RESERVED JUDGMENT
BENCH-1

THE UTTAR PRADESH REAL ESTATE APPELLATE TRIBUNAL, AT LUCKNOW.

1.Appeal NO. 21/2023

Air Force Naval Housing Board. ……………Appellant.

Versus

Rishi Raj. ……………Respondent.

With

2. Appeal No.169/2024

Air Force Naval Housing Board. ……………Appellant.

Versus

Prateek Vashistha. ……………Respondent.

With

3. Appeal No. 225/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

WC CDR Sirohi ……………Respondent.

With

4. Appeal No. 226/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Rahul Agarwal ……………Respondent.

With

5. Appeal No. 227/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Rajesh Kumar Batra ……………Respondent.

With

6. Appeal NO. 228/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Manoj Sing Aswal ……………Respondent.

With

7. Appeal NO. 229/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Dharmendra Kumar ……………Respondent.

With

8. Appeal NO. 230/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Jasveer Singh ……………Respondent.

With

9. Appeal NO. 231/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Sanjay Singh ……………Respondent.

With

10. Appeal NO. 232/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Vikash Kumar ……………Respondent.

With

11. Appeal NO. 233/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Sgt Satish Kumar Sharma ……………Respondent.

With

12. Appeal NO. 234/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Vikram Singh Rajawat ……………Respondent.

With

13. Appeal NO. 235/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Bijendra Singh ……………Respondent.

With

14. Appeal NO. 236/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Angela Bhasin ……………Respondent.

With

15. Appeal NO. 237/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Commodore Chitrapu Uday Bhaskar ……………Respondent.

With

16. Appeal NO. 238/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Saurabh Ranjan ……………Respondent.

With

17. Appeal NO. 239/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Lt Cdr Bharat Singh ……………Respondent.

With

18. Appeal NO. 240/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Suneel Tyagi ……………Respondent.

With

19. Appeal NO. 241/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Air Vice Mshl Rajinder Khurana ……………Respondent.

With

20. Appeal NO. 242/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Ashwani Kumar Sharma ……………Respondent.

With

21. Appeal NO. 273/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Rakesh Chander Saxena ……………Respondent.

With

22. Appeal NO. 274/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Arun Malhotra ……………Respondent.

With

23. Appeal NO. 275/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Gajinder Kumar ……………Respondent.

With

24. Appeal NO. 454/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Sarvesh Sharma ……………Respondent.

With

25. Appeal NO. 506/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Mohit Anand ……………Respondent.

With

26. Appeal NO. 507/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Cdr Rajat Aggarwal ……………Respondent.

With

27. Appeal NO. 508/2020

Air Force Naval Housing Board. ……………Appellant.

Versus

Khurram Abbas ……………Respondent.

With

28.APPEAL NO. 864/2021

Air Force Naval Housing Board. ……………Appellant.

Versus

Cdr Narinder Singh ……………Respondent.

With

29.APPEAL NO. 865/2021

Air Force Naval Housing Board. ……………Appellant.

Versus

Dr. Shruti Saxena ……………Respondent.

With

30.APPEAL NO. 866/2021

Air Force Naval Housing Board. ……………Appellant.

Versus

Wg Cdr Asheesh Pandit ……………Respondent.

With

31.APPEAL NO. 867/2021

Air Force Naval Housing Board. ……………Appellant.

Versus

Vikrant Chaudhary ……………Respondent.

With

32.APPEAL NO. 868/2021

Air Force Naval Housing Board. ……………Appellant.

Versus

Wg Cdr Sunil Rawat ……………Respondent.

With

33.APPEAL NO. 869/2021

Air Force Naval Housing Board. ……………Appellant.

Versus

Cdr Ravi Inder Singh ……………Respondent.

With

34.APPEAL NO. 941/2021

Air Force Naval Housing Board. ……………Appellant.

Versus

Vinod Kumar Sharma ……………Respondent.

With

35.APPEAL NO. 942/2021

Air Force Naval Housing Board. ……………Appellant.

Versus

Deepak Tyagi ……………Respondent.

With

36.APPEAL NO. 852/2022

Air Force Naval Housing Board. ……………Appellant.

Versus

Rajat Tomar ……………Respondent.

With

37.APPEAL NO. 853/2022

Air Force Naval Housing Board. ……………Appellant.

Versus

Subhash Nain ……………Respondent.

With

38.APPEAL NO. 854/2022

Air Force Naval Housing Board. ……………Appellant.

Versus

Rahul Mishra ……………Respondent.

With

39.APPEAL NO. 855/2022

Air Force Naval Housing Board. ……………Appellant.

Versus

Wg Cdr Hari Datt Talwani. ……………Respondent.

With

40.APPEAL NO. 17/2023

Air Force Naval Housing Board. ……………Appellant.

Versus

Sushil Kumar Sharma ……………Respondent.

With

41.APPEAL NO. 22/2023

Air Force Naval Housing Board. ……………Appellant.

Versus

Gaurav Singh ……………Respondent.

With

42.APPEAL NO. 23/2023

Air Force Naval Housing Board. ……………Appellant.

Versus

Gp Capt Monish Yadav (Retd) ……………Respondent.

With

43.APPEAL NO. 368/2023

Air Force Naval Housing Board. ……………Appellant.

Versus

Wg Cdr Naveen Talwaniwg ……………Respondent.

With

44.APPEAL NO. 369/2023

Air Force Naval Housing Board. ……………Appellant.

Versus

Wg Cdr Ashwani Jain ……………Respondent.

With

45.APPEAL NO. 370/2023

Air Force Naval Housing Board. ……………Appellant.

Versus

Amit Kumar ……………Respondent.

With

46.APPEAL NO. 371/2023

Air Force Naval Housing Board. ……………Appellant.

Versus

Ajeet Singh ……………Respondent.

With

47.APPEAL NO. 591/2023

Air Force Naval Housing Board. ……………Appellant.

Versus

Pawan Arora ……………Respondent.

With

48.APPEAL NO. 592/2023

Air Force Naval Housing Board. ……………Appellant.

Versus

CSA Gupta ……………Respondent.

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

1. Before we proceed to examine the instant matter/issue, we deem it proper to place on record that on demitting office by Technical Member from 26.09.2023 the judicial functioning of the Tribunal had come to stand still with effect from 27.09.2023. On receipt of the notification dated 28.11.2023 with respect to appointment of Judicial Member, in the larger interest as well as to resume the judicial functioning of the Tribunal and to achieve the mandate of Section 44(5) of the Real Estate (Regulation & Development) Act 2016 read with Regulation 22 and 25 a Bench consisting of Chairman and Judicial Member was constituted vide order dated 01.12.2023. The Registry was directed to issue cause list of fresh appeals and re-schedule the cause list of pending appeals from 27.09.2023 on joining of the Judicial Member. Accordingly an office order dated 02.12.2023 was issued by the Registrar, which reads as under:--

OFFICE ORDER

It is hereby informed to all the concerned that the Tribunal was working with single Bench consisting of Hon'ble Chairman and Hon'ble Technical Member after demitting office by the Hon'ble Judicial Member on 31.12.2022. Hon'ble Technical Member also demitted office on 26.09.2023 and Hon'ble Administrative Member being on unauthorized leave from 30.09.2022 (who finally resigned on 29.10.2023) resulting the judicial functioning of the Tribunal to tune to standstill with effect from 27.09.2023.

The State Government vide Notification dated 28.11.2023 has appointed Hon'ble Judicial Member and as such presently, Hon'ble Chairman and Hon'ble Judicial Member having judicial back ground are available.

As per Section 43(3) of the Act 2016 every Bench of the Appellate Tribunal is to consist of at least one Judicial Member and one Administrative or Technical Member. The Appellate

Tribunal is required to scrutinize judicially the appeals against the order of Regulatory Authority or Adjudicating Officer. Rule 30 of the Rules 2016 empowers the Appellate Tribunal to call upon such experts or consultants from the fields of economics, commerce, accountancy, real estate, competition, construction, architecture or engineering or from any other discipline as it deems necessary, to assist the Appellate Tribunal in the conduct of any enquiry or proceedings before it.

Section 55 of the Act 2016 protects the acts and proceedings of the Appellate Tribunal from being invalid merely for the reason of any vacancy in, or any defect in the constitution of the Appellate Tribunal or any defect in the appointment of a person acting as a Member of the Appellate Tribunal or any irregularity in the procedure of the Appellate Tribunal not affecting the merits of the case.

Accordingly in the larger interest and expeditious disposal of appeals as per mandate of Section 44(5) of the Act 2016 the Bench for hearing of appeals is constituted with Hon'ble Chairman & Hon'ble Judicial Member for judicial scrutiny of the appeals and in case any expert opinion/assistance is required the same will be taken as per provisions of Rule 30 of the Rules 2016 in appropriate cases or such cases will be deferred till availability of Administrative/Technical Member.

On joining of Hon'ble Judicial Member, the Registry is directed to issue cause list of fresh appeals and re-schedule the cause list of pending appeals from 27.09.2023 and upload the same on the website of the Tribunal and also inform all the parties/legal representatives about the same.

This order is issued with the approval of Hon'ble Chairman.

The judicial functioning of the Tribunal resumed with effect from 18.12.2023 after joining of the Judicial Member and the said Bench is still continuing on account of non-appointment of Technical and Administrative Members.

2. Now we proceed to deal with the instant matter.

3. The issues in all these 48 appeals are identical, hence these appeals were heard together and are being disposed of by a composite judgment. For the sake of convenience we take Appeal No.21/2023 as the leading case.

4. The facts of the case, as culled out from leading Appeal No. 21/2023, are as under:--

4.1 Air Force Naval Housing Board (Appellant) is a Welfare Society registered under the Societies Registration Act, 1860 with objective of providing residential houses to the serving Air Force and Naval Personnel and widows of these services only on 'No Profit No Loss' basis under Self Financed Housing Scheme.

4.2 Appellant does not possesses any fund of its own and is completely dependent on the contributions made by the Naval and Air Force personnel and widows who are allottees of various self financed housing schemes. Hence, each rupee spent on particular project from purchasing of land to the completion is contributed by the allottees. The amount collected by the allottees is used solely in the project without deriving any benefit. Thus the Appellant does not carry any business rather its activities are for welfare of Air Force and Naval personnel.

4.3 After completion of the project, final costing of the project is carried out by the members of Final Costing Committee which includes the independent serving officers from Air Force, Navy and representatives of the members of the particular scheme/project in addition to two independent auditors. After the final costing, excess/unspent amount if any collected from the allottees is returned back to the allottees and in case the cost is increased, then the increased amount is collected from each allottee in proportionate share based on the size of dwelling units. These Terms & Conditions were duly accepted by Complainant.

4.4 In consonance of its objects, the Appellant Board launched its self financed housing project in Meerut in 2008. The land was allotted by Meerut Development Authority. Subsequent to approval of layout by MDA, contract for civil work for initial 05 towers was awarded to M/s OICL on 05.05.2010. Accordingly the work started in 2010.

4.5 The cost and the areas of dwelling units (DUs) worked out at this stage were tentative and were for planning purpose only and to recover the land cost. After award of contract for civil work the revised cost was intimated to the allottees. On 16.02.2011, contract for remaining 03 towers was awarded to the contractor making total no of DUs to 545 and the tentative PDC was revised to March 2013. Though the Appellant after due selection process had selected one of the reputed builders of that time but the reasons for delay were beyond the control of Appellant which contributed to increase in cost since its launch

4.6 The cost of the dwelling unit at the time of allotment was only Basic Tentative Cost and the same was subject to change depending upon numerous factors such as super area, cost of award of contract, development charges/any other charges by the Meerut Development Authority.

4.7 It was also mentioned in the allotment letter itself that in addition to the basic cost LTMF, VAT, Service Tax, Parking Area, Equalization Charges, cost of additional area would also be charged.

4.8 The date of possession in July 2012 mentioned in the allotment letter was tentative. It is clearly mentioned at clause 17 of the allotment letter that "however, due to unforeseen circumstances beyond the control of AFNHB if the completion of the project gets delayed no interest and/or compensation shall become payable" which was duly agreed upon by Complainant.

4.9 The allotment letter clearly states that Escalation is payable due to possible increase in prices of land, material, labor, Taxes or other mandatory charges, change in specifications & area etc. The terms and conditions of allotment letter as stated above were duly accepted by the Complainant.

4.10 During the course of progress of project a letter dated 18.12.2013 was sent to all allottees intimating them about increase in cost and the reasons thereof. Further, during the delayed period of 4 years the basic structure work involving use of steel and cement was executed and at that time there was considerable increase in cost of steel and cement prices. This resulted in exponential increase in cost. Increase in service tax from 4.5% to 6%, increase in WCT from 11% to 14.5%, increase in mandatory Govt. fees for Environmental Clearance, Clearance from Pollution Control Board, extension of validity of plans by MDA were also contributed in escalation of the cost of flats.

4.11 Hon'ble Supreme Court's order on blanket ban on mining in 2011 resulted in non-availability of sand and aggregate, followed by steep rise in prices of these basic building materials. Stagnation in the real estate market since 2011-12, has resulted in stalling of this project. All AFNHB projects were also affected as all contractors suffered losses on this account. Besides being affected by the general recession in real estate market, M/s OICL, the AFNHB contractor at Meerut also suffered major setbacks resulting in many of their real estate projects getting stalled. This resulted in a severe financial crisis for M/s OICL which lead to total stoppage of work in our Meerut project for two years from 2013 to 2015. The work recommenced in 2015 but contractor failed to mobilize required resources to progress the project at required pace due to its extremely poor financial state. This position of respondent was clearly explained to all the allottees vide letter dated 30.06.2017 uploaded on AFNHB website. The contract was terminated on 24.10.2017 and contract for balance work was awarded to another contractor. The subsequent contractor also failed and finally AFNHB got the balance work completed on its own.

4.12 The cost of DU was frozen and communicated to all allottees vide web update dated 06.02.2018.

4.13 Due to the delay as mentioned above the Respondent had filed a complaint before U.P RERA praying for refund with interest/compensation. Similarly, 15 more allottees also approached to RERA for similar relief.

4.14 Vide common order dated 10.04.2019 the RERA Greater Noida allowed the complaint of all 16 connected complainants including the respondent wherein UP RERA directed to pay interest @ MCLR+1% w.e.f. 01.07.2012 till offer of possession or obtaining of OC whichever is later or refund of principal amount along with interest in case of failure of Appellant to provide possession till July 2019.

4.15 Since the scheme is self financed, the appellant is not in a position to pay refund of their deposited amount with interest as the same has to be included booked in project cost and recovered from all the allottees.

4.16 Current status of the project is that Meerut Development Authority on 21.11.2019 has issued Partial OC for 5 Towers i.e. A, F, G, H, J consisting of 245 flats along with Community Centre and Public Utility. The Meerut Development Authority has issued completion certificate on 21.10.2022.

4.17 Completion certificate in respect of flat no.J-906 allotted to the Respondent has already been obtained on 21.11.2019 and possession of this Flat has been offered vide web update dated 22.11.2019.

4.18 There are some complainants from this connected matter, who have taken over possession but have also approached UP RERA for executions. The UP RERA has issued recovery certificates for refund of principal amount with interest despite the fact that they have already taken possession.

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

(I). Because that impugned order is liable to be set aside as Hon'ble UP RERA, Greater Noida failed to consider the fact that date of completion of project mentioned at the time of registration of Meerut project with RERA U. P. was July, 2018 so the delay, if any as per RERA, is to be calculated w.e.f. August, 2018. In this regard affidavit statement on behalf of UOI on the issue of retrospective applicability of RERA filed before Mumbai High Court in matter "Neelkamal Realtors vs UOI" at Para 195 at page 116 is important which reads "the affidavit filed on behalf of UOI clearly stated that in respect of on-going projects the promoter can prescribe fresh time period independent of the time period stipulated in the agreements for sale entered into between the promoter and the allottees at the time of registration of the project as per Section 4(2) (1) (C). Thus the promoter is given opportunity for completing the project or phase, as the case may be by prescribing fresh time period so that he is not visited with the penal consequences laid down under RERA. If the promoter has all the permissions specified in Section 4(2) in place and is permitted to prescribe new time period, I do not find that first proviso to Section 3(1) is unreasonable" In view of the facts even if the penalty is to be imposed then it should be beyond the period of 31.07.2018 which is the date of completion of Meerut project mentioned by AFNHB at the time of registration with RERA U.P. and not from May 2012 as has been imposed by RERA Greater Noida vide impugned order.

(П) Because Air Force Naval Housing Board (Appellant) is a Welfare Society registered under the Societies Registration Act, 1860 with objective of providing residential houses to the serving Air Force and Naval Personnel and widows of these services only on 'No Profit No Loss' basis under Self Financed Housing Scheme. The Appellant Board is a welfare society and dependant on contributions made by allottees of different housing schemes. It does not have its own funds and the project is self financed by the allottees. In view of this, any compensation/interest awarded to Respondent would have to be put into the project fund and ultimately the other allottees would suffer as there would be more deficit amount to be recovered from allottees at the time of final costing. Since the Meerut project is already in deficit so Appellant is not in a position to pay the compensation as ordered by RERA Greater Noida.

(III) Because considering the status of the AFNHB it should not be treated at par with a private Builder while imposing penalties under RERA. Sec 4 (2) (L) (D) of RERA directs that "seventy per cent. of the amounts realized for the real estate project from the allottees, from time to time, shall be deposited in a separate account to be maintained in a scheduled bank to cover the cost of construction and the land cost and shall be used only for that purpose". It contemplates that Promoter is having an approx 30% profit margin. But in case of AFNIIB all the amount received from allottees of a project is kept in a separate account and spent for that project only even before RERA came into picture. Thus in the event that penalty is imposed on a Builder it may be paid from the balance 30% whereas in case of AFNHB any penalty imposed would have to be put in the project fund only as there is no separate provision of funds / account to bear these expenses relating to a particular project which will put additional burden on all the allottees.

(IV) Because impugned order is liable to be set aside as RERA Greater Noida has failed to observe that date of possession of July 2012 mentioned in the allotment letter was tentative. It is clearly mentioned at clause 17 of the allotment letter that "however, due to unforeseen circumstances beyond the control of AFNHB if the completion of the project gets delayed no interest and/or compensation shall become payable" which was duly agreed upon by Respondent.

(V) Because impugned order is liable to be set aside as RERA Greater Noida has failed to observe that equalization charges imposed by Appellant is not a penalty rather it is charged to the allottees who join the scheme at a later stage so as to bring them at par with the allottees who have joined the scheme at initial stage. Levying of Equalization charge is a policy of the respondent and this practice is being followed by it from its inception. Payment of equalization charges was also mentioned in the allotment letter at Para 11 and the same was within the knowledge of the Respondent. Further all equalization charges thus collected are ploughed back into the project fund for the benefit of allottees and are included in the final costing. Hence nothing remains with the respondent on this account

(VI) Because impugned order is liable to be set aside as RERA Greater Noida has failed to consider that the project was delayed due to various unforeseen circumstances.

i) Hon'ble Supreme Court's order on blanket ban on mining in 2011 resulted in non-availability of sand and aggregate, followed by steep rise in prices of these basic building materials. The scarcity of basic building raw material resulted in considerable delay which was beyond the control of Appellant.

ii) That the contract was awarded to one of the best companies M/s Omaxe Infrastructure and Constructions Ltd but the contractor faced financial hardships on account of losses in other projects and despite financial assistance provided by Appellant, contractor failed to follow the bar charts / work schedules and delayed the project. Ultimately having no option Appellant had to terminate the contract. The entire sequence of events from giving warnings to the contractor waiting for the improvement in status of work and when nothing happens then ultimately terminating him and then floating fresh tenders and appointing a new contractor and giving some time to the newly appointed contractor to gain momentum to catch the pace of work consumes time. Thus considerable period of time was consumed in terminating the contractor M/s OICL and appointing a fresh contractor M/s Umaxe which was beyond the control of Appellant.

iii) That in a recent NCLT judgment titled Navin Raheja vs Shilpa Jain and Ors no 23/2019(IBC)23 passed by NCLAT, New Delhi the issue was "Whether the 'Corporate Debtor' can be held to have committed default, if apartment/flat/ premises is otherwise ready but offer of possession was delayed due to the reasons beyond the control of 'Corporate Debtor' such as absence of clearance by the Competent Authorities/ Government etc.". In that case the the Corporate debtor had applied for OC of the project after completing all the formalities in 2013 but the OC was issued by concerned Authorities in 2016. NCLAT held that *"If the delay is not due to the 'Corporate Debtor' but force majeure, as noticed above, it cannot be alleged that the 'Corporate Debtor' defaulted in delivering the possession". Similarly,* Appellant had applied for OC of the project on 13.08.2020 after obtaining all permissions (viz: Structural safety, Electrical, Lift and Fire) but the OC has not been issued by Meerut Development Authority till date due to which Appellant is not able to offer possession to complainant in terms of provisions of RERA. Thus the delay by Meerut Development Authority in issuing of OC comes under Force Majeure and is beyond the control of Appellant for which Appellant should not be penalized.

(VII) Because the impugned order is liable to be set aside as RERA Greater Noida has failed to consider that contractors of the project M/s Omaxe Infrastructure and M/s Umaxe Projects are also jointly liable for the delay. It is submitted definition of Promoter as per Sec 2 (zk) (vi) Explanation of RERA says *"for the purpose of this clause, where the person who constructs or converts a building into apartment or develops a plot for sale and person who sells apartments or plots are different persons, both of them shall deemed to be promoters and shall be jointly liable as such for the functions and the responsibilities specified, under this Act or the Rules and Regulations made there under"*. Appellant carries out group housing activities on behalf of the allottees as facilitator for the allottees by awarding contract to civil contractors and engaging other agencies and rendering assistance for completion of project. Contractor appointed by Appellant was to carry out the job assigned independently by mobilizing the required resources / manpower / material etc. with role of AFNHB limited to supervising whether the work is being carried out as per contract. It was for the contractor to adhere to the time lines as per Schedule of contract and make up for the loss of time, if any. Further any shortage of man / material / machines was the onus of Contractor only. AFNHB after acquiring the land and obtaining all the required permissions/ necessary approvals from the concerned Authorities to start / carry out construction work had assigned the project to the contractor. Thus contractors of the project M/s Omaxe Infrastructure and M/s Umaxe Projects are also equally liable to pay any compensation/interest awarded to the allottee.

(VIII) Because in the ongoing Arbitration proceedings with the previous contractor of the project which was conducted by retired Judge of Delhi High Court it has been acknowledged that W delay was on the part of contractor and all the claims of Respondent have been allowed. Accordingly an award of Rs 40.50 Cr has been passed in favour of Appellant for which Appellant has initiated execution proceedings. The appellant has communicated to the allottees that the amount recovered under execution of award, would be put in the project fund of Meerut for the benefit of all the allottees.

(IX) Because after passing of order dated 10.04.2019 there has been a great variation in the orders passed / relief granted by UP RERA Greater Noida in various complaints filed by allottees of Meerut project against the Appellant. While in some of the cases (19 nos) interest has been awarded to the Complainant w.e.f. 01.05.2016 in others (19 nos.) the interest awarded is w.e.f. 01.05.2017. Besides that there are 15 such cases where the complaints were dismissed and no interest was awarded because the complaints were filed by complainants after taking possession of their respective flats.

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

a) To set aside para 2 and para 4 of impugned order dated 10.04.2019 passed by UP RERA Greater Noida to the extent of interest granted in favor of complainant/Respondent.

b) To pass such other or further order / orders as this Hon'ble Authority deems fit and proper in the facts and circumstances of the case and in the interest of justice.

7. The respondent of the leading case (Rishi Raj) filed objection to the memo of appeal stating that the instant appeal has been filed with oblique motives only to harass the respondent. The present appeal is based on fallacious and vexatious grounds. Hence, deserves to be rejected with cost in the interest of justice. The respondent further submitted that:

7.1 The Respondent preferred complaint bearing Complaint No. 620182504 before the learned Uttar Pradesh Real Estate Regulatory Authority seeking possession and interest for the delayed period.

7.2 The aforesaid complaint was heard and allowed by the Ld. Uttar Pradesh Real Estate Regulatory Authority vide its impugned order dated 10.04.2019 whereby the appellant was directed to give possession of allotted unit & pay interest as per the agreement from 01.07.2012 to till 30.04.2016(@ 13%) and thereafter interest at the rate of MCLR+1 percent per annum from the date 01.05.2016 to till filing the instant appeal i.e. 27.12.2022.

7.3 A scheme of multi storied residential apartment was floated by the Appellant Board at Meerut. The possession of the flat was proposed to be handed over to the allottees in mid-2012.

7.4 The appellant charged penal interest at the rate of 13% percent for any delayed payment by the respondent.

7.5 The possession of the aforesaid flat was offered to the Respondent after delay of more than 5 years.

7.6 In terms of the aforesaid it is evidently clear that the Appellant is guilty of deficiency in services and has also failed to grant possession of the aforesaid flat within time as per the agreement/allotment letter.

7.7 In support of the afore-said contention of the respondent, reliance is being placed on a matter reported in **2020 (3) RCR (Civil) 544 in Arifur Rahman Khan and Ors. vs. DLF Southern Homes Pvt. Ltd. and Ors.** wherein expression Deficiency of Service has been dealt with by the Hon'ble Apex Court and it has been discussed as follows:

> *"23. ....The expression deficiency of services is defined in Section 2 (1) (g) of the CP Act 1986 as:*
>
> *(g) "deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.*
>
> *24. A failure of the developer to comply with the contractual obligation to provide the flat to a flat purchaser within a contractually stipulated period amounts to a deficiency. There is a fault, shortcoming or inadequacy in the nature and manner of performance which has been undertaken to be performed in pursuance of the contract in relation to the service. The expression 'service' in Section 2(1) (o) means a service of any description which is made available to potential users including the provision of facilities in connection with (among other things) housing construction. Under Section 14(1)(e), the jurisdiction of the consumer forum extends to directing the opposite party inter alia to remove the deficiency in the service in question. Intrinsic to the jurisdiction which has been conferred to direct the removal*

> *of a deficiency in service is the provision of compensation as a measure of restitution to a flat buyer for the delay which has been occasioned by the developer beyond the period within which possession was to be handed over to the purchaser. Flat purchasers suffer agony and harassment, as a result of the default of the developer. Flat purchasers make legitimate assessments in regard to the future course of their lives based on the flat which has been purchased being available for use and occupation. These legitimate expectations are belied when the developer as in the present case is guilty of a delay of years in the fulfillment of a contractual obligation."*

7.8 The act of the appellant shows the unwillingness to perform his part of the commitment and the filing of the instant appeal can only be termed as delay tactics in order to harass the respondent and to avoid any payment of interest or principal amount as adjudicated by the competent court. The said act can only be termed as abuse of process of law and the said appeal is liable to be dismissed on this ground alone.

7.9 It is undisputed fact that the Appellant has failed to perform his duties as per relevant provisions of the RERA Act, 2016.

7.10 The appellant has miserably failed to adhere to his promises made in the aforesaid allotment letter as well as has also failed to comply with his responsibilities as a promoter under the RERA Act.

7.11 In case of ***Neelkamal Realtors Suburban Pvt. Ltd. And others versus Union Of India*** Hon'ble Bombay High Court held that-

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

> *prejudice to any other remedy available, to return the amount received by him in respect of that apartment with interest at such rate as may be prescribed in this behalf including compensation. If the allottee does not intend to withdraw from the project he shall be paid by the promoter interest for every month's delay till handing over of the possession. The requirement to pay interest is not a penalty as the payment of interest is compensatory in nature in the light of the delay suffered by the allottee who has paid for his apartment but has not received possession of it. The obligation imposed on the promoter to pay interest till such time as the apartment is handed over to him is not unreasonable. The interest is merely compensation for use of money."*

7.12 In case of **Fortune Infrastructure v. Trevor D'Lima reported at (2018) 5 SCC 442 Hon'ble Apex Court** held that:

> *''15. 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. In the facts and circumstances of this case, a time period of 3 years would have been reasonable for completion of the contract i.e., the possession was required to be given by last quarter of 2014. Further there is no dispute as to the fact that until now there is no redevelopment of the property. Hence, in view of the above discussion, which draw us to an irresistible conclusion that there is deficiency of service on the part of the appellants and accordingly the issue is answered.''*

7.13 None of the grounds taken by the appellant are sustainable in the eyes of law or even equity and the Ld. Authority after considering the relevant facts of the case and evidence on record has passed a well reasoned and speaking order, which this Hon'ble tribunal may be pleased to uphold and dismiss the instant appeal by imposing heavy cost on the appellant.

8. The appellant did not choose to file any reply to the objections of the respondent.

9. Heard Sri Harsh Vardhan, learned counsel for the appellant, Sri Rakesh Kumar Rana, learned counsel for the respondent in majority of connected cases and Sri Bharat Singh, respondent in person in Misc. Case No. 239/2020.

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

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

(2) Whether it is necessary and mandatory for the Promoter to have first Completion Certificate and Occupancy Certificate under the provisions of Act, 2016, Rules 2016 read with Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010 before offering possession as well as asking the allottee to settle the account and satisfy the final demand?

(3) Whether the project of the appellant/promoter is delayed?

(4) Whether the respondent is entitled for interest due to delay in possession of the allotted unit/plot and/or while seeking refund on the deposited amount under the scheme of Act 2016 and if yes, what rate of interest is required to be paid by the promoter/appellant to the allottee/respondent?

11. **Question No. (1)** is as to whether under the scheme of the Act, 2016 and Rules, 2016 any mechanism has been provided for determination of the interest or compensation for the delay in handing over possession and/or refund with interest if allottee chooses to withdraw from the Project.

11.1 The Real Estate (Regulation & Development) Act, 2016 has been enacted 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. The Real Estate (Regulation & Development) Act, 2016 delineates functions and duties of promoter in chapter 3 and rights and duties of allottees in chapter 4. The Real Estate Regulatory Authority has been assigned functions and has been given powers as detailed out in chapter 5.

11.2 The Real Estate (Regulation & Development) Act, 2016 is not only curative but also preventive. The powers, roles, domain and jurisdiction of the authority as well as adjudicating officer have been clearly defined and demarcated by this legislation. The interpretation of the law has to be done keeping in view the whole scheme, aim and object of the Act and not in isolation. 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 in case of authority and compensation or interest in case of adjudicating officer.

11.3 The purposes for filing complaints before authority or to the adjudicating officer are different.

(a) The purpose of filing complaints before authority is to seek compliance of obligations cast upon promoter, real estate agent or allottee, getting directions issued by the authority for compliance of provisions of the Act, the rules and regulations thereunder, for initiating penal proceeding against the defaulters.

(b) Whereas purpose of initiating proceedings before the adjudicating officer is to seek compensation in case of violations of provisions of the Act, Rules, Regulations & terms and conditions of the agreement. Hence depending on the purpose of complaint it is filed either before the authority or before the adjudicating officer.

11.4 The provisions of compensation are provided in sections 12, 14, 18 and section 19. The domain of adjudicating officer is restricted to adjudging of compensation only in the matters which are covered under these sections.

11.5 The U.P. Real Estate (Regulation and Developments) Rules, 2016, lays down the procedure for filing of complaint with the authority under Rule 33 and Rule 34 lays down the procedure for filing the complaint with the adjudicating officer.

11.6 From the bare perusal of Sections 12, 14, 18 and Section 19 one will get the picture that some of the provisions of these sections provide for compensation and in case of failure of the promoter to comply specified obligations, such as Sections 12, 14(3), 18(1), 18(2), 18(3) and Section 19(4) then these matters come within the domain of exercising the power by the adjudicating officer but limited to adjudging compensation.

11.7 Section 18(1) provides some specific obligations of the promoter alongwith compensation. Similarly, Section 19(4) provides for certain rights of the allottee and in case of violation of the right by the promoter, the allottee shall be entitled to claim refund of amount paid alongwith interest at the prescribed rates alongwith compensation. As far as adjudging of compensation is concerned, it is squarely within the power of the adjudicating officer.

11.8 The powers such as power to register projects, power to register real estate agents, power to issue directions for compliance of obligations, power to impose penalty in case of any violation or contravention of the provisions of this Act or the rules or regulations made thereunder against any promoter, allottee or real estate agent as the case may be is with the authority.

As far as compliance of obligations by the promoter or real estate agent or allottee is concerned it is the function of the authority and not of the adjudicating officer. In case the obligation by the promoter, real estate agent or allottee is not complied with by any of them, it is violation of the provision of the Act providing that particular obligation and a complaint may be filed under section 31 by any aggrieved person seeking order under section 37 from the authority to ensure compliance of obligation by the defaulter, being the function of the authority under section 34(f).

Section 34(f) provides specific functions of the authority as under:-

> ***34. Functions of Authority.***
>
> *"The function of the authority shall include …….*
>
> *(f) to ensure compliance of the obligations cast upon the Promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.*
>
> *……..*"

The obligation cast upon the promoters, the allottee and the real estate agents has been given in various provision of the Act, the rules and regulations. It is the function of the authority to ensure compliance of the obligations including the obligations of the promoter mentioned in sections 12, 14, 18 and section 19.

11.9 In case of non-compliance of obligations by the promoter as given in section 14(1) and 14(2) if the allottee has suffered some loss or injury and intends to file compensation application he may do so and file such application for compensation with the adjudicating officer who is the sole authority under the Act to adjudge compensation. Although sections 14(1) and 14(2) do not provide for any kind of compensation specifically, but once the provisions are read with Section 18(3) it may initiate compensation proceedings. The power under section 18(3) to decide compensation is provided as under:

18. Return of amount and compensation.—

> *"(3) If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act."*

This power to adjudge compensation given to the adjudicating officer in section 18(3) is general in nature which covers all the obligations cast upon the promoter throughout the Act and not only limited to sections 12, 14, 18 and section 19 i.e. in case a promoter fails to discharge any other obligation imposed on him under this Act or the rules or regulations thereunder or even in accordance with the agreement for sale he shall be liable to pay such compensation to the allottee in the manner as provided under the Act.

11.10 The general power given in section 18(3) by implication crystallizes that the separate domain of power is to be exercised by the authority and the adjudicating officer. Accordingly, the role of the authority extends to any other matter as provided under the Act except the power to adjudge compensation.

11.11 Now if we deeply examine section 18 as a whole, the following are the express provisions for providing compensation to an Allottee under section 18:-

A. *Where the Allottee wishes to withdraw from the project, without prejudice to any other remedy available, on demand he shall be liable to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act.*

B. *The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under the Act.*

C. *If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made there under or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.*

11.12 As per the provisions of Section 18, compensation can be sought by an Allottee in case of defective title of the land, and also if the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made there under or in accordance with the terms and conditions of the agreement for sale.

11.13 The word "Any Other" signifies beside these, meaning thereby that apart from the delay in possession, any other breach of the terms & conditions of the Agreement to sell or breach of the obligations imposed on him by the provisions of the Act or Rules shall also be liable to compensate the Allottee.

11.14 If we critically analyze the section, we will find that the word 'compensation' has been used in every sub-section covering almost all the scenario except the word compensation has not been used in the case where Allottee decides to stay in the project even due to delay in handing over of the possession and he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed only.

11.15 The intention of the legislature was to provide Compensation only to those Allottees who exit the project and also regarding defective title and breach of agreement to sale and obligations imposed on, by the Act and Rules, but not to those who wishes to stay in the project, for them beside the other provision of compensation in term of defective title and breach of agreement to sale as well as obligations imposed on by the Act and Rules is applicable, but in case of delay in handing over of possession ,the Allottee is entitled for only INTEREST at a prescribed rate and not "compensation" as the Suffix "including compensation" has not been provided by the Act.

11.16 Thus the intention of the legislature was clear in providing the compensation of delay to only those who exit the project and not to those who wishes to stay in the project and apparently while enacting the proviso to Section 18(1), the legislature had in mind the findings of the Hon'ble Supreme Court in ***Chief Administrator Huda Vs. Shakuntala Devi***, wherein the Hon'ble Supreme Court has opined that in case of delayed possession the appreciated value of the property is also to be taken as a factor of compensation while reducing the quantum of compensation awarded by the national commission.

Further section 18(1) empowers an allottee to choose or to exercise one of the two options mentioned therein i.e. an allottee either can withdraw from the project or continue with the project. In case of failure of the promoter to complete or give possession as per agreement for sale and for both the eventualities specific obligations have been cast on the promoter.

11.17 On analysis of the provision of Section 71, it is clear that the purpose of appointing adjudicating officer by the authority is to adjudge compensation under sections 12, 14, 18 and section 19.

Sub-sections (2) and (3) of section 71 of the Act lay down the procedure to be followed for exercising the power to adjudicate, and section 72 lays down the factors to be taken into account by the adjudicating officer for adjudging the quantum of compensation or interest.

11.18 Section 71(3) gives jurisdiction to the adjudicating officer for holding inquiry for his satisfaction that the person has failed to comply with the provisions of any of the sections 12, 14, 18 and 19. Section 71 (3) reads as under:-

71. Power to adjudicate.—

……………

……………

"(3) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject-matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in subsection (1), he may direct to pay such compensation or interest, as the case any be, as he thinks fit in accordance with the provisions of any of those sections."

The purpose of holding inquiry by the adjudicating officer is to satisfy that the person has failed to comply with the provisions of any of these sections referred above providing for compensation. Accordingly, he will decide compensation keeping in view the factors to be taken into account as provided in Section 72. The adjudicating officer has been given powers for adjudging compensation. He has not been given any other specific power under the Act where other remedies are also available to the allottee in case the promoter has failed to comply with the provision of any of Sections 12, 14, 18 and Section 19.

11.19 Section 72 further provides guidance to the adjudicating officer as what factors are to be taken into account by the adjudicating officer for adjudging the quantum of compensation under section 71. Section 72 reads as under:-

72. Factors to be taken into account by the adjudicating officer.—

"While adjudging the quantum of compensation or interest, as the case may be, under section 71, the adjudicating officer shall have due regard to the following factors, namely:-

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

(b) the amount of loss caused as a result of the default;

(c) the repetitive nature of the default;

(d) such other factors which the adjudicating officer considers necessary to the case in furtherance of justice."

11.20 Thus we may conclude from the above is that if a complainant is successful in his/her/its claim for compensation under sections 12, 14, 18 or section 19 of the Act, the adjudicating officer would adjudge the compensation to be paid by the promoter to the aggrieved person. However, despite being under an obligation to pay the compensation quantified by the adjudicating officer, the promoter fails to pay the compensation, in such a situation, the authority would have the jurisdiction to impose penalty and interest on the promoter because failure of the promoter to pay compensation would constitute contravention of sections 12, 14, 18 or 19 of the Act read with sections 71 and 72. This consequence would flow despite the fact that the compensation can be recovered from the promoter under section 40(1) of the Act read with rule 24 of the rules and paid to the complainant.

11.21 As the purpose of inquiry by the adjudicating officer is to satisfy that the person has violated or contravened any of the provisions of sections 12, 14, 18 and section 19 and then only he will proceed to adjudge compensation. For other remedies or relief, the action is to be taken by the authority. The purpose of inquiry by the authority is again to see whether the person has failed to comply with the provisions of any of the sections in the Real Estate (Regulation and Development) Act, 2016 including sections 12, 14, 18 or 19, and contravened the provisions of the Act, the rules and regulations made thereunder and then it shall proceed to pass such orders including imposition of penalty in accordance with the provisions of the Act or rules and regulations thereunder. **Hence the power to hear the complaints for violation or contravention of sections 12, 14, 18 or 19 rests with the both the adjudicating officer as well as the authority, but**

outcome in both the cases is different. In case of complaint before the adjudicating officer regarding violation/contravention of the provision of the Act, outcome is compensation or interest to the allottee and in case of complaint before the authority it is either penalty and/or compliance of obligation etc. but not compensation.

11.22 The adjudicating officer after conducting inquiry regarding failure to comply with the provisions of any of these sections 12, 14, 18 or 19 may direct to pay such compensation or interest as he thinks fit. He may refer his inquiry report regarding his satisfaction that contravention of provision of the Act has taken place, to the authority for other remedies available to the promoter, allottee and real estate agent under the Real Estate (Regulation and Development) Act, 2016, for exercising of power by the authority in respect of imposing penalty. If the inquiry is conducted on the basis of complaint or suo-motu by the authority and it comes to the conclusion that violation or contravention of any of the provision of the Real Estate (Regulation and Development) Act, 2016, the rules or regulations thereunder has occurred including any of the sections 12, 14, 18 or 19 the authority may order for compliance of obligations as provided in the Real Estate (Regulation and Development) Act, 2016 and may also take other action of imposing penalty. The authority does not have the power to decide compensation in case a person has failed to comply with the provisions of sections 12, 14, 18 or 19, then the complaint has a right to approach the adjudicating officer for adjudging compensation and the directions to pay such compensation or interest as think fit by the adjudicating officer.

11.23 The Act nowhere puts any bar on conduct of inquiry by the authority for violation of any of sections 12, 14, 18 or 19. The jurisdiction of the adjudicating officer is to adjudge compensation to be paid for which he can hold his own inquiry regarding person's failure to comply with any of the provisions of sections 12, 14, 18 or 19 and further proceeding to adjudge the compensation. In case the complaint is filed regarding violation of any of the provisions of the Real Estate (Regulation and Development) Act, 2016 and certain relief but **NOT** the compensation has been sought from the authority along with penal action then the authority has powers to hold an inquiry into such matter including non-compliance of sections 12, 14, 18 or 19 and the applicant shall be at liberty to go to the adjudicating officer and make an application for compensation in addition. In case the complaint has been made regarding violation of provisions of sections 12, 14, 18 or 19 and allottee has sought both relief, penal action and compensation then the authority may refer the complaint to the adjudicating officer both for ascertaining whether the person has failed to comply with the provisions of any of these sections and also to adjudge compensation to be paid. Based on the report of the adjudicating officer regarding failure of the person to comply with the provisions of any of these sections, the authority may order the relief/remedy as provided in the Real Estate (Regulation and Development) Act, 2016 along with penal action. The language of Section 34(f) is very clear that the function of the authority shall include ensuring compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

The attention can be drawn to Section 38 of the Real Estate (Regulation and Development) Act, 2016 regarding powers of the authority. Section 38(1) is reproduced as under :

38. Powers of Authority.—

> *"(1) The Authority shall have powers to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the rules and the regulations made thereunder."*

From the above it is clear that the authority has powers to impose penalty or interest in regard to any contravention of obligation cast upon the promoter or allottee or real estate agent. This power is about the whole Act without any exclusion of sections 12, 14, 18 or 19. So, in case of contravention of obligations cast upon the promoters in these sections also the authority has the power to impose penalty or interest. This power to impose penalty has not been given anywhere to the adjudicating officer in the Act. Adjudicating officer is appointed for the sole purpose of adjudging compensation and for satisfying himself regarding failure of person to comply with the provisions of sections 12, 14, 18 or 19 of the Act so that he may direct the promoter to pay such compensation or interest as he thinks fit. It is to be noted that compensation proceedings can be brought against promoters not against allottee or real estate agent, whereas penalty proceedings can be initiated against promoter, real estate agent and allottee. Similarly, directions to comply with provisions of the Act and to comply obligation by promoters, allottees and real estate agent may be issued by authority but not by adjudicating officer.

If any application is before the adjudicating officer for compensation, in some of the sections specific provisions for compensation have been made as in sections 12, 14(3), 18(1), 18(2) and 18(3) read with 19(4). In section 12, the penalty proceedings are in the eventuality of sustaining any loss or damage by reason of any incorrect, false statement etc. In section 14(3) again, compensation shall be payable in the event of promoter's failure to rectify defects. In section 18(1), compensation shall be payable in case of failure of the promoter to give possession by the due date specified in agreement for sale. Section 18(2) provides compensation to the allottee in case of any loss caused to him due to defective title of the land. Section 18(3) is general in nature which provides for compensation to the allottee in case of failure of promoter to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale.

The allottee may make an application for compensation in case of failure of the promoter to meet the obligations cast on him. This compensation is for the loss caused as a result of default, amount of disproportionate gain or unfair advantage as a result of default, nature of default etc.

Sections 12, 14, 18 or 19 provide both for certain specified obligations cast on promoters and also compensation provisions in case of failure of promoters to meet with the obligations.

Compensation provision has been made in sections 12, 14, 18 or 19 in addition to other remedy available to the allottee such as return of amount received by the promoter on demand and interest at the prescribed rate. Similarly, interest at the prescribed rate is to be paid for every month of delay till the handing over of the possession.

11.24 The domain of exercising powers by the authority and the adjudicating officer are different. If the purpose of complaint is compensation then it is the adjudicating officer not only in respect of sections 12, 14, 18 or 19 but also on failure of promoter to fulfill his obligations in any other provisions of the Act or the rules or regulation made there under or as per terms and condition in the agreement for sale as mentioned in Section 18(3) giving sweeping powers to the adjudicating officer for deciding compensation in the eventuality of failure of promoter to fulfill the obligations. If the purpose of complaint is to initiate penal proceedings against the defaulting promoter, real estate agent or allottee, then the power to entertain such complaints vest with the authority. Similarly in case of failure of promoter to fulfill any obligations cast on him, the complainant may also make a request to the authority for ensuring compliance of the obligations by the promoter, real estate agent or allottee, including the compliance of obligations of promoters mentioned in sections 12, 14, 18 or 19 except the power to adjudge compensation. The power to file complaint for prosecution in certain cases also vests with the authority and not with the adjudicating officer. The cognizance of offence under the Act can be taken only on a complaint made in writing by the authority or by any officer authorized for this purpose.

11.25 In the eventuality of failure of promoter to give possession in accordance with the terms and conditions of agreement for sale, the allottee has two options:-

(1) Where allottee wishes to withdraw from the project –

the promoter shall be liable on demand to the allottee without prejudice to any other remedy available to return the amount received by him with interest at the rate as may be prescribed. In this case there are two obligations of the promoter:-

(a) to return of the amount received by him along with interest at the prescribed rates;

(b) to make payment of compensation in the manner as provided under this Act.

(2) In case allottee doesn't intend to withdraw –

(a) in this case allottee shall be paid by the promoter interest at the prescribed rates for every month of delay till the handing over of possession at the rate as may be prescribed.

(b) In the second option there is no direct provision of compensation.

In the first case, where the allottee wishes to withdraw from the project, there is a liability on the promoter to return the amount received by him on demand to the allottee along with interest at the prescribed rates. If the promoter fails to fulfill his obligations, then the allottee is at liberty to approach the authority for compliance of the obligations imposed under section 18(1) keeping in view the provisions contained in section 34(f). This is a plain and simple obligation to be fulfilled by the promoter and nothing is to be adjudged as the promoter is to return the amount received by him and interest at the prescribed rates. In this case directions issued by the authority to the promoter to return the amount received by him alongwith interest at the prescribed rate are binding on the promoter and in case of non-compliance penal proceedings may be initiated against the promoter. The second part of this obligation is payment of compensation in the manner as provided under this Act. If compensation demanded by the allottee is paid by the promoter nothing remains to be decided regarding compensation. In case promoter fails to pay compensation as demanded by the allottee then in that eventuality role of adjudicating officer will come and the adjudicating officer shall adjudge the compensation on an application made by the complainant/allottee.

The word 'compensation' the manner as provided in the Act is to be noted. The manner has been provided in section 71(2), 71(3) and section 72. The application for adjudging compensation shall be dealt with by the adjudicating officer as provided in sections 71(2) and section 71(3). The purpose of inquiry by the adjudicating officer is to satisfy himself that the person has failed to comply with provisions of any of these sections specified in sub-section 71(1). He may direct to pay such compensation or interest as he thinks fit in accordance with the provisions of any of these sections i.e. sections 12, 14, 18 or 19. The power to give compensation herein is limited to the compensation in accordance with the provisions of any of these sections i.e. compensation as mentioned in section 12, 14(3),18(1), 18(2), 18(3) and section 19(4). The adjudicating officer has no powers to issue directions for compliance of obligations by the promoter. He has powers only to decide compensation in case of violations of the obligations by the promoter. The application for compensation in such eventuality is maintainable only with the adjudicating officer and not with the authority. The allottee may also give application for ensuring compliance of the obligations by the promoter to the authority and authority may issue directions for compliance of the obligations.

So, this part is an automatic obligation on the promoter for which nothing is to be adjudged by the adjudicating officer where this obligation is mandatory in nature and in case of its non-compliance the allottee may approach the authority and authority is duty bound to ensure compliance by the promoter and shall issue directions accordingly.

The authority may also initiate penalty proceedings apart from giving directions to return the amount with prescribed interest as has been provided under this sub-section. But this will be applicable only prospectively. The matter left to the adjudicating officer is only about adjudging the compensation or interest nothing more, nothing less.

Keeping in view the above position whenever the complaint is made to the authority even in case of failure by the promoter to discharge his obligations under section 18(1) and request is made to the authority for ensuring compliance, i.e. return of amount received by the promoter along with prescribed interest, the authority is well within its powers to issue directions to the promoter to return the amount along with the interest as prescribed, exercising the powers vested in the authority under section 34(f) and section 37. Here, the interest is also mentioned as the interest as prescribed. The interest rate has been prescribed in the rules. So as far as this interest as prescribed in the rules is concerned is different than the interest as provided in sections 71(3) and 72 compensation or interest as the case may be.

11.26 On examining the provisions of Section 72 with the provisions of Section 18 the position emerges as under:-

A. The interest in both the sections are distant, as in section 18 the interest is coupled with the suffix at such rate as may be prescribed, but not in section 72, meaning thereby the Adjudicating Officer is not bound by the rate of interest as may be prescribed and he is free to quantify the compensation or interest according to the facts and circumstances of a case and the evidences produced.

B. The calculation of interest in section 18 is dependent on the rate prescribed, which is static and the period of delay, but in section 72 there are 4 factors which are to be mandatorily kept in mind by the Adjudicating Officer.

C. Numerous reliefs can be claimed under Section 18 from the Authority, whereas in Section 71 and 72 the Adjudicating Officer may only direct to pay such compensation or interest, as the case may be, as he thinks fit.

11.27 The Hon'ble Supreme court in the case of M/s. NEWTECH PROMOTERS AND DEVELOPERS PVT. LTD Vs STATE OF U.P. and Others [2021(11) ADJ 280], [2022 (1) R.C.R.(Civil) 357] while dealing with the jurisdiction of the Authority and the Adjudicating officer under the provision of the Real Estate (Regulation and Development) Act, 2016 has framed a question as follows:-

> "1. Whether the authority has jurisdiction to direct return/refund of the amount to the allottee under Sections 12, 14, 18 and 19 of the Act or the jurisdiction exclusively lies with the adjudicating officer under Section 71 of the Act?"

After elaborate discussion, the Hon'ble Apex court at paragraph 86 held that:

> *" 86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount,* ***or directing payment of interest for delayed delivery of possession,*** *or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. If the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under*

Section 71 and that would be against the mandate of the Act 2016".

11.28 On examination of the above finding of the Hon'ble Apex Court with the provision of the section 18 of the Act 2016, it is clear that when the Allottee decides to stay in the project even due to delay in handing over of the possession, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed, meaning thereby in this situation the Allottee is entitled for interest for every month of delay till the handing over of the possession, at such rate as may be prescribed, and not "compensation" as the Suffix "including compensation" in case of seeking refund due to delay beyond the period prescribed in the agreement.

11.29 The scheme of the provisions of Section 18 of the Act 2016 clearly provides that in cases where the Allottee intends to stay in the project, the Allottee is entitled only for interest as per the rate prescribed and its jurisdiction of determination lies in the regulatory authority and not with Adjudicating Officer, and hence the Adjudicating Officer cannot grant interest as compensation, because the Statute does not provide any scope of compensation in such situation.

11.30 From the aforementioned discussion, it is clear that the Act of 2016 provides a mechanism for determination of interest as per the rate prescribed by the Regulatory Authority for the delay in handing over possession of the unit to the allottee and promoter is required to pay interest for every months' delay in handing over of possession, if the allottee wishes to stay with the project.

Further, if allottee seeks refund of the amount by withdrawing from the project then such refund could be together with interest as may be prescribed and would be independent of the compensation payable to an allottee either in terms of Section 18(1), (2) & (3) of the Act read with other provisions as well as for violation of the terms and conditions of the agreement excluding the claim of delay in possession. **Question no. (1)** is answered accordingly.

12. **Question no. (2)** is as to whether it is necessary and mandatory for the Promoter to have first Completion Certificate and Occupancy Certificate under the provisions of Act, 2016, Rules 2016 read with Uttar Pradesh Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010 before offering possession as well as asking the allottee to settle the account and satisfy the final demand.

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

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

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

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

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

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

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

12.6 In view of the aforesaid analysis, we are of the considered view that as per the provisions of the U.P. Apartments Act, 2010 read with the provisions of Act, 2016 a Promoter is required to offer legal and habitable possession to the allottees only after obtaining C.C./O.C. and ask for clearing dues by raising final demand. **Question no. (2)** is decided accordingly.

13. Vide **question no. (3)** we are required to examine as to whether the project of the appellant/promoter is delayed.

13.1 The admitted facts of the case are that the appellant floated a scheme of multi storied residential apartments at Meerut in the year 2008. The possession of the flat was proposed to be handed over to the allottees in mid-2012. The possession of the booked flat was offered by the appellant to the respondent after a delay of more than 5 years.

13.2 The contention of the appellant is that Hon'ble Supreme Court's ban on mining in the year 2011 resulted in stalling the project. The ban on mining imposed by the Hon'ble Supreme Court in the year does not come under the definition of 'force majeure'. Moreover, as per appellant, the ban on mining was imposed by the Hon'ble Supreme Court for some time in the year 2011, which cannot justify the admitted delay of more than 5 years.

13.3 In view of the above, we are of the considered opinion that the project of the appellant was delayed. **Question no. (3)** is answered accordingly.

14. **Question No. (4)** is regarding respondent's entitlement for interest due to delay in possession of the allotted unit/plot and/or while seeking refund, on the deposited amount under the scheme of the Act, 2016 and if yes, what rate of interest is required to be paid by the promoter to the allottee/respondent.

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

14.2 The Hon'ble Bombay High Court in the case of ***Neelkamal Realtors Suburban Pvt. Ltd. And others Vs. Union of India (supra)*** observed that 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/plot but has not received possession of it. The obligation imposed on the promoter to pay interest till such time as the apartment/plot is handed over to him is not unreasonable. The interest is merely compensation for use of money.

14.3 Subsequently, in ***Wg. Cdr. Arifur Rahman Khan & Others Vs. DLF Southern Homes Pvt. Ltd., reported in (2020) SCC Online 667*** affirming the view taken in the Judgment in Pioneer's case the Hon'ble Supreme Court held that the term of the agreement authored by the Developer does not maintain a level platform between the Developer and the flat purchaser. The stringent terms imposed on the flat purchaser are not in consonance with the obligation of the Developer to meet the timelines for construction and handing over possession, and do not reflect an even bargain. The failure of the Developer to comply with the contractual obligation to provide the flat within the contractually stipulated period, would amount to a deficiency of service. Given the one-sided nature of the Apartment Buyer's Agreement, the consumer fora had the jurisdiction to award just and reasonable compensation as an incident of the power to direct removal of deficiency in service.

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

14.5 The Hon'ble Supreme Court in Civil Appeal No(s) 6745-6749 of 2021 titled as **M/s Newtech Promoters and Developers Pvt. Ltd Vs. State of UP &Ors. Etc.** has gone one step ahead by observing that if the promoter fails to give the possession of apartment/plot/building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act.

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

<u>Rule 9.2(ii)</u>

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

India + 1% unless provided otherwise under the Rules, within forty-five days of receiving the termination notice:

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

Rule 9.3

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

Rule 9.3(i)

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

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

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

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

14.9 The **Hon'ble Supreme Court** in ***Civil Appeal Nos. 4910-4941/2019 DLF Homes Panchkula Pvt. Ltd. Vs. D. S. Dhanda etc.etc. with Civil Appeal Nos. 4942-4945/2019 DLF Homes Panchkula Pvt. Ltd. Vs. Sudesh Goel etc. decided on 10.05.2019*** held in para 3 of the judgment as under:-

> *"…… We feel it appropriate that, considering that the subject units in question are dwelling units, in a residential housing project, the rate of interest for house building loan for the corresponding period in a scheduled nationalized bank (take, State Bank of India) would be appropriate and logical, and, if floating/varying/different rates of interest were/are prescribed, the higher rate of interest should be taken for this instant computation."*

14.10 Further, an allottee deposits amount under the hope and trust that he/she will get the flat within the time schedule advertised at the initial stage. There may be certain cases where allottees might be residing in rented houses and they might have managed their financial position in such a manner that after deposit of amount, they will get flats of their own and thereafter they will be free from payment of rent as then they will shift from rented houses to allotted flats but on account of inordinate delay in delivery of possession of allotted flats, their financial calculations and legitimate expectations stand frustrated causing various types of financial losses to them. On the other hand once the promoter/builder made offers and same are accepted by the allottees with legitimate expectation, the obligation cast upon the promoter/builder is to complete the same within the time schedule mentioned in the offer and if they fail to discharge the same the affected allottees are entitled to the interest and/or compensation for delayed delivery of possession, as the allottees have parted with money which was earning interest. If an allottee chooses to remain in the project and in case the allottee seeks refund then he is entitled for interest on the deposited amount and/or compensation in accordance with the provisions of the Act 2016, which in our considered view will be in accordance with the principles of equity as well.

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

14.11 In view of the aforementioned, we are of the view that the respondent is entitled for interest on account of delayed possession 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 2016 and Rules 2016. **Question no. (4)** is answered in affirmative in favour of the respondent.

15. In view of the aforesaid analysis, we do not find any illegality or perversity in the impugned order of the Regulatory Authority. **Accordingly all the 48 appeals/Misc. Cases are hereby dismissed.**

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

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

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

> *"127. It may further be noticed that under the present real estate sector which is now being regulated under the provisions of the Act 2016, the complaint for refund of the amount of payment which the allottee/consumer has deposited with the promoter and at a later stage, when the promoter is unable to hand over possession in breach*

of the conditions of the agreement between the parties, are being instituted at the instance of the consumer/allottee demanding for refund of the amount deposited by them and after the scrutiny of facts being made based on the contemporaneous documentary evidence on record made available by the respective parties, the legislature in its wisdom has intended to ensure that the money which has been computed by the authority at least must be safeguarded if the promoter intends to prefer an appeal before the tribunal and in case, the appeal fails at a later stage, it becomes difficult for the consumer/allottee to get the amount recovered which has been determined by the authority and to avoid the consumer/allottee to go from pillar to post for recovery of the amount that has been determined by the authority in fact, belongs to the allottee at a later stage could be saved from all the miseries which come forward against him."

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

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

> *"140. It is settled principle of law that if the plain interpretation does not fulfill the mandate and object of the Act, this Court has to interpret the law in consonance with the spirit and purpose of the statute. There is indeed a visible inconsistency in the powers of the authority regarding refund of the amount received by the promoter and the provision of law in Section 18 and the text of the provision by which such refund can be referred under Section 40(1). While harmonizing the construction of the scheme of the Act with the right of recovery as mandated in Section 40(1) of the Act keeping in mind the intention of the legislature to provide for a speedy recovery of the amount invested by the allottee along with the interest incurred thereon is self explanatory. However, if Section 40(1) is strictly construed and it is understood to mean that only penalty and interest on the principal amount are recoverable as arrears of land revenue, it would defeat the basic purpose of the Act."*

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

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

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

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

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

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

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

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

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

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

17. No order as to costs.

Dated: 07th May, 2024
Shakir **(Sanjai Khare)** **(D.K. Arora)**