahabad High Court or Hon'ble Supreme Court. The Hon'ble NGT only stayed construction in the peripheral of 10 kilometers' radius on the ground that the area of 10 kilometer is falling within the peripheral of bio-sensitive zone, but the project area of the appellant is beyond the above area and, therefore, no stay was operative upon the project of the appellant.

13.4 Learned counsel for the respondent, during the course of arguments, vehemently submitted that there is nothing regarding Fire NOC in the Part Occupancy Certificate issued by the Greater Noida Authority dated 28.08.2017 for 798 flats, whereas clause 20.1.2 of the Greater Noida Industrial Development Area Building Regulation, 2010 provides that 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. Therefore, the Part Occupancy Certificate dated 28.08.2017 has been issued in violation of the provisions of Regulation 20.1.2. and as such the same is not a valid occupancy certificate.

13.5 As per the provisions of allotment letter, the possession was to be given by the appellant to the respondent by December 2015 + margin of 6 months,

hence for all practical purposes the possession of the unit was to be given by the appellant to the respondent by June 2016, whereas, as per averment of the appellant, the possession of the unit was handed over by the appellant to the respondent on 02.01.2019. Thus, we hold that there was delay in completion of the project. **Issue no. (3)** is answered accordingly.

14. **Vide Issue No. (4)** we are required to examine as to whether after execution of the Tripartite Sub-lease Deed on 01.02.2019 actual possession of the unit was given by the appellant to the respondent.

14.1 The appellant, in its averments, accepted that it has given possession of the unit to the respondent on 02.01.2019 and at the time of taking possession, the respondent signed an undertaking on 02.01.2019 to the effect that he was satisfied about the payments made under different heads including the delay possession charges and penalty interest as mentioned in the outstanding statement provided with the offer of possession. The respondent further agreed not to raise any objection or claim of any nature whatsoever against the appellant in future.

14.2 We have examined the undertaking with respect to taking physical possession of the unit in satisfactory condition and the affidavit dated 02.01.2019 followed by the registration of Tripartite Sub-lease Deed on 01.02.2019 before the Sub-Registrar Sadar, Gautam Budh Nagar. We have also examined the complaint of the respondent filed before the Regulatory Authority on 27.04.2019 wherein it is mentioned that the registry of flat was done on 01.02.2019 before Sub-Registrar, Greater Noida; the developer illegally refusing to handover physical possession of the flat; all original documents and sale deed are in the custody of developer till date; and sought relief against the appellant for directing the developer to immediately handover physical possession of the flat and original sale deed with all possession documents signed by the complainant/owner; and further direct the developer to pay delay penalty for 32 months along with compensation for delay in possession and causing intentional loss to the complainant/owner. The respondent has also mentioned, under the heading ‘any other’ that exemplary penalty be imposed against the developer for violation of provisions of RERA Act and demanding 2 years’ advance maintenance charges without giving possession of the flat.

14.3 On scrutiny of the pleadings and record we are of the considered view that the undertaking and the affidavit dated 02.01.2019 have been signed by the complainant/respondent under coercion and pleading to this effect has also been made by the respondent. Much time has been consumed by the appellant between purchase of stamp papers and execution of Sub-lease Deed due to persistent demand of the appellant to pay advance maintenance charges for 2 years before execution of Sub-lease Deed and at no point of time the respondent had given any assurance for payment of advance maintenance for 2 years. However, one year's advance maintenance was given under protest. Due to oblique motive, the appellant put forth 2 years' advance maintenance charges and club charges as precondition for physical possession.

14.4 The appellant in the memo of appeal mentioned that after execution of Tripartite Sub-lease Deed, the respondent did not visit the appellant's office either to collect the Title Deed or to deposit the documents which are needed to generate No Dues Certificate, but on the contrary the respondent continuously sent vague and immaterial mails threatening the appellant for consequences of civil as well as criminal nature, if the said flat was not handed over to the respondent. The appellant replied the said emails of the respondent vide its emails dated 25.02.2019 and 11.04.2019 asking the respondent to take physical possession of the apartment after completing the formalities. This fact goes to establish beyond doubt that despite execution of Tripartite Sub-lease Deed on 01.02.2019 the physical possession of the unit has not been given by the appellant to the respondent either on the ground of advance maintenance charges for two years or on any other ground, which resulted in approaching the respondent to the Regulatory Authority for seeking direction against the appellant to immediately handover the possession of the flat with original sale deed and all possession documents signed by the complainant/owner. The Regulatory Authority by means of impugned order dated 21.08.2019 directed the appellant to ensure delivery of possession of the unit to the complainant/respondent within 3 months from the date of uploading the order on the portal and payment of penal interest at the rate of MCLR+1% from the due date of handing over the possession as per terms of the agreement till the date of handing over the possession by the promoter and also provide detailed calculation sheet to the

complainant/respondent regarding any additional demand under different heads and equivalent/proportionate amount only be recovered in terms of the agreement. The appellant was also directed to adjust the advance maintenance charges towards the maintenance charges which would be due after handing over the possession.

14.5 Thus, we are of the considered view that after execution of the Tripartite Sub-lease Deed on 01.02.2019 actual possession of the unit was not given by the appellant to the respondent. **Issue no. (4)** is answered accordingly.

15. **Vide Issue No. (5)** we are required to examine as to whether advance maintenance charges can be taken by the promoter from the allottee prior to providing possession.

15.1 Chapter III of the Act 2016 provides the functions and duties of promoter. Section 11 enumerates various duties of the promoter. Sub Section (4)(b) of Section 11 cast responsibility on the promoter to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees, as the case may be.

15.2 Sub clause (4) (f) of Section 11 of the Act 2016 further mandates the promoter to execute a registered conveyance deed of the apartment, plot or building, as the case may be, in favour of the allottee along with the undivided proportionate title in the common areas to the association of allottees or competent authority, as the case may be, as provided under section 17 of the Act.

15.3 Sub clause (4)(g) of Section 11 of the Act 2016 imposes responsibility to pay all outgoings until the promoter transfers the physical possession of the real estate project to the allottee or the associations of allottees, as the case may be, which he has collected from the allottees, for the payment of outgoings (including land cost, ground rent, municipal or other local taxes, charges for water or electricity, maintenance charges, including mortgage loan and interest on mortgages or other encumbrances and such other liabilities payable to competent authorities, banks and financial institutions, which are related to the project) and if any promoter fails to pay all or any of the outgoings collected by him from the allottees or any liability, mortgage

loan and interest thereon before transferring the real estate project to such allottees, or the association of the allottees, as the case may be, the promoter shall continue to be liable, even after the transfer of the property, to pay such outgoings and penal charges, if any, to the authority or person to whom they are payable and be liable for the cost of any legal proceedings which may be taken therefore by such authority or person.

15.4 Section 12 of the Act 2016 provides obligations of promoter regarding veracity of the advertisement or prospectus and in case 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 2016. Further if the person affected by such incorrect, false statement contained in the notice, advertisement or prospectus, or the model apartment, plot or building as the case may be, intends to withdraw from the proposed project, he shall be returned his entire investment along with interest at such rate as may be prescribed and the compensation in the manner provided under the Act 2016.

15.5 Section 18 of the Act 2016 deals with the procedure for return of amount and compensation and gives option to an allottee to either continue with the Project or withdraw from the project if promoter fails to complete or is unable to give possession of an apartment, plot or building- (a) in accordance with the terms of the agreement for sale or, as the case may be duly completed by the date specified therein or (b) due to discontinuance of his business as the developer on account of suspension or revocation of the registration under the Act for any other reasons. The promoter is liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act: Provided that 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. Further if the

promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder 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 this Act.

15.6 Section 19 of the Act 2016 deals with the rights and duties of allottees. Sub clause (4) of Section 19 makes the allottee entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, 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 his registration under the provisions of this Act or the rules or regulations made thereunder. Sub clause (10) of Section 19 imposes obligation that every allottee shall take physical possession of the apartment, plot or building, as the case may be, within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be. Sub clause (11) mandates that every allottee shall participate towards registration of the conveyance deed of the apartment, plot or building, as the case may be, as provided under sub-section (1) of section 17 of the Act.

15.7 In view of the aforesaid provisions, especially the provisions of Section 11(4)(g) of the Act 2016, we are of the considered opinion that advance maintenance charges cannot be taken by the promoter from the allottee prior to providing possession. **Issue no. (5)** is answered accordingly.

16. **Vide Issue no. (6)** we are required to examine as to whether the appellant is entitled for interest for the delay in completion of the Project under the scheme of the Act, 2016 and if yes, what rate of interest is required to be paid by the Promote to the allottee.

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 to any other 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".*

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 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.

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. 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.

16.10 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.

16.11 On the basis of aforesaid analysis the **issue no. (6)** is decided in affirmative in favour of respondent.

17. In view of the aforesaid analysis, the admitted position is that inspite of execution of the Tripartite Sub-lease Deed on 01.02.2019 and also taking undertaking and affidavit from the respondent on 02.01.2019 the physical possession of the unit has not been given by the appellant to the respondent. The original lease deed and other documents have also not been given by the appellant to the respondent.

18 Thus, the appellant violated the provisions of Sections 11(4), 12, 17 and 19 of the Act 2016.

19. On due consideration we do not find any illegality or perversity in the impugned order of the Regulatory Authority dated 21.08.2019. **Accordingly the appeal is dismissed.**

20. Now the issue to be decided is as to what should be done of the pre-deposit made by the appellant/promoter in compliance of the provisions of Section 43(5) of the Act in case of dismissed appeal.

20.1 The aims and objects of the Act 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.

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."

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.

20.2 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."

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 alongwith the interest incurred thereon.

20.3 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.

20.4 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.

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.

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.

20.5 In the instant case, since the appeal of the promoter has been dismissed, we direct the Registry to scrutinize the details of the amount deposited by the applicant/appellant/promoter under the provisions of Section 43(5) of the Act and inform the Accounts Department. The Accounts Department, after verifying the same either from the record or from the Bank, will transfer the amount to the concerned account of the U.P. Real Estate Regulatory Authority (U.P. RERA). Further, we direct the UP RERA to dispose of this amount during the execution proceedings in accordance with its order dated 21.08.2019 passed in complaint case no. NCR144/04/0994/2019 (Subodh Goel Vs. Valencia Homes).

21. No order as to costs.

Dated: 30.05.2023
Shakir **(K. K. Jain)** **(D. K. Arora)**