THE U.P. REAL ESTATE APPELLATE TRIBUNAL, LUCKNOW

Division Bench Court No. 1

APPEAL-381/2019

U.P. AVAS EVAM VIKAS PARISHAD ....**Appellant**

Versus

VIJOY KUMAR ....**Respondent**

Counsel for Appellant SIDDHARTH VIKRAM ASTHANA

Counsel for Respondent TUSHAR BAHADUR

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

1. The present appeal has been preferred by U.P. Avas Evam Vikas Parishad (hereinafter referred to as "the appellant/Promoter") under Section 44 of the Real Estate (Regulation and Development) Act 2016 (hereinafter referred to as "the Act") aggrieved against the order dated 25.06.2019 passed by Real Estate Regulatory Authority (hereinafter referred to as the "Regulatory Authority") in complaint no. 10201820520 (Vijoy Kumar Vs. U.P. Avas Evam Vikas Parishad), whereby the Regulatory Authority directed the promoter to handover possession of the flat in question within 45 days as well as give interest for the delayed possession after deducting 2 years from the delay period at the rate of MCLR+1% from the promised date of possession as indicated in the Registration Booklet to the date of actual payment.

1.1 The case was initially registered as Misc. Case No. 389/2019 and subsequently converted into Appeal No. 381/2019.

2. The facts of the case, in brief, are that the respondent booked a residential flat No. B-305 in the Project, Shikhar Enclave, Ghaziabad of the appellant/promoter and the demand letter was sent, informing that the estimated cost of the said flat is about Rs. 51,25,000/=, out of which after adjustment of Registration amount Rs. 2,60,000/=, the complainant was required to deposit the first installment of Rs. 6,65,000/= on 31.07.2011 and rest amount at the rate of Rs. 6,00,000/= in seven quarterly installments to be paid commencing from 31.10.2011. In terms of Clause 9.1 of the Registration

Booklet of the project, it was proposed to give possession of the flat in question within 24 months, but the promoter failed to give possession by the nominated dated i.e. 24 months from 25.06.2011. The possession of the said flat was not delivered by the promoter to the respondent by the time of filing of the complaint before the Regulatory Authority on 02.10.2018. The Regulatory Authority gave the benefit of force majeure of two years for the delay in completion of the project as there was some land dispute going on before the Hon'ble High Court.

3. The appellant/promoter challenged the order of the Regulatory Authority on the following grounds:-

A. The scheme floated by the appellant was self financing scheme and the price and time given in the Registration Booklet is tentative and if the allotted flat is not delivered in time, but delivered after some delay at the original rate upon final costing (without charging a revised higher rate which is prevailing at a later date) the allottee will not be entitled to claim interest and compensation. The interest awarded to the complainant from 25.09.2016 to 25.08.2018 at the rate of MCLR+1% is bad in law in the circumstances of the present case.

B. The Regulatory Authority has agreed with the cause of delay due to interim protection granted by the Hon'ble High Court in Writ Petition No. 54818/2013 (M/s Sai Construction Vs. U.P. Avas Evam Vikas Parishad). Since the Hon'ble High Court had granted stay on 08.10.2013, which could be vacated only on 21.01.2016 i.e. after a lapse of two years three months and 13 days. Thereafter five months period was spoiled in grant of permission by the Forest Department; moreover farmers menace was also caused after promulgation of the Right to Fair Compensation and Transparency in Land Acquisition Rehabilitation and Resettlement Act 2013, but the period of only two years has been excluded from the alleged delay and therefore the impugned order is erroneous.

C. The Regulatory Authority failed to appreciate that the delay is neither intentional nor deliberate and nor caused with a view to misappropriate the funds of the complainant nor there is any malafide intention to grab the money of the complainant or with a view to extract any undue benefit like private builders. The appellant/promoter is a Semi-Government Organization, having been constituted for the welfare of the public and has engaged in the activities to make a planned development of the city as well as to meet residential needs of the public in a regularized manner on cheaper rates and the money deposited by the complainant is quite secure with almost 100% guarantee for providing the flat, unlike the private builders. Accordingly, no interest is liable to be awarded against the appellant/promoter in the circumstances of the case.

D. The Regulatory Authority failed to appreciate that the project is under self-financing scheme and the allottee if not paid all the installments in time cannot obviously expect completion of construction and therefore, the complainant is not entitled for any compensation in the nature of interest.

E. The Regulatory Authority failed to appreciate that the complainant did not opt to get refund of the deposited amount with interest upon failure of the appellant to provide the flat even after six months from the deposit of the last installment as provided under Clause 4.6 of the Registration Booklet. As such, the complainant has given the implied consent in this regard and due to this complainant is not entitled to claim any interest/compensation upon getting the flat.

F. The Regulatory Authority does not rewrite the terms of contract and therefore, the higher rate of interest at the rate of MCLR+1% cannot be awarded to the complainant against the terms of contract.

G. The Regulatory Authority failed to appreciate that the possession was offered on 13.10.2016 by sending the Allotment Letter and directing the complainant to deposit the balance amount and for getting the sale deed registered and take possession of allotted flat after completion of required formalities. The flat allotted to the complainant was ready for possession and even the Completion Certificate (CC) of the entire project has been issued on 31.12.2018, but the complainant has not yet completed the required formalities, as such no interest/compensation is liable to be awarded to the complainant.

H. The Regulatory Authority while passing the impugned order has failed to appreciate that the delay caused was on account of enforcing circumstances and beyond the control of the promoter.

I. The Regulatory Authority failed to appreciate that since the appellant/promoter has already been awarded an interest amounting to Rs. 9,46,804/= (at the rate of 6% per annum upon the deposited amount) as such no more interest is liable to be awarded to the complainant.

J. The Regulatory Authority while passing the impugned order has failed to appreciate the fact that the short-comings if any and whatsoever pointed out by the allottee are finally completed at the time of delivery of actual physical possession after execution of sale deed.

K. The Regulatory Authority failed to appreciate the fact that the project in question is registered under the RERA Act and the date of completion of work was mentioned as 31.12.2017 and the promoter has applied for extension of the registration of the project before the Regulatory Authority.

L. The provisions of RERA Act are applicable prospectively and thus promoter is not liable to pay any amount in excess in terms of the earlier contract.

M. The impugned order is not in consonance with true spirit of law and is illegal, incorrect and is invalid in the eyes of law.

4. The appellant/promoter has prayed for setting aside of the order dated 25.06.2019 passed by the Regulatory Authority.

5. Heard Shri Siddharth Vikram Asthana, learned counsel for the appellant/promoter and Shri Tushar Bahadur, learned counsel for the respondent.

6. Shri Vijoy Kumar, the respondent filed his objection denying the contents of the appeal. He further stated that:-

i. The respondent has invested his hard earned money for the unit which was allotted to him and not for any other purpose. The appellant is bound under the proviso to Section 18(1) of the Act to pay the delay penalty to the respondent from the date on which the allotted unit was supposed to be handed over to the respondent at such rate as may be prescribed.

ii. The respondent approached the office of the appellant/promoter in pursuance to the letters issued to him in the year 2016 and 2017, but the unit which was allotted to him was incomplete, and as such the respondent was not able to take the physical possession of the unit. The Executive Engineer of the promoter vide its letter dated 04.10.2018, has admitted that some of the work in the project is incomplete, as such the promoter has preferred a letter before the Regulatory Authority seeking six more months to complete the pending work in the project.

iii. When the promoter, even after delay of more than five years, failed to handover the possession then the respondent was left with no option but to prefer a complaint dated 02.10.2018 before the Regulatory Authority.

iv. In pursuance to the Regulatory Authority's order passed on 25.06.2019, the respondent made several telephonic conversation in the office of the appellant and thereafter the respondent purchased e-stamp dated

28.12.2019 for Rs. 4 lacs for the unit allotted to him but till date the unit has not been handed over to him in one pretext or another and the e-stamp dated 28.12.2019 is lying in the office of the appellant/promoter. In the meantime, the appellant/promoter served the letter dated 15.01.2020 wherein the time was asked to fulfill the requirement for execution of sale deed.

v. The appellant/promoter claimed that the appellant has adjusted the interest of Rs. 9,46,804/= is not correct, as the appellant has adjusted Rs. 5,98,542/= only out of Rs. 9,46,804/= claimed, as is evident from the demand notice dated 23.06.2017. The project was delayed around 6 years has been recorded thoroughly in the Regulatory Authority's order dated 25.06.2019. The interest for delay has been awarded in terms of Section 18 of the Act and the Rule dated 17.10.2018.

vi. The Hon'ble Allahabad High Court in Writ C-54818 of 2013 did not put any stay upon the project, but the Hon'ble High Court was pleased to direct that in case no fresh contract was finalized in pursuance of the fresh tender invited on 11.09.2013, no fresh contract shall be awarded in favour of any person. As such the stay was on inviting a fresh contract but not on the project.

vii. It was the duty of the appellant/promoter to seek necessary permissions from the concerned authorities before floating the present project and inviting the allottees to deposit their hard earned money as the booking amount of the unit.

viii. The appellant/promoter has sufficient knowledge of their work and duties as public institution, before entering into the agreement with the respondent, therefore, the reasons stated by the promoter for delay in the entire project is not acceptable. More so, as no records to support the averments has been placed by the appellant/promoter.

ix. The interest at the rate of Savings Bank Account will not be adequate, therefore, the rate of interest as MCLR+1% is correct as has been adequately recorded in the Regulatory Authority's order dated 25.06.2019.

x. The very fact that the project has been registered in the official website of RERA, therefore, the project comes within the purview of RERA. Section 18 clearly mentioned that the promoter has to pay the interest in case the project is delayed and the allottee does not wish to withdraw from the project.

xi. The respondent cleared/paid all the payments/installments/ demands raised by the appellant/promoter on time and if at all there was any marginal delay in paying the installments on time, the delay penalty shall be charged at the rate of 13.5% from the respondent, and the same is evident from demand notice dated 23.06.2017.

xii. The delay was deliberate as no efforts were made to vacate the stay granted by the Hon'ble High Court. The deduction of two years from the total delay is highly unreasonable and against the legal principles of "commodum ex injuria sua nemo habere" which means no party can take undue advantage of their own wrong.

xiii. The provision for filing a fresh timeline for the project is to complete remaining development work within the fresh timeline, but the delay penalty will be calculated as per the agreement as observed in para 256 of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. The Union of India and 2 Ors**.

7. In the rejoinder, the appellant/Promoter denied the averments made by the respondent and reiterated the averments made in the appeal. The appellant/promoter further submitted that:-

(i) The respondent was always at liberty to get the refund as per the provisions of Clause 4.6 of the Registration Booklet. There was a implied consent on the part of the respondent for taking delayed possession and therefore, inline with Latin maxim Volenti non fit injuria (in English "to a willing person, injury is not done") and therefore, the respondent cannot claim compensation.

(ii) The major portion of the development work was done at the time of issuance of Allotment Letter and several allottees were residing there but the respondent willfully did not deposit the remaining sale consideration amount in order to get the sale deed executed in his favour. The respondent failed to perform his part even after issuance of C.C. dated 31.12.2018.

(iii) The C.C. of the project was issued on 31.12.2018 and the respondent got his sale deed executed on 23.12.2019 after completing the necessary formalities. The appellant/promoter never charged any other extra cost towards the flat inspite of the fact that the value of the flat has been appreciated to a large extent. There is a law laid down by the Hon'ble Supreme Court in Supertech Ltd. Vs Rajni Goyal Civil Appeal No. 6649-50 of 2018 "The Appellant-Builder had obtained the completion certificate as late as April 2016. The Respondet-Purchaser could not have any further grievance after April 2016 with respect to delay in handing over possession. The Respondent-Purchaser ought not to be allowed to reap the benefits of her own delay in taking possession".

(iv) The appellant has already provided Rs. 9,48,125/= as delay penalty according to the terms of the contract firstly by demand letter dated 01.02.2017 and again on 23.06.2017, but the respondent willfully delayed execution of sale deed even after issuance of C.C. on 31.12.2018.

(v) As per Clause 2.1 of the Registration Booklet the 24 months period for delivery of the possession was tentative. It is wrong to mention that the flats were ought to be delivered by June 2013. As per the view laid down by the Apex Court in M/s Fortune Infrastructure Vs. Trevor D'Lima & Ors. in Civil Appeal No. 3533-3534 of 2017, where there is no specific time limit for delivery of possession is provided at least a period of 3 years should assumed.

(vi) It is not correct to say that the appellant/promoter did not take any action for getting the stay order vacated, infact it is on account of the appellant/promoter's efforts that the compromise took place with the contractor and the stay order was vacated by the Hon'ble High Court.

(vii) the Regulatory Authority failed to consider that on account of force majeure condition and circumstances beyond the control of the appellant/Promoter, the possession of the flat could not be handed over to the respondent/allottee within proposed period;

(viii) the scheme quoted by the appellant/promoter was self-financing scheme and the price as well as the time mentioned in the Registration Booklet are tentative and are not final. The appellant/promoter could not deliver the possession of the flat due to certain factors which are beyond its control. Since no revised higher rates are being charged from the respondent, therefore the respondent is not entitled to claim interest and compensation in the light of the law laid down by Hon'ble Supreme Court in Civil Appeal No. 6051 of 2002 (Ghaziabad Development Authority Vs. Shakuntala Rohatagi) judgment, delivered on 04.03.2009.

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

(i) Whether the provisions of Act, 2016 are applicable to the Project of the appellant and the Regulatory Authority is vested with the powers and jurisdiction to consider and decide the complaint of the respondent under the scheme of the Act, 2016?

(ii) Whether under the scheme of the Act, 2016 and Rules, 2016 any mechanism has been provided for determination of the interest or compensation for the delay in handing over possession of the apartment/plot to the allottee, if the allottee does not intend to withdraw from the Project?

(iii) Whether the Regulatory Authority ought to have examined the complaint of the respondent only on the basis of agreed terms and conditions mentioned in the Registration Booklet read with demand letter?

(iv) Whether there was a delay in handing over of the possession of the Unit by the appellant to the respondent, and if yes whether the benefit of force majeure can be given to the appellant/promoter?

(v) Whether the respondent is entitled for interest and/or compensation on account of delayed possession under the scheme of the Act, 2016 and whether the rate of interest granted by the Regulatory Authority is in accordance with the provisions of the Act, 2016, Rules 2016?

(vi) Whether the allottee/respondent can claim interest and/or compensation for delayed possession of the Unit by the appellant even after getting interest by the appellant/promoter at the rate of 6% p.a.?

9. In order to examine question no. (i), we proceed to examine the relevant provisions of the Real Estate (Regulation and Development) Act, 2016 (herein after referred to as the 'Act of 2016').

The preamble of the Act of 2016, provides to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto. From the preamble it is evident that the Act 2016 has been promulgated for regulation and promotion of real estate sector and sale of real estate in an efficient and transparent manner and to protect the interest of consumers in the real estate sector.

9.1 In Chapter 1 (which normally provides for applicability and exemptions under an Act) nowhere, it is mentioned that this Act is applicable only to registered projects. It has also not been indicated anywhere in the Act, 2016 that certain projects are out of the ambit of the Act, 2016.

Section 3(2) only provides for those categories of projects where no registration shall be required.

9.2 The definition of the project provided in section 2(zj) reads as under:-

<u>Section 2(zj):-</u>

"project" means real estate project as defined in clause 2(zn) under this Act.

<u>Section 2(zn):-</u>

"real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof, into apartments or the development of land into plots or apartment, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;.

Accordingly, project means a real estate project as defined in clause 2(zn).

9.3 In this definition, it is not mentioned that real estate project means registered real estate project. There is requirement of prior registration of real estate projects, unless exempted, and also restriction on certain activities without registering the projects. Registration of real estate projects for certain categories have been exempted from prior registration under Section 3(2) but not from the provisions of Act, 2016. Otherwise, it would have been mentioned in the applicability part by saying that this Act is applicable only to registered real estate projects.

9.4 The domain of the Regulatory Authority extends even to the projects which have not been registered, and also those exempted from prior registration. No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Regulatory Authority established under this Act. In case of violation, the Regulatory Authority may take action for non-registration under Section 59 of the Act of 2016. Accordingly, the projects which have not been registered, but are registrable under Section 3 come within the domain of the Regulatory Authority and the Regulatory Authority is well within its power to initiate penal proceedings and also to entertain complaints regarding violation of the provisions of the Act of 2016. The Regulatory Authority cannot take a stand that the project is unregistered and accordingly it has no jurisdiction to entertain the complaint and the home buyer/complainant cannot be left in lurch, helpless and in miserable condition. The complainant may make a complaint to the Regulatory Authority regarding non-registration of the project as well as may request the Regulatory Authority for compliance of obligations by the promoter in case the promoter violates any of the provision of the Act, the rules and the regulations made there under. The Regulatory Authority in such case cannot take a stand that let the project be got registered and only thereafter it will entertain the complaint. If a complaint in such cases is not entertained by the Regulatory Authority, a scrupulous promoter or builder or developer may not register the project to avoid jurisdiction of the Regulatory Authority. This will frustrate the very purpose of the Act regarding giving relief to the complainant and ensuring compliance of the obligations by the promoters, real estate agents and allottees.

9.5 The Act provides for obligations of the promoter, real estate agent and allottees both during the registration phase as well as post-expiry of validity of registration i.e. after the completion of the project. The obligations post-expiry of the validity of registration are to be ensured by the authority both in case of projects which were registered, and validity of registration expired as well as for the projects where completion certificate was obtained prior to coming into force of this Act and exempted from prior registration. The obligations of the promoter after completion of the project such as handing over of possession and executing a registered conveyance deed within specified period, workmanship and structural defects rectification liability upto five years after giving possession, land title defect liability without any limitation period etc. are applicable for all the real estate projects, both registered as well as exempted from prior registration.

9.6 Further, in case of a project where completion certificate has been obtained for a real estate project but there is unsold inventory left out then it is true that there won't be any requirement of prior registration of the project as the project has already been completed prior to coming into force of this Act. The registration of projects serves mainly three purposes.

(i) to monitor the progress of the project so that the project is completed timely;

(ii) to ensure that the amount collected from the buyers is not diverted to any other purpose; and also

(iii) to see that layout plan, building plan, specifications etc. as approved by the competent authority are followed by the promoter. The requirement of registration is to monitor the project from commencement to completion. The validity of registration expires on issuance of completion certificate or on expiry of period for completion of project declared by promoter under Section 4(2) (ℓ) (C), keeping in view the provisions of section 5(3).

9.7 There are certain obligations of the promoters which are to be complied by them. Some of these obligations are during registration phase and some of the obligations are post expiry of validity of registration. Accordingly, there are large number of obligations of the promoter which are not linked with the completion of the project, but those provisions relate to regulating relationship between promoter and allottee such as conveyance deed, giving possession, workmanship and structural defect rectification liability, defective land title liability, etc. The projects which have been issued completion certificate prior to commencement of the Act have been taken out of prior registration requirement, but not out of the ambit of the Act. The unsold inventory of such projects sold after commencement of this Act falls within the purview of this Act as these projects have not been kept out of the ambit of the Act, 2016.

9.8 After the commencement of Act 2016, the buyers of the real estate, out of unsold inventory where the promoter has obtained completion certificate prior to commencement of the Act, cannot be left in lurch in case possession is not handed over or conveyance deed is not made as per the agreement for sale, defective land title, structural defect and workmanship defects, etc. Whenever sale of real estate takes place after commencement of Act of 2016 and a project qualifies to be a real estate project as per definition given in the Act and the promoter is covered in the definition of promoter as given in the Act, then a complaint in respect of matters where this Act casts certain obligations upon the promoter can be made to the Regulatory Authority. There cannot be two different authorities to be approached for similar types of complaints. The registration certificate of real estate project is valid from the date of registration and it expires as soon as the project is completed, and the completion certificate is issued i.e. the time period declared by the promoter in accordance with Section 4(2) (ℓ) (C) for completion of the project. Hence, even after the expiry of validity of registration there are large number of obligations which are to be discharged by the promoter. Hence, in respect of those obligations complaints of projects registered or exempted irrespective of the fact whether the sale has taken place before the commencement of the Act or after commencement of the Act can be made to the Regulatory Authority and such projects are squarely covered in the ambit of the Real Estate Regulatory Authority. In nutshell, this Act primarily protects the interest of the consumers in case of sale of real estate.

9.9 There will be three categories of real estate projects which can be sold by a promoter:

(i) Real estate projects where completion certificate of the project has been obtained prior to commencement of the RERA Act, 2016 but there is unsold inventory of real estate project.

(ii) The real estate projects which are "on-going" and where the completion certificate has not been issued on the date of commencement of the RERA Act, 2016. So, these are to be registered as real estate projects with the Regulatory Authority.

(iii) New real estate projects to be taken up after commencement of this Act: Here, there can be two types of real estate projects which can be put to sale by the promoter. (a) where the promoter intends to market/sell real estate project only after obtaining completion certificate; (b) where promoter intends to advertise, market or sell real estate during construction phase i.e. prior to obtaining completion certificate.

All these projects come within the ambit of the Real Estate Regulatory Authority.

9.10 Chapter 2 of the Act, 2016 relates to registration of real estate projects. Section 3 of the Act, 2016 provides prior registration of real estate project with the Real Estate Regulatory Authority as follows: -

> **3.** ***Prior registration of real estate project with Real Estate Regulatory Authority***. –
> *"(1) No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any*

real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act .... "

Section 3(1) provides for certain restrictions on the promoter without registering a real estate project with the real estate regulatory authority concerned.

The proviso to Section 3(1) further provides for registration of ongoing Projects:-

"……Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act."

9.11 This provision requires that the projects which fulfill following two conditions are required to be registered within a period of three months from the date of commencement of this Act. The commencement date of the Real Estate (Regulation and Development) Act, 2016 is 01.05.2017, except Section 2, 20 to 39, 41 to 58, 71 to 78 and 81 to 92, which came into force with effect from 01.05.2016. Accordingly, by 31.07.2017 the following projects covered in proviso 3(1) of the Act have to register with the Regulatory Authority:

(i) The projects that are ongoing on the date of commencement of the Real Estate (Regulation and Development) Act, 2016; and

(ii) The projects for which completion certificate has not been issued.

9.12 For the issuance of the completion certificate material date is 01.05.2017 i.e. the date of commencement of the Real Estate (Regulation and Development) Act, 2016. Accordingly, all those projects where completion certificate has not been issued on the date of commencement of this Act are necessarily to be registered with the Regulatory Authority within a period of three months.

9.13 The proviso to section 3(1) provides that the projects that are ongoing on the date of commencement of this Act and for which completion certificate has not been issued, the promoter shall make an application to the authority for registration of the said project within a period of three months from the date of commencement of the Act. This Act came into force on 01.05.2017- barring some sections which came into force on 01.05.2016. Section 3 of the Act came into force w.e.f. 01.05.2017 and accordingly, for the on-going projects registration was to be applied by the promoter within three months, i.e., by 31.07.2017.

9.14 Section 3(2) provides those categories of projects where no registration of real estate projects shall be required. The section 3(2) reads as follows:-

"Notwithstanding anything contained in sub-section (1)- no registration of the real estate project shall be required-

a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases:

Provided that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act;

b) where the promoter has received completion certificate for a real estate project prior to commencement of this Act;

c) for the purpose of renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project

Explanation. -For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a stand-alone real estate project, and the promoter shall obtain registration under this Act for each phase separately."

In sub-section 3 (2) (b) it has been mentioned that those projects where the promoter has received the completion certificate for real estate project prior to commencement of the Act, 2016 have been taken out of the ambit of registration and not the real estate projects which may have received the completion certificate after the commencement of this Act. Section 3(2) exempts certain categories of real estate projects only from prior registration related provisions but not from the ambit of other provisions of the Act, 2016.

9.15 From the plain reading of section 3, it is evident that the projects for which the completion certificate has been issued prior to commencement of this Act have only been exempted from prior registration, if the proviso to section 3(1) is read with section 3 (2) (b). Section 3 (2) provides for categories of projects where no prior registration shall be required. This section 3 (2) (b) specifically provides that no prior registration of the real estate project shall be required where the promoter has received completion certificate for a real estate project prior to commencement of this Act, i.e. prior to 01.05.2017.

In other words all projects, where completion certificate has not been issued are ongoing projects and completion certificate issued by the competent authority on or before 30.04.2017 is the conclusive proof of the fact that the project is complete, and it is not “on-going”.

9.16 The Hon'ble Bombay High Court in the case of ***Neelkamal Realtors Suburban Pvt. Ltd. & others Vs. Union of India,*** (2018)1AIR Bom R 558, was pleased to observe in para 255 as under:

> *"The intention of RERA is to bring the complaints of allottees before one Authority and simplify the process. If the interpretation suggested by the petitioners, namely, that the provision is applicable only after coming into force RERA is accepted, this would result in allottees having to approach different fora for interest prior to RERA and subsequent to RERA. In fact, Section 71 of RERA provides that the cases pending before the Consumer Court can be transferred to Authority. Reference to pending cases is obviously a reference to claims for interest and or compensation pending when the RERA came into force."*

9.17 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, in para 23, observed as follows:-

> ***"23.*** *In terms of Section 18 of the RERA Act, if a promoter fails to complete or is unable to give possession of an apartment duly completed by the date specified in the agreement, the Promoter would be liable, on demand, to return the amount received by him in respect of that apartment if the allottee wishes to withdraw from the Project. Such right of an allottee is specifically made "without prejudice to any other remedy available to him". 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. 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). The case of Himanshu Giri came under the latter category. The RERA Act*

thus definitely provides a remedy to an allottee who wishes to withdraw from the Project or claim return on his investment."

9.18 The **Hon'ble Punjab and Haryana High Court in *CWP No. 38144 of 2018 Experion Developers Pvt. Ltd. Vs. State of Haryana and others*** and other connected matters vide judgment dated 16th October, 2020 while examining the challenge to Sections 13, 18(1) and 19(4) of the Act, 2016 and Rules 3 to 16 of the Haryana Rules as regards their retroactive application to the ongoing projects, vide paras 73 to 80, pleased to observe as under:-

"73. The last issue concerns the retroactivity of the provisions of the Act particularly with reference to 'ongoing' projects. The expression "Real Estate Project" is defined in Section 2 (zn) of the Act to mean:

"the development of a building or a building consisting or apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto."

74. The Act is intended to apply even to 'ongoing' Real Estate Projects. The expression 'ongoing project' has not been defined under the Act but under Rule 2 (o) of the Haryana Rules which reads as under:

"ongoing project" means a project for which a license was issued for the development under the Haryana Development and Regulation of Urban Area Act, 1975 on or before the 1st

May, 2017 and where development works were yet to be completed on the said date, but does not include:

(i) any project for which after completion of development works, an application under Rule 16 of the Haryana Development and Regulation of Urban Area Rules, 1976 or under sub code 4.10 of the Haryana Building Code 2017, as the case may be, is made to the Competent Authority on or before publication of these rules and

(ii) that part of any project for which part completion/completion, occupation certificate or part thereof has been granted on or before publication of these rules."

75. The expression 'Completion Certificate' has been defined under Section 2 (q) of the Act as under:

"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."

76. This has to be read along with the expression 'occupancy certificate' which is defined under Section 2 (zf) of the Act as under:

"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."

77. Rule 3 of the Haryana Rules talks of application for registration and Rule 4 of 'additional disclosure by Promoters of ongoing projects.' Therefore, all 'ongoing projects' i.e. those that commenced prior to the Act, and in respect of which no completion certificate is yet issued, are covered under the Act. It is plain that the legislative intent was to make the Act applicable to not only to the projects which were to commence after the Act became operational but also to ongoing projects. The issue that arises is whether this is permissible in law?

78. The decision of the Bombay High Court in Neelkamal Realtors Suburban Pvt. Ltd. (supra) has dealt with this issue quite extensively. The conclusion of the Bombay High Court that this retroactive application of the Act, as distinguished from retrospective effect, in relation to ongoing project is consistent with the legal position in this regard. A very conscious decision was taken that the Act should apply not only to new projects but to existing projects as well.

79. The following observations of the Bombay High Court in Neelkamal Realtors Suburban Pvt. Ltd. (supra) are relevant in this context:

> *"86. On behalf of the Petitioners it was submitted that registration of ongoing project under RERA would be contrary to the contractual rights established between the promoter and allottee under the agreement for sale executed prior to registration under RERA. In that sense, the provisions have retrospective or retroactive application. After assessing, we find that the projects already completed are not in any way affected and, therefore, no vested or accrued rights are getting affected by RERA.*

The RERA will apply after getting the project registered. In that sense, the application of RERA is prospective in nature. What the provisions envisage is that a promoter of a project which is not complete/sans completion certificate shall get the project registered under RERA, but, while getting project registered, promoter is entitled to prescribe a fresh time limit for getting the remaining development work completed. From the scheme of RERA and the subject case laws cited above, we do not find that first proviso to Section 3(1) is violative of Article 14 or Article 19(1)(g) of the Constitution of India. The Parliament is competent to enact a law affecting the antecedent events. In the case of State of Bombay v. Vishnu Ramchandra AIR 1961 SC 307, the Apex Court observed that the fact that part of the requisites for operation of the statute were drawn from a time antecedent to its passing did not make the statute retrospective so long as the action was taken after the Act came into force. The consequences for breach of such obligations under RERA are prospective in operation. In case ongoing projects, of which completion certificates were not obtained, were not to be covered under RERA, then there was likelihood of classifications in respect of undeveloped ongoing project and the new project to be commenced. In view of the material collected by the Standing Committee and the Select Committee and as discussed on the floor of the Parliament, it was thought fit that ongoing project shall also be made to be registered under RERA. The Parliament felt the need because it was noticed that all over the country in large number of projects the allottees did not get possession for years together. Huge sums of money of the allottees is locked in. Sizable section of allottees had invested their hard earned money, life savings, borrowed money, money obtained through loan from various financial institutions with a hope that sooner or later they would get possession of their apartment/flat/unit. There was no law regulating the real estate sector, development work/obligations of *promoter and the allottee. Therefore, the Parliament considered it to pass a central law on the subject. During the course of hearing, it was brought to notice that in the State of Maharashtra a law i.e. MOFA on the subject has been in operation. But MOFA provisions are not akin to regulatory provisions of RERA.*

87. The important provisions like Sections 3 to 19, 40, 59 to 70 and 79 to 80 were notified for operation from 1/5/2017. RERA law was enacted in the year 2016. The Central Government did not make any haste to implement these provisions at one and the same time, but the provisions were made applicable thoughtfully and phase- wise. Considering the scheme of RERA, object and purpose for which it is enacted in the larger public interest, we do not find that challenge on the ground that it violates rights of the Petitioners under Articles 14 and 19(1)(g) stand to reason. Merely because sale and purchase agreement was entered into by the promoter prior to coming into force of RERA does not make the application of enactment retrospective in nature. The RERA was passed because it was felt that several promoters had defaulted and such defaults had taken place prior to coming into force of RERA. In the affidavit-in reply, the UOI had stated that in the State of Maharashtra 12608 ongoing projects have been registered, while 806 new projects have been registered. This figure itself would justify the registration of ongoing projects for regulating the development work of such projects.

88. On behalf of the Petitioners it was submitted that Parliament lacks power to make retrospective laws. Series of judgments cited above would indicate a settled principle that a legislature could enact law having retrospective/retroactive operation. It cannot be countenance that merely because an enactment is made retrospective in its operation, it would be contrary to Article 14 and Article 19(1)(g). We find substance in the *submissions advanced by the learned counsel appearing for the respondents that Parliament not only has power to legislate retrospectively but even modify pre-existing contract between private parties in the larger public interest. No enactment can be struck down merely by saying that it is arbitrary and unreasonable unless constitutional infirmity has been established. It is settled position that with the development of law, it is desirable that courts should apply the latest tools of interpretation to arrive at a more meaningful and definite conclusion. A balance has to be struck between the restrictions imposed and the social control envisaged by Article 19(6). The application of the principles will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.*

89. Legislative power to make law with retrospective effect is well recognized. In the facts, it would not be permissible for the Petitioners to say that they have vested right in dealing with the completion of the project by leaving the proposed allottees in helpless and miserable condition. In a country like ours, when millions are in search of homes and had to put entire life earnings to purchase a residential house for them, it was compelling obligation on the Government to look into the issues in the larger public interest and if required, make stringent laws regulating such sectors. We cannot foresee a situation where helpless allottees had to approach various forums in search of some reliefs here and there and wait for the outcome of the same for indefinite period. The public interest at large is one of the relevant consideration in determining the constitutional validity of retrospective legislation."

80. This Court concurs with the above conclusions. No order of the Supreme Court either entertaining a Special Leave

Petition against the above decision in Neelkamal Realtors Suburban Pvt. Ltd. (supra) or staying its operation has been shown to this Court. In any event, the Court is of the view that there is nothing unreasonable and arbitrary in making the provisions of the Act applicable to all ongoing projects. There is a clear indication in the Act read with the Haryana Rules of what can be considered to be an ongoing project. If it is the case of the promoter that the completion certificate has been deliberately delayed, that would be examined by the AO, the Authority or the Appellate Tribunal, as the case may be, and the decision on that issue shall be taken into account while deciding the case. The mere fact that there may be an instance where there has been deliberate delay in issuing the completion certificate will not render the retroactivity of the provisions unreasonable or arbitrary. Consequently, this Court rejects the challenge to Sections 13, 18 (1) and 19 (4) of the Act and Rules 3 to 16 of the Haryana Rules as regards their retroactive applicability to 'ongoing projects'."

9.19 It is an accepted fact that self financing Multi-storeyed Housing Scheme by the name of Shikhar Enclave under Vasundhara Yojana, Sector-15, Ghaziabad was advertised in 2011 by the appellant/promoter, and on the basis of the allotment/demand letter dated 25.06.2011, the cost of the flat was deposited in installments by the respondent. The date of coming into force of the Act of 2016 is 01.05.2017. Since the Completion Certificate (C.C.) was issued on 31.12.2018, therefore, the project of the appellant falls under the category of "ongoing projects" and this is the reason appellant got registered the project in question with UP RERA vide Registration No- UPRERAPRJ7849. Therefore, the provisions of the Act of 2016 will apply.

9.20 For the sake of argument, even if we assume that the Act applies only to those projects where the agreement was signed after 01.05.2017, then where will the buyer go for seeking relief if they have entered into an agreement prior to 01.05.2017 and the possession of their units/flats/plots has not been given even after 01.05.2017. The Act of 2016 has been promulgated primarily in order to protect the interests of the consumers (buyers), since the Consumer Protection Act 1986 was not adequate to address all the concerns of the buyers and promoter in the Real Estate Sector. Applying the provisions of the Act to only those projects where agreement has been signed after 01.05.2017 and not applying them to the projects where the agreement was signed prior to 01.05.2017 is quite illogical, and if accepted, will defeat the very objective for which the Act was promulgated.

9.21 The legislature not only has power to legislate retrospectively but even to modify pre-existing contracts between the parties in the larger public interest. There is nothing unreasonable or arbitrary in making the provisions of the Act applicable to all ongoing projects including the present case as the project in question falls within the category of ongoing projects as defined under Section 3 of the Act. We are of the considered view that the jurisdiction of the Regulatory Authority and the Adjudication Officer applies even to the projects where some kind of written understanding has been reached between the parties, even prior to coming into force of the Act, as the Act is retroactive in nature. Therefore, the argument of the appellant/promoter that the project in question does not fall within the jurisdiction of the Regulatory Authority is not tenable, and legally not valid.

9.22 Thus, we are of the considered view that a complaint pertaining to violation of provisions of the Act, 2016, the Uttar Pradesh Real Estate (Regulation and Development) Rules, 2016 (hereinafter referred to as

Rules, 2016) and regulations made thereunder may be filed by any aggrieved person in respect of real estate belonging to any real estate project which qualifies to be real estate project as per the definition given in section 2(zn) of the Real Estate (Regulation and Development) Act, 2016. Further, for the project in question the Regulatory Authority is vested with the powers & jurisdiction to consider and decide the complaint of respondent under the Scheme of Act, 2016, Rules 2016 and Regulations framed there under. Question no. (i) is answered accordingly.

10. Question no. (ii) is regarding, whether under the scheme of the Act, 2016 and Rules, 2016 any mechanism has been provided for determination of the interest or compensation for the delay in handing over possession.

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

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

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

Section 18 (1) (a) of the Act, the promoter is made liable on the demand of the allottee:-

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

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

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

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

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

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

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

Extract of Section 31 of the Act

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

Explanation

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

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

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

Extract of Rule 33(1) of Rules-

(1) Any aggrieved person may file a complaint with the regulatory authority for any violation under the Act or the rules and regulations, made there under, save as those provided to be adjudicated by the adjudicating

officer, in Form M which shall be accompanied by a fee of rupees one thousand in the form of a demand draft drawn on a nationalized bank, in favour of regulatory authority and payable at the main branch of that bank at the station, where the seat of the said regulatory authority is situated.

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

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

10.10 Further, the Hon'ble Bombay High Court in the case of ***Neelkamal Realtors Suburban Pvt. Ltd. And others Vs. Union of India (supra)*** observed as follows:-

> *"Section 18(1)(b) lays down that if the promoter fails to complete or is unable to give possession of an apartment due to discontinuance of his business as a developer on account of suspension or revocation of the registration under the Act or for any other reason, he is liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice 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".*

From the aforementioned discussion, it is clear that the Act of 2016 provides a mechanism for determination of interest and/or compensation for the delay in handing over possession of the unit to the allottee, if the allottee wishes to stay with the project. Question no. (ii) is answered accordingly.

11. Question no. (iii) is regarding whether the Regulatory Authority ought to have examined the complaint of the respondent only on the basis of agreed terms and conditions mentioned in the Registration Booklet read with allotment letter?

11.1 We now examine the relevant Clauses of the Registration Booklet and the conditions of the demand letter dated 23.06.2017 (placed at P. No. 27 of the appeal).

Approximate English version of Clauses 2.1, 4.6 & 4.7 are as follows:-

Clause 2.1 The above mentioned price is tentative. The proposed construction is to be completed within 24 months. On completion of the project, the actual price will be determined and the final price will be payable, therefore, the amount of the prescribed installments may be increased or decreased. There is a possibility of change in the estimated cost due to inalienable reasons like increase in the market rate of construction material or increase in the charges of the labourers. On completion of the project, the actual costing will be done and the balance amount after adjustment of the deposited amount will be payable.

Clause 4.6 If the Parishad is unable to allot the flat even after six months from the deposit of final prescribed installment, due to delay in construction of the flats, then the deposited amount of the allottee will be returned with interest calculated from the next month after depositing the last installment till the month before the demand of refund of the amount, as per the rules of the Parishad in force for the time being i.e. the interest rate payable on the savings account by a nationalized bank.

Clause 4.7 If for any reason the Parishad decides not to operate this scheme, then the deposited amount of the registered applicants/allottees will be refunded as per rules. But in this situation, the interest will be paid only if the amount remains deposited in the account of the Parishad for more than one year, and the interest rate payable on the bank account will be the same as given by the nationalized bank.

The demand letter dated 23.06.2017, states as follows:-

Terms and condition – In any case, on payment of the amount after the due date, additional penal interest of 13.5 percent per annum will be payable for the full month. In case of late deposit of service tax, interest etc. penal interest will be payable under the provisions of service tax and the Rules. Location charges have been included in the construction cost. In case of any dispute, the decision of Housing Commissioner will be final.

11.2 Having examined the terms and conditions of the Registration Booklet/Allotment letter, we would like to examine the laws on contracts. In this connection, it is useful to note what Chitty has to say about the old ideas of freedom of contract in modern times. The relevant passages are to be found in Chitty on Contracts, Twenty-fifth Edition, Volume- I, in para 4, and are as follows :-

"These ideas have to a large extent lost their appeal today. "Freedom of contract", it has been said, "is a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large." Freedom of contract is of little value when one party has no alternative between accepting a set of terms proposed by the other or doing without the goods or services offered. Many contracts entered into by public utility undertakings and others take the form of a set of terms fixed in advance by one party and not open to discussion by the other. These are called "contracts d'adhesion" by French lawyers. Traders frequently contract, not on individually negotiated terms, but on those contained in a standard form of contract settled by a trade association. And the terms of an employee's contract of employment may be determined by agreement between his trade union and his employer, or by a statutory scheme of employment. Such transactions are nevertheless contracts notwithstanding that freedom of contract is to a great extent lacking.

Where freedom of contract is absent, the disadvantages to consumers or members of the public have to some extent been offset by administrative procedure for consultation, and by legislation. Many statutes introduce terms into contracts *which the parties are forbidden to exclude, or declare that certain provisions in a contract shall be void. And the courts have developed a number of devices for refusing to implement exemption clauses imposed by the economically stronger party on the weaker, although they have not recognised in themselves any general power (except by statute) to declare broadly that an exemption clause will not be enforced unless it is reasonable. Again, more recently, certain of the judges appear to have recognised the possibility of relief from contractual obligations on the ground of "inequality of bargaining power".*

11.3 Now turning to the question regarding ex-facie one sided, unfair and unreasonable agreement terms of a contract, the Hon'ble Supreme Court in ***LIC of India and Anr. Vs. Consumer Education & Research Centre & Ors., (1995) 5SSC 482,*** decided on 10th May 1995, was pleased to observe that :-

"in dotted line contracts there would be no occasion for a weaker party to bargain or to assume to have equal bargaining power. He has either to accept or leave the services or goods in terms of the dotted line …….. imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line………".

11.4 Recently, the Hon'ble Supreme Court in ***Pioneer Urban Land & Infrastructure Ltd. Vs. Govindan Raghavan, II (2019) CPJ 34(SC)***, rejected the plea of the builder that it should not be directed to pay interest at the rate of 10.7% as the agreement provided for 6% interest. The Hon'ble Supreme Court observed that :-

"6.7. A term of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on

the dotted line, on a contract framed by the builder. The contractual terms of the Agreement dated 08.05.2012 are ex-facie one-sided, unfair, and unreasonable. The incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice as per Section 2 (r) of the Consumer Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling the flats by the Builder.

7. In view of the above discussion, we have no hesitation in holding that the terms of the Apartment Buyer's Agreement dated 08.05.2012 were wholly one-sided and unfair to the Respondent – Flat Purchaser. The Appellant – Builder could not seek to bind the Respondent with such one-sided contractual terms."

11.5 Subsequently, in ***Wg. Cdr. Arifur Rahman Khan & Ors. 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 time lines 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.

11.6 Moreover, Section 23 of the Contract Act, 1872 provides that what consideration and objects are lawful, and what are not. It says that the consideration or object of an agreement is lawful, unless, it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

11.7 The expression "public policy" or "opposed to public policy" has not been defined in the Contract Act. In **R.B. Singh Vs. State of U.P. a Division Bench of the Hon'ble Allahabad High Court** explained the meaning of word "Policy" and "Public Policy" as defined in various Dictionaries-

> *"30. In Grocier New Webster's Dictionary (page 304) "Policy" has been defined as a selected, planned line of conduct in the light of which individual decisions are made and coordination achieved. In Legal Glossary (1993, page 250) "policy" means a course of action adopted as advantageous or expedient. According to the Oxford Dictionary the word "Policy" means political sagacity, State-craft, prudent conduct, sagacity, craftiness, 'course of action adopted by Government'. According to Webster's New International Dictionary "policy" means a settled or definite course or method adopted and followed by a Government, institution, body or individual; a civil or ecclesiastical policy; Government; the science of Government.*
>
> *31. In Law Lexicon with Legal Maxims it has been mentioned that the general head of "public policy" covers a wide range of topics, such as for example, trading with the enemy in time of war, stifling prosecutions, chaperty and maintenance, and various other mater's; it has even been said in the House of Lords that public policy is always an unsafe and treacherous ground for legal decision. In Black's Law Dictionary "Public Policy" mean community common sense and common conscience, extended and applied throughout the State to matters of public morals, health, safety, welfare, and the like; it is that general and well settled public opinion relating to man's plan, palpable duty to his fellowmen, having due regard to all circumstances of each particular relation and situation. In Words and Phrases (West Publishing Co.) the word "public policy" generally means that imports something that is uncertain and*

fluctuating, varying with the changing economic needs, social customs and moral aspiration of the people. Lord Wright in his Legal Essays and Addresses (Vol. III, pages 76 and 78) stated that public policy like any other branch of the common law ought to be and I thing is, governed by the judicial use of precedents..... If it is said that rules of public policy have to be moulded to suit new conditions of a changing world, that is true, but the same is true with the principles of the canon law generally; Lord Lindley held in Janson v. Driefontein Consolidated Mines Ltd. that "a contract or other branch which is against public policy i.e. against the general interest of the country is illegal."

11.8 In ***Gherulal Parakh v. Mahadeodas Malya, AIR 1959 SC 781*** the **Hon'ble Supreme Court** while defining the word "Public Policy" or the "Policy of Law" has held as under :-

"*Public policy or the policy of the law is an illusive concept; it has been described as "untrustworthy guide", "variable quality", "uncertain one", "unruly horse", etc. The primary duty of a Court of Law is to enforce a promise which the parties have made and to uphold the sanctity of contract which form the basis of society, but in certain cases, the court may relieve them of their duty on a rule founded on what is called the public policy for want of better words Lord Atkin describes that something done contrary to public policy is a harmful thing, but the doctrine is extended not only to harmful cases but also to harmful tendencies; this doctrine of public policy is only a branch of common law, and just like any other branch of common law it is governed by precedents; the principles have been crystallized under different heads and though it is permissible for courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public.*"

11.9 In the case of ***Central Inlad Water Transport Corpn. v. Brojo Nath Ganguly, (1986) 3 SCC 156*** the Hon'ble Supreme Court explained the above expressions and held-

"*The Indian Contract Act does not define the expression "public policy" or "opposed to public policy". From the very nature of things, the expressions "public policy", "opposed to* *public policy" or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time."*

The Hon'ble Supreme Court, after discussing the different schools of thought including landmark judgments on the expression of "public policy", further explained in the above case that-

"*It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification, Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles under lying the Fundamental Rights and the Directive Principles enshrined in our Constitution".*

11.10 Thus, where the terms of a contract show that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder, then certainly the contractual terms of the Agreement are one sided, unfair and unreasonable. It would also be referred as an unconscionable bargain. An unconscionable bargain would be one which is irreconcilable with what is right or reasonable or the terms of which are so unfair and unreasonable that they shock conscience of the Court.

11.11 Now again the question is that under which head an unconscionable bargain would fall? If it falls under the head of undue influence, it would be voidable but if it falls under the head of being opposed to public policy, it would be void. The word "unconscionable" is defined in the *Shorter Oxford English Dictionary,* 3rd Edn., Vol. II, p. 2288, when used with reference to actions etc, as *"showing no regard for conscience; irreconcilable with what is right or reasonable".*

11.12 The Hon'ble Supreme Court in the case of ***DLF Universal Ltd. Vs. Town & Country Planning Deptt.*** reported in ***(2010) 14 SCC*** was pleased to quote in the heading **"Interpretation of contract"** as follows:-

"Interpretation of contract

13. It is settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualize. It comprises joint intent of the parties. Every such contract expresses the autonomy of the contractual parties' private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. Consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties at the time the contract so formed. It is not the intent of a single party; it is the joint intent of both parties and the joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation.

"14. *As is stated in Anson's Law of Contract:*

a basic principle of the Common Law of Contract is that the parties are free to determine for themselves what primary obligations they will accept….Today, the position is seen in a different light. Freedom of contract is generally regarded as a reasonable, social, ideal only to the extent that equality of bargaining power between the contracting parties can be assumed and no injury is done to the interests of the community at large.

15. The Court assumes:

that the parties to the contract are reasonable persons who seek to achieve reasonable results, fairness and efficiency.... In a contract between the joint intent of the parties and the intent of the reasonable person, joint intent trumps, and the Judge should interpret the contract accordingly. A party who claims otherwise, violates the principle of good faith."

11.13 The appellant/promoter has submitted that the interest awarded by the Regulatory Authority to the complainant from 25.09.2016 to 25.08.2018 at the rate of MCLR+ 1 percent is bad in law in the circumstances of the present case. The appellant/promoter has further submitted that as per Clause 4.6 of the Registration Booklet, the respondent could have opted to get refund of the deposited amount with interest upon failure of the appellant/promoter to provide the flat even after six months from the deposition of the last installment. As such the complainant has given the implied consent in this regard, and therefore he is not entitled for any interest/compensation. The respondent has submitted that he paid all the installments raised by the appellant/promoter on time, and therefore the delay penalty should be at the rate of 13.5% p.a. i.e. the same as was to be charged from the respondent as per the provisions of demand letter dated 23.06.2017.

11.14 On scrutiny of demand letter dated 23.06.2017 (placed at S. No. 27 of the appeal), we find that the amount payable by the buyer/allottee to the promoter in case of default in payment is at the rate of 13.5% p.a, as mentioned in Condition para of the said letter, which is much higher than the interest or delayed penalty payable by the promoter to the buyer/allottee in case of default/delayed possession as provided in the Registration Booklet, wherein it is provided that the promoter will refund the money to the allottee with the interest rate payable on the savings account interest of a Nationalized Bank as laid down in Clauses

4.6 of the Registration Booklet. Similarly, Clause 4.7 provides that in case the Parishad decides not to operate this scheme, then the deposited amount will be refunded as per the Rules and the interest will be paid only if the amount remains deposited in the account of the Parishad for more than one year, and the interest rate payable on the same will be as given on the savings account by the Nationalized Bank. It is evident from these terms and conditions of the Demand Letter and the Clauses of Registration Booklet that they do not provide a level playing field between the appellant/promoter and the allottee/respondent. We feel that this imbalance is on account of the fact that the buyer/allottee has much less bargaining power as compared to the promoter, and since the buyer/allottee had no choice but to accept such "dotted line, one sided, unjust and unreasonable" terms and conditions of the Registration Booklet, and of the Demand Letter as framed by the appellant/promoter. Such terms and conditions which are one-sided, unjust and unreasonable cannot be made binding on the allottee/respondent.

11.15 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, reported in MANU/SC/0235/2019, while examining the award of interest by the National Consumer Disputes Redressal Commission (NCDRC) for delay in giving possession by the Builder/Promoter to the allottee/home buyer, pleased to observe that the jurisdiction of the NCDRC to award just compensation under the provisions of the Consumer Protection Act, 1986 could not in the circumstances be constrained by the terms of the agreement if the agreement is one sided and does not provide sufficient recompense to the flat purchasers. The relevant paras 8 and 9 of the said judgment are reproduced below:-

> *"8. We will at the outset deal with the submission of the developer that the NCDRC was not justified in awarding*

interest at the rate of 6 per cent per annum and that the terms of the flat purchase agreements must prevail.

9. We are in agreement with the view of the NCDRC that the rate which has been stipulated by the developer, of compensation at the rate of 3 per sq. ft. per month does not provide just or reasonable recompense to a flat buyer who has invested money and has not been handed over possession as on the stipulated date of 31 January 2014. To take a simple illustration, a flat buyer with an agreement of a flat admeasuring a 1000 sq.ft. would receive, under the agreement, not more than Rs.3000/- per month. This in a city such as Bangalore does not provide just or adequate compensation. The jurisdiction of the NCDRC to award just compensation under the provisions of the Consumer Protection Act, 1986 cannot in the circumstances be constrained by the terms of the agreement. The agreement in its view is one sided and does not provide sufficient recompense to the flat purchasers."

11.16 In the light of above, we are of the view that the appellant in the present case is a corporation of the State Government having wide powers for acquisition of land and for development of residential projects. The rules, terms & conditions provided in the Registration Booklet and the Demand letter are heavily loaded in favour of the promoter (i.e. appellant) and the buyer (respondent) is in an obvious disadvantaged position and has no real choice but to agree to the rules, terms & conditions of the Registration Booklet and of the Demand Letter in order to buy a residential flat of his dreams, using his hard earned savings. Such terms and conditions of agreement, called by any name whatsoever, fall in the category of "dotted line" agreements or "one sided, unfair and unreasonable" agreements, as observed by the Hon'ble Apex Court in several cases. We thus while rejecting the argument of the appellant that Regulatory Authority's order is not sustainable merely on the ground that it has ordered the appellant to pay to the respondent an interest which is higher in rate than what is provided in the Registration Booklet, hold that the Regulatory Authority is required to examine a complaint as per the provisions of the Act, Rules and Regulations and not merely on the basis of the terms and conditions of the Registration Booklet or as provided in the Demand Letter only. Question no. (iii) is accordingly answered against the appellant/promoter.

12. The question no. (iv), is regarding determination as to whether there was a delay in handing over the possession of the unit and if yes, the benefit of force majeure can be given to appellant/promoter.

12.1 In the present case, the complainant (respondent) filed his complaint on 02.10.2018 before the Regulatory Authority seeking direction to the appellant for payment of interest at the rate of 13.5% p.a. till 31.03.2018 and thereafter payment of same rate of interest on monthly basis. The Regulatory Authority in its order dated 25.06.2019 has directed the appellant/promoter to handover possession of the unit to the respondent within 45 days as well as to pay interest at the rate of MCLR+ 1 percent for the delayed period (after reducing the same by two years) from the date of promised possession as per the Registration Booklet up to the date of actual handing over of the possession.

12.2 The appellant/promoter has submitted that several allottees were residing in the Shikhar Enclave, but the respondent willfully did not deposit the sale consideration amount. The respondent failed to perform his part even after issuance of C.C. dated 31.12.2018. The appellant/promoter has further submitted that the possession was offered on 13.10.2016 by sending the allotment letter and directing the complainant to deposit the balance amount and for getting the sale deed registered and to take possession of the allotted flat after completion of the required formalities.

12.3 On perusal of Clause 2.1 of the Registration Booklet, it is evident that the construction of the flat was to be completed within 24 months from the date of issuance of demand letter. In the instant case, the demand letter has been issued on 25.06.2011. Accordingly, the flat in question should have been constructed and delivered by 24.06.2013.

12.4 The Hon'ble Supreme Court has time and again held that where the buyer has to suffer on account of delay beyond a reasonable time then he/she has to be compensated either by way of interest or penalty and in this connection Hon'ble Supreme Court in ***M/s. Fortune Infrastructure Vs. Trevor Dlima & Ors (2018) 5SCC 442*** observed as follows -

> *"………Moreover, a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, along with compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration……"*

12.5 Hon'ble Supreme Court in ***Civil Case No. 3182 of 2019 Kolkata West International City Pvt. Ltd. Vs. Devashish Rudra , 2019(6) SCALE 462*** has observed that :-

> *"…… it would be unreasonable to require a buyer to wait indefinitely for the possession ……"*

12.6 From the submissions made by the appellant/promoter, it is evident that the offer of possession was made on 13.10.2016, whereas the appellant/promoter got the C.C. only on 31.12.2018. Evidently, the action of the appellant/promoter to make an offer of final possession even before the issuance of C.C. is not in accordance with the provisions of Section 4(5) of the Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010, which reads as follows:-

"Section 4 – General liabilities of promoter –

(5) 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 promotion 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."

12.7 The appellant/promoter has submitted that the project in question is registered under the RERA Act with Project ID as UPRERAPRJ7849, and therein the proposed end date of the project is mentioned as 31.12.2017 and the promoter has applied for extension of the registration of the project before the Regulatory Authority.

12.8 The force majeure has been explained in Section 6 of the Act of 2016, wherein it has been mentioned that the registration granted under section 5 may be extended by the Authority on an application made by the promoter due to force majeure, in such form and on payment of such fee as may be specified by regulations made by the Authority:

The explanation to Section 6 defines the force majeure, that "for the purpose of this section, the expression "force majeure" shall mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project."

12.9 Under Rule 7.1, of the Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules 2018, the procedure and conditions of possession of the apartment/ plot alongwith situation, which can be called as force majeure, have been defined and prescribed. Rule 7.1 is extracted as follows:-

7. POSSESSION OF THE APARTMENT/PLOT

7.1 *"………The Promoter assures to hand over possession of the [Apartment/Plot] along with ready and complete Common Areas with all specifications, amenities and facilities of the Project in place on ______________ , unless there is delay or failure due to war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project ("Force Majeure"). If, however, the completion of the Project is delayed due to the*

Force Majeure conditions then the Allottee agrees that the Promoter shall be entitled to the extension of time for delivery of possession of the [Apartment/Plot]:

Provided that such Force Majeure conditions are not of a nature which make it impossible for the contract to be implemented. The Allottee agrees and confirms that, in the event it becomes impossible for the Promoter to implement the project due to Force Majeure conditions, then this allotment shall stand terminated and the Promoter shall refund to the Allottee the entire amount received by the Promoter from the allotment within 120 days from that date. The Promoter shall intimate the Allottee about such termination at least thirty days prior to such termination. After refund of the money paid by the Allottee, the Allottee agrees that he/she shall not have any rights, claims etc. against the Promoter and that the Promoter shall be released and discharged from all its obligations and liabilities under this Agreement……."

12.10 Recently, in ***Civil Appeal No. 940/2017 (Vikram Chatterjee and Ors. Vs. Union of India and Ors.),*** the Hon'ble Supreme Court has defined Force Majeure as under :-

"Force Majeure shall mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature".

12.11 Force majeure clause is generally provided in the Contracts/Agreements and this clause typically spells out specific circumstances or events, which would qualify as force majeure events. The consequences of occurrence of such events, to qualify for the benefit of force majeure, they should be beyond the control of the parties and the parties will be required to demonstrate that they have made attempts to mitigate the impact of such force majeure events. Depending upon the language of the force majeure clause, the parties may be required to issue a notice formally intimating the other party of the occurrence of such events and the invocation of the force majeure clause.

12.12 A perusal of the Registration Booklet and the Allotment Letter indicates that no specific circumstances or events have been spelled out in these documents which can be termed as force majeure events. We also find that the appellant/promoter did not issue any formal notice intimating the allottee/respondent about the delay taking place in completion of the project due to any event which would qualify as force majeure.

12.13 It is clear from the above that the expression force majeure, as defined in the Act of 2016, means a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature. We also find that the Registration Booklet in Clause 2.1 & Clause 9.1 clearly spell out the expected date of completion of the project as "within 24 months from the date of issuance of demand letter", and there is no force majeure clause mentioned therein. On examination of the order dated 25.06.2019, passed by the Regulatory Authority, we find that the Regulatory Authority has relied upon the judgment of Hon'ble Bombay High Court in the case of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. The Union of India and 2 Ors**. In this case the Regulatory Authority has observed that if the complainant decides to stay with the project, then the interest will be payable on the principal amount paid by the buyer as per the provisions of agreement between the promoter and the buyer, since the said principal amount has been used by the promoter. Regarding the delay in completion of the project, the Regulatory Authority in its order dated 25.06.2019 has observed that there was a land dispute in the project, and therefore the delay took place and after considering the evidence produced by the appellant/promoter, it is clear that the delay took place due to the stay orders granted by the Hon'ble

High Court. Accordingly, the benefit of force majeure of two years has been given to the appellant/promoter by the Regulatory Authority.

12.14 We find that the benefit of two years given as force majeure to the appellant/promoter by the Regulatory Authority is quite reasonable and sufficient. It is also observed that the benefit of force majeure given to the appellant/promoter has not been challenged by the respondent/allottee. As regards, the reasonableness of the force majeure of two years is concerned; we find that it is reasonable and sufficient. We therefore, do not find any reason to increase it further.

12.15 It is evident from the facts mentioned earlier that there has been a considerable delay in handing over of the possession despite the allottee/respondent having made payments on time as per demand. The appellant/promoter has already been given the benefit of force majeure of two years due to the stay granted by the Hon'ble High Court in land dispute case. The delay caused in completion of the project is mainly on account of the appellant/promoter barring two years due to the stay order granted by Hon'ble High Court. There is therefore little force in the averments made by the appellant/promoter that the benefit of force majeure should be given for the entire period of delay since the circumstances were beyond its control. Accordingly question no. (iv) is answered against the appellant/promoter.

13. Question no. (v), is regarding respondent’s entitlement for interest and/or compensation on account of delayed possession and whether the rate of interest granted by the Regulatory Authority is in accordance with law.

13.1 A perusal of the complaint dated 02.10.2018 (placed at P. No. 15-16 & 17 of the Appeal) made by the respondent before the Regulatory Authority indicates that the respondent had asked for possession at the earliest, payment of interest at the rate of 13.5% for delay period and compensation for harassment.

13.2 An examination of the Regulatory Authority’s order passed on 25.06.2019 reveals that the Regulatory Authority has directed the appellant/promoter to handover possession of the unit within 45 days as well as to pay interest at the rate of MCLR+1 percent per annum for the delay period from the date of promised delivery uptill the date of actual possession, after reducing the delay period by two years due to the stay order of Hon'ble High Court in the land dispute case.

13.3 Section 18(1) of the Act clearly specifies that if a promoter fails to give possession of a flat duly completed by the date specified, and if an allottee does not intend to withdraw from the project, then he shall be paid interest by the promoter for every month of delay till handing over of the possession at such rate as may be prescribed. We, therefore, hold that an allottee (respondent) is entitled for getting interest and/or compensation on account of delayed possession under the scheme of the Act of 2016.

13.4 On examining the quantum of interest to be paid by the appellant to the respondent, we first examine the meaning of MCLR. The term MCLR stands for the Marginal Cost of Lending Rate, which is the minimum interest that a bank can lend at. The RBI introduced the MCLR methodology for fixing interest rate from 01.04.2016 and the MCLR replaced the base rate structure, which had been in place since July 2010. Banks review and publish MCLR's every month. Since the allottees of the Real Estate have to often take loan to supplement their savings before buying a property, the A.O.'s direction for interest at the rate of MCLR +1% is equitable and just for the reason that the home buyers when they receive an interest at the rate of MCLR +1% for the period of delayed possession, their cost of borrowing money from the bank, gets more or less off-set by the interest they get for the delayed possession.

13.5 We have come across various orders of the Regulatory Authority as well as of the A. O. wherein they had granted interest at the rate of MCLR+1% per annum in case of delayed projects. This Tribunal 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**, in which the Tribunal had held as follows:-

> *"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........."*

13.6 In view of the aforementioned, we are of the view that the respondent is entitled for interest on account of delayed possesson and the rate of interest i.e. MCLR+1% granted by the Regulatory Authority is fair, just and reasonable – as it balances the equities between the parties and the Regulatory Authority's action is in accordance with the provisions of the Act. Question no. (v) is answered accordingly.

14. The question no. (vi), is regarding, whether the allottee/respondent can claim interest and/or compensation for delayed possession of the Unit by the appellant even after getting interest by the appellant/promoter at the rate of 6% p.a.?

14.1 As per Clauses 2.1 & 9.1 of the Registration Booklet of the appellant, the possession of the Unit/Apartment/Flat was to be given to the respondent in 24 months from the date of allotment, i.e. by June 2013. Further it is recorded in the Regulatory Authority's order dated 25.06.2019 that the complainants were advised by the appellant/promoter that the possession would be handed over by 31.12.2016 and later on, the proposed dated of possession was extended to 31.12.2017. For this one year delay, the appellant/promoter paid Rs. 9,48,125/= as the interest.

14.2 The issue regarding claim for compensation of an allottee for delay in handing over possession of the Unit/Apartment/Flat against promoter/builder after taking possession is no more res integra. The Hon'ble Supreme Court in the case of ***Wg. Cdr. Arifur Rahman Khan and Aleya Sultan and others Versus DLF Southern Homes Pvt. Ltd. (now known as BEGUR OMR Homes Pvt. Ltd. and others*****, (**reported **in SCC online SC 667)** while examining the issue whether a flat buyer who seeks to espouse a claim against the developer for delayed possession can as a consequence of doing so be compelled to defer the right to obtain a conveyance to perfect their title, was pleased to observe that it would be manifestly unreasonable to expect that in order to pursue a claim for compensation for delayed handing over of possession, the purchaser must indefinitely defer obtaining a conveyance of the premises purchased or, if they seek to obtain a Deed of Conveyance to forsake the right to claim compensation. Paras 34, 35 and 36 of the aforesaid judgment read as follows:-

"34. The developer has not disputed these communications. Though these are four communications issued by the developer, the appellants submitted that they are not isolated aberrations but fit into a pattern. The developer does not state that it was willing to offer the flat purchasers possession of their flats and the right to execute conveyance of the flats while reserving their claim for compensation for

delay. On the contrary, the tenor of the communications indicates that while executing the Deeds of Conveyance, the flat buyers were informed that no form of protest or reservation would be acceptable. The flat buyers were essentially presented with an unfair choice of either retaining their right to pursue their claims (in which event they would not get possession or title in the meantime) or to forsake the claims in order to perfect their title to the flats for which they had paid valuable consideration. In this backdrop, the simple question which we need to address is whether a flat buyer who seeks to espouse a claim against the developer for delayed possession can as a consequence of doing so be compelled to defer the right to obtain a conveyance to perfect their title. It would, in our view, be manifestly unreasonable to expect that in order to pursue a claim for compensation for delayed handing over of possession, the purchaser must indefinitely defer obtaining a conveyance of the premises purchased or, if they seek to obtain a Deed of Conveyance to forsake the right to claim compensation. This basically is a position which the NCDRC has espoused. We cannot countenance that view.

35 The flat purchasers invested hard earned money. It is only reasonable to presume that the next logical step is for the purchaser to perfect the title to the premises which have been allotted under the terms of the ABA. But the submission of the developer is that the purchaser forsakes the remedy before the consumer forum by seeking a Deed of Conveyance. To accept such a construction would lead to an absurd consequence of requiring the purchaser either to abandon a just claim as a condition for obtaining the conveyance or to indefinitely delay the execution of the Deed of Conveyance pending protracted consumer litigation.

36. It has been urged by the learned counsel of the developer that a consequence of the execution of the Deed of Conveyance in the present case is that the same ceases to be a transaction in the nature of "supply of services" covered under the CP Act 1986 and becomes a mere sale of immovable property which is not amenable to the jurisdiction of Consumer Fora. In Narne Construction (P) Ltd. v. Union of India21, this Court distinguished between a simple transfer of a piece of immovable property and housing construction or building activity carried out by a private or statutory body falling in the category of "service" within the *meaning of Section 2 (1) (o) of the CP Act 1986. This Court held that:*

> *"8. Having regard to the nature of transaction between the appellant Company and its customers involved much more than a simple transfer of a piece of immovable property it is clear the same constitutes "service" within the meaning of the Act. It was not the case that the appellant Company was selling the given property with all its advantages and/or disadvantages on "as is where is" basis, as was the position in UT Chandigarh Admn v. Amarjeet Singh. It is a case where a clear-cut assurance was made to the purchasers as to the nature and extent of development that would be carried out by the appellant Company as a part of package under which a sale of fully developed plots with assured facilities was made in favour of the purchasers for valuable consideration. To the extent the transfer of site with developments in the manner and to the extent indicated earlier was a part of the transaction, the appellant Company has indeed undertaken to provide a service. Any deficiency or defect in such service would make it accountable before the competent Consumer Forum at the instance of consumers like the respondents."*

The developer in the present case has undertaken to provide a service in the nature of developing residential flats with certain amenities and remains amenable to the jurisdiction of the Consumer Fora. Consequently, we are unable to subscribe to the view of the NCDRC that flat purchasers who obtained possession or executed Deeds of Conveyance have lost their right to make a claim for compensation for the delayed handing over of the flats."

14.3 After examining the pleadings of both the parties and after seeing the record, we find that an amount of Rs. 9,48,125/= has already been paid to the respondent/complainant due to delay in handing over of the possession by one year i.e. from 31.12.2016 to 31.12.2017. Accordingly, we are of the view that the amount already paid at the rate of 6% p.a. as delayed interest is to be adjusted against the interest of MCLR+ 1 percent awarded in favour of the respondent. We therefore, conclude that the allottee/respondent is entitled for interest and /or compensation for delayed possession of the unit as awarded by the Regulatory Authority in its order dated 25.06.2019. However, as the appellant has already received interest for one year at the rate of 6%

p.a., the same is to be adjusted against the interest payable to the respondent/complainant in terms of the order of Regulatory Authority dated 25.06.2019. Question no. (vi) is answered accordingly.

15. The appellant/promoter has relied upon the judgment passed in the case of ***Bangalore Development Authority Vs. Syndicate Bank***, decided by Hon'ble Apex Court in the matter of self financing scheme. On examination, we find that Hon'ble Supreme Court in the case of Bangalore Development Authority Vs. Syndicate Bank (supra) while laying down principles for delay in the delivery of possession was pleased to observe that if some statute steps in and creates any statutory obligation on the part of the Development Authority in the contractual field, the matter will be governed by the provisions of that statute. The relevant portion of para 10 is being extracted as follows:-

> *"10. Where a Development Authority forms layouts and allots plots/flats (or houses) by inviting applications, the following general principles regulate the granting of relief to a consumer (applicant for allotment) who complains of delay in delivery or non-delivery and seeks redressal under the Consumer Protection Act, 1986 ('Act' for short) - [vide : Lucknow Development Authority vs. M. K. Gupta - 1994 (1) SCC 243, Ghaziabad Development Authority vs. Balbir Singh - 2004 (5) SCC 65, and Haryana Development Authority vs. Darsh Kumar - 2005 (9) SCC 449, as also Ghaziabad Development Authority vs. Union of India - 2000 (6) SCC 113]:*
>
> *(a) Where the development authority having received the full price, does not deliver possession of the allotted plot/flat/house within the time stipulated or within a reasonable time, or where the allotment is cancelled or possession is refused without any justifiable cause, the allottee is entitled for refund of the amount paid, with reasonable interest thereon from the date of payment to date of refund. In addition, the allottee may also be entitled to compensation, as may be decided with reference to the facts of each case.*

(b) Where no time is stipulated for performance of the contract (that is for delivery), or where time is not the essence of the contract and the buyer does not issue a notice making time the essence by fixing a reasonable time for performance, if the buyer, instead of rescinding the contract on the ground of non-performance, accepts the belated performance in terms of the contract, there is no question of any breach or payment of damages under the general law governing contracts. However, if some statute steps in and creates any statutory obligations on the part of the development authority in the contractual field, the matter will be governed by the provisions of that statute.
……………………………………………….”

15.1 The appellant/promoter has also placed reliance on judgment dated 04.03.2009 passed by Hon'ble Apex Court in ***Civil Appeal No. 6051/2002 (Ghaziabad Development Authority Vs. Shakuntala Rohatgi***). As far as this judgment is concerned, the Hon'ble Supreme Court while making following observations, placed reliance on the principles laid down regarding award of interest in ***Ghaziabad Development Authority Vs. Balbir Singh (2004)5 SCC 65, Municipal Corporation Chandigarh and others Vs. Shanti Nikunj, (2006)4 SCC 109 and Bangalore Development Authority Vs. Syndicate Bank (2007) 6 SCC 711.*** The relevant portion of Para 10 of **Bangalore Development Authority Vs. Syndicate Bank** has been extracted in the preceding para:-

With utmost humility at our command, we observe that the ratio of cases ***Bangalore Development Authority Vs. Syndicate Bank*** *and* ***Ghaziabad Development Authority Vs. Shakuntala Rohatgi*** do not apply to the present case, since both the judgments are prior to the promulgation of the Act of 2016. It is our considered view that the provisions of the Act of 2016 are to be examined for deciding the instant case.

16. Further while examining the record and order of the Regulatory Authority dated 25.06.2019, we found that the Regulatory Authority awarded interest at

the rate of MCLR+ 1 percent for the delayed period (after giving the benefit of force majeure of two years) but there is no mention about the interest of Rs.9,46,804/=, which has already been paid by the appellant/promoter to the respondent for one year delay (i.e. from 31.12.2016 to 31.12.2017), and therefore, in our considered view the order of the Regulatory Authority dated 25.06.2019 needs to be modified to the extent of adjusting the amount of Rs.9,46,804/= against the interest for the delay period as it works out in the aforesaid order of the Regulatory Authority.

17. On the basis of the aforesaid analysis and examining the material on record as well as grounds of appeal in detail, we do not find any force in the grounds of appeal. Further, there is no illegality or perversity in the order of the Regulatory Authority. Accordingly we uphold the order of the Regulatory Authority dated 25.06.2019 with the modification that the amount of Rs.9,46,804/= paid by the appellant to the respondent for one year delay (i.e. from 31.12.2016 to 31.12.2017) will be adjusted in the amount of interest for the delay period as it works out in the order of the Regulatory Authority dated 25.06.2019.

18. We direct the Registry to transfer the entire amount deposited by the promoter under the provisions of Section 43(5) of the Act to the concerned account of the U.P. Real Estate Regulatory Authority (UP RERA), who will dispose it off in accordance with its' judgment/order dated 25.06.2019 readwith our direction in para 17 of this order. We hope and trust that UP RERA will remit the amount to the respondent/buyer after due diligence and proceed for recovery of the balance amount from the appellant/promoter, if necessary. In case the amount being transferred to UP RERA is in excess of what is due to be paid to the respondent/buyer, then the remaining balance amount will be returned to the appellant/promoter. This is being done in order to protect the interests of the real estate allottees/buyers, who have very little bargaining power as against that of the promoter, and also in accordance with the spirit of the Act of 2016.

19. The respondent is at liberty to approach the U.P. Real Estate Regulatory Authority for execution of this order in case of non-compliance within the time frame fixed by this Tribunal.

20. No order as to costs.

Dated:24.08.2021
GAURAVSRI (Rajiv Misra) (D. K. Arora)

This judgment was pronounced in open court through video conferencing.

Dated:24.08.2021
GAURAVSRI (Rajiv Misra) (D. K. Arora)