

THE U.P. REAL ESTATE APPELLATE TRIBUNAL
AT
LUCKNOW

Bench 1
Reserved Judgment

APPEAL No. 306/2021

(Complaint No. ADJ/LKO162/12/0045/2019)

U.P. Awas Evam Vikas Parishad. Vs. Shobhit Chaturvedi

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

1. The instant appeal has been filed by the U.P. Awas Evam Vikas Parishad ("the appellant/promoter") under Section 44 of the Real Estate (Regulation and Development) Act, 2016 ("the Act") challenging order passed by the Adjudicating Officer (A.O.), in Complaint No. ADJ/LKO162/12/0045/2019 made by the complainant/allottee. While disposing off the complaint, the Adjudicating Officer in its order has directed the appellant/promoter to pay interest as compensation @ MCLR+1 percent p.a. on the original cost of Rs. 20,88,000/- i.e. (30.08.2015 to 21.07.2017) of the flat to the complainant/respondent for the period of delay, within a period of 45 days. Further, if the payment is not made within the specified time period then the complainant/respondent will be entitled to get interest thereon at the same rate (i.e. MCLR+ 1 percent p.a.).
 - 1.1 The instant appeal has been filed by Shri Anoop Kumar Asthana, Advocate and Shri Siddharth Vikram Asthana, Advocate, learned counsel for the appellant/promoter, the appeal pertains to Neelgiri Enclave, a project of the appellant/promoter, located at Sector 17, Vrindavan Yojna, Lucknow. The appellant/promoter has sought relief for setting aside the impugned order of the Adjudicating Officer and

consequently award of compensation to the complainant for the period of delay.

2. The perusal of the A.O.'s order dated 18.12.2020 in complaint no. ADJ/LKO162/12/0045/2019 (Shobhit Chaturvedi Vs. U.P. Awas Evam Vikas Parishad indicates that the A.O. has examined the issues of delay in handing over the possession and for not providing window as per Registration Booklet and car parking, etc.

- 2.1 While examining the issue of delay in offering possession, the AO has observed in its order dated 18.12.2020 that as per the conditions of the Registration Booklet of the appellant/promoter, the possession was to be given within 24 months. The Allotment Letter was issued on 30.08.2013 and 24 months ends on 30.08.2015 and the offer of possession was issued to the allottee on 21.07.2017. Thus the period from 30.08.2015 to 21.07.2017 has been determined as delay period.

- 2.2 While determining whether the complainant/respondent is entitled for getting the interest for the delay period, the AO has relied upon the provisions of Section 18 of the Act and the judgment of Hon'ble Supreme Court in Chief Administrator HUDA Vs. Shakuntla Devi, Pioneer Urban Land & Infrastructure Ltd. Vs. Govindan Raghavan 2019 SCC page 725, judgment of this Tribunal in Appeal No. 525/2020 (U.P. Awas Vikas Evam Vikas Parishad Vs. Dharmendra Rana) dated 06.11.2020 as well as judgment of Hon'ble Allahabad High Court in Writ C. No. 13904/2020 (Vibhor Vaibhav Infrahomes Pvt. Ltd. Vs. UOI and ors.) dated 08.10.2020, and directed for interest at the rate of MCLR+ 1 percent on the initial cost of the project (i.e. Rs. 20.88 lac) for the delay period.

- 2.3 While examining the submissions of the appellant/promoter regarding the cause of delay being on account of farmers' agitation, filing of FIR against anti social elements, stay granted by the Hon'ble Allahabad High Court, etc., the AO has observed

that the appellant/promoter has hidden facts from the allottees as the advertisement for the project was given in the year 2012, whereas there was a stay order granted by the Hon'ble High Court in the year 2011.

2.4 After examination of the submissions made by both the parties, the AO has directed the appellant/promoter to pay compensation in the form of interest to the allottee/respondent at the rate of MCLR+ 1 percent p.a. on the cost of the flat i.e. Rs. 20.88 lacs within 45 days, and if the payment is not made within the prescribed period, the complainant/respondent will be entitled to get interest at the same rate on the compensation as awarded in its Order.

3. The submissions of learned counsel for the appellant/promoter are that the appellant/promoter had opened the registration in its Self-Financing Housing Scheme in Vrindavan Yojna Part-4, Sector- 17, called Nilgiri Enclave in March 2013. The Allotment Letter/demand letter with certain terms and conditions was issued to the complainant on 30.08.2013 and the offer of possession/final demand letter was issued to the complainant/respondent on 21.07.2017. The conveyance deed was executed on 08.03.2018 and the physical possession was handed over to the complainant/respondent on 05.06.2018. It is further submitted that the complainant/respondent has approached the Regulatory Authority for compensation after lapse of about 17 months period by filing complaint on 02.12.2019, which has been disposed off by way of impugned order dated 18.12.2020 passed by the A.O.

3.1 The appellant/promoter has relied upon the judgment passed in TKA Padnabhan Vs. Abhiyan CGHS Ltd. Revision Petition No. 1942/2013 decided by the Hon'ble National Commission on 04.01.2016, in which the Hon'ble National Commission has observed that once the petitioner had taken the possession of the flat unconditionally and without any protest, thereafter he ceased to be a consumer, and the agreement executed between

the parties came to an end; as such the consumer complaint on the face of it is not maintainable.

3.2 The appellant/promoter has also relied upon the Hon'ble Supreme Court's order dated 04.03.2009 in the case of Ghaziabad Development Authority Vs. Shakuntala Rohatgi, in which the Hon'ble Supreme Court had held that where a plot/flat is not delivered in time but is delivered after some delay at the original rate (without charging a revised higher rate which was prevailing at a later date), the allottees will not be entitled to claim interest.

3.3 Regarding delay in completion of the project, the appellant/promoter has submitted that the delay in completion of the project is neither intentional nor deliberate, nor malafide and the same was beyond its control.

3.4 Further, the appellant/promoter has submitted that compensation for delay in delivery of possession is not liable to be awarded to the complainant as per the observations of Hon'ble Supreme Court in the case of Ghaziabad Development Authority Vs. Shakuntala Rohatgi decided on 04.03.2009.

4. In this appeal though Dr. Azhar Ikram, Advocate appeared on behalf of the respondent and sought time for filing vakalatnama alongwith objections on 10.01.2022, but neither he filed his vakalatnama nor objections till 26.07.2022.
5. The appellant/promoter has taken several grounds in this appeal. These grounds have been dealt with exhaustively by this Tribunal in **UP Awas Evam Viks Parishad Vs. Brij Kishore Mishra (Appeal No. 08/2020)** and in the case of **UP Awas Evam Viks Parishad Vs. Rakesh Kumar Singh (Appeal No. 93/2020)** vide judgments dated 10.08.2021. However, during the arguments, learned counsel for the appellant pressed only grounds A, B, G & H, which are being reproduced as follows:-

- (A) *Because any claim can be raised and compensation can be awarded only on the basis of contract existing between the parties. If there is no privity of contract then the claim can neither be raised nor can be awarded but the learned Adjudicating Officer failed to appreciate that after execution of sale deed the prior contract of 2013 in the nature of brochure had come to an end and there was no privity of contract existing between both parties at the time of filing the complaint, hence the complaint was not maintainable and the compensation for delay in delivery of possession could not be awarded.*
- (B) *Because the learned Adjudicating Officer has failed to appreciate that the contract to provide the flat existing between both parties vide contract of 2013 through terms of brochure has come to an end after execution of sale deed and delivery of possession having made to the complainant, which was obtained by the complainant without any protest or raising any grievance and as such after execution of sale deed the contract to provide the flat had come to an end since there was no privity of contract existing between both parties hence the complaint for awarding compensation was not maintainable as held in TKA Padnabhan Vs. Abhiyan CGHS Ltd., Revision Petition No. 1942/2013 decided by the Hon'ble National Commission on 04.01.2016.*
- (G) *Because the learned Adjudicating Officer has failed to appreciate that the complainant has got the sale deed executed and taken the possession without any demur or protest as such the terms of the same are legally effective and binding upon the complainant. Now the complainant is stopped from raising any objection or challenging the terms of contract. And in the light of the law as referred herein above, the claim for interest/compensation for*

delay in delivery of possession is not maintainable and the impugned order awarding compensation for delay in delivery of possession is illegal, incorrect not maintainable in the eyes of law and is liable to be set aside.

(H) Because the learned Adjudicating Officer has failed to appreciate that the second mode of contention of the appellant is that since the flat has been delivered even with some delay without charging a revised higher rate which was prevailing at a later date, as such the compensation for delay in delivery of possession is not liable to be awarded to the complainant. In this regard the Hon'ble Supreme Court in Gaziabad Development Authority Vs. Shakuntala Rohatgi, while deciding a bunch of civil appeals on 04/03/2009 has held that "where the plot/flat which is allotted is not delivered in time but is delivered after some delay at the original rate (without charging a revised higher rate which was prevailing at a later date) the allottees will not be entitled to claim interest where the allotment is at a tentative rate subject to calculation of final cost which is higher than the tentative cost (as contrasted from charging revised prevailing price applicable to later allottees) it will not be considered as charging revised higher rate".

It is submitted that the price in the brochure is tentative and no fixed date for delivery of possession has been given and only the tentative time has been proposed for delivery of possession of the allotted flat. The flat has been allotted under self finance affordable housing scheme on low price and there is an escalation of only 4.17% in comparison to 32% as shown according to CPWD price index no. 23/24/Executive Engineer Planning/NA 11/3311 dated 31/10/2018, during the

period 01/10/12 to 31/10/2018. Even according to RERA registration the price index in 4 years have been increased @ 21.12% in the market. As such the law down by the Apex Court in GDA Vs. Shakuntala Rohatgi is fully applicable.”

6. In order to examine the rival claims and to address the grounds pressed by the learned counsel for the appellant, we deem it fit to frame the following questions:-
 - i. Whether the Adjudicating Officer ought to have examined the complaint of the respondent only on the basis of agreed terms and conditions mentioned in the Registration Booklet, read with allotment letter.
 - ii. Whether there is any delay in handing over of the possession to the allottee, and if yes, on whose account?
 - iii. Whether an allottee is entitled for claiming compensation/ interest for the delayed possession, even if the allottee has already taken possession of the flat and sale deed has been executed after the allottees agreed to pay the final cost of the flat?
 - iv. Whether there is any illegality or perversity in the impugned order dated 16.07.2021 of the Adjudicating Officer in granting interest as compensation to the respondent for delay in providing possession of the flat by the appellant?
7. Heard Shri Akhand Pratap Singh, learned counsel for the appellant/promoter.
8. Question no. (i) is regarding whether the Adjudicating Officer ought to have examined the complaint of the respondent only on the basis of agreed terms and conditions mentioned in the Registration Booklet read with demand/allotment letter?
 - 9.1 We now examine the relevant Clauses of the Registration Booklet placed by the learned counsel for the appellant/promoter and the conditions of the allotment/demand letter dated 30.08.2013 and the Sale Deed, which are extracted

form the record of instant appeal, which are extracted from the record of instant appeal.

Approximate English version of Clauses 3.1 (a) 5.6 and 10.1 of the Registration Booklet are as follows:-

Clause 3.1 (a) “The said mentioned price is estimated price. It is proposed to construct the flats within 24 months. Final price will be payable on completion of the Project after actual costing.....”

Clause 5.6 “Due to delay in construction of flats if the Promoter is not able to handover the possession even after 6 months of payment of last installment then the money of the allottee will be returned with an interest of savings bank account of a Nationalised Bank.”

Clause 10.1 “It is proposed to handover physical possession of the flat within a period of 24 months from the date of issue of demand letter.”

We also examined the relevant para of the sale deed, Clause 6(a) of which reads as under:-

Clause 6(a) “The property has been handed over in its present state to the willing buyer and the willing buyer will not have any complaint or objection or claim on any account in future.”

It is our opinion that the construction of the flat is completed with a view to hand over the same to the allottees/buyers. It is possible that giving possession of the flat may get delayed by 1 month or so after the completion of the construction. The “proposed” date for completion of construction or for handing over physical possession may not be a firm date, but definitely it is a promised date for completion of the construction and consequent handing over of the possession, as far as an allottee/buyer is concerned. Moreover any allottee/home buyer cannot be made to wait indefinitely in the garb of “proposed” date of completion, and the stand of the appellant/promoter is contrary to the dictum of Hon'ble Supreme Court in the case of *M/s. Fortune Infrastructure Vs. Trevor Dlima & Ors* and *Kolkata West International City Pvt. Ltd. Vs. Devashish*

Rudra. It is therefore concluded that the flats in question were to be handed over in about 2 years time.

Evidently, Clause 5.6 of the Registration Booklet and Clause 6(a) of the Sale Deed are heavily loaded in favour of the appellant/promoter.

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

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

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

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

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

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

provided for 6% interest. The Hon'ble Supreme Court observed that:-

“6.7. A term of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder. The contractual terms of the Agreement dated 08.05.2012 are ex-facie one-sided, unfair, and unreasonable. The incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice as per Section 2 (r) of the Consumer Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling the flats by the Builder.

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

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

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

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

“30. In Grocier New Webster's Dictionary (page 304) "Policy" has been defined as a selected, planned line of conduct in the light of which individual decisions are made and coordination achieved. In Legal Glossary (1993, page 250) "policy" means a course of action adopted as advantageous or expedient. According to the Oxford Dictionary the word "Policy" means political sagacity, State-craft, prudent conduct, sagacity, craftiness, 'course of action adopted by Government'. According to Webster's New International Dictionary "policy" means a settled or definite course or method adopted and followed by a Government, institution, body or individual; a civil or ecclesiastical policy; Government; the science of Government.

31. In Law Lexicon with Legal Maxims it has been mentioned that the general head of "public policy" covers a wide range of topics, such as for example, trading with the enemy in time of war, stifling prosecutions, chaperty and maintenance, and various other mater's; it has even been said in the House of Lords that public policy is always an unsafe and treacherous ground for legal decision. In Black's Law Dictionary "Public Policy" mean

community common sense and common conscience, extended and applied throughout the State to matters of public morals, health, safety, welfare, and the like; it is that general and well settled public opinion relating to man's plan, palpable duty to his fellowmen, having due regard to all circumstances of each particular relation and situation. In Words and Phrases (West Publishing Co.) the word "public policy" generally means that imports something that is uncertain and fluctuating, varying with the changing economic needs, social customs and moral aspiration of the people. Lord Wright in his Legal Essays and Addresses (Vol. III, pages 76 and 78) stated that public policy like any other branch of the common law ought to be and I think is, governed by the judicial use of precedents..... If it is said that rules of public policy have to be moulded to suit new conditions of a changing world, that is true, but the same is true with the principles of the canon law generally; Lord Lindley held in Janson v. Driefontein Consolidated Mines Ltd. that "a contract or other branch which is against public policy i.e. against the general interest of the country is illegal."

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

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

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

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

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

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

- 9.10 Thus, where the terms of a contract show that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder, then certainly the contractual terms of the Agreement are one sided, unfair and unreasonable. It would also be referred as an unconscionable bargain. An unconscionable bargain would be one which is irreconcilable

with what is right or reasonable or the terms of which are so unfair and unreasonable that they shock conscience of the Court.

- 9.11 Now again the question is that under which head an unconscionable bargain would fall? If it falls under the head of undue influence, it would be voidable but if it falls under the head of being opposed to public policy, it would be void. The word "unconscionable" is defined in the *Shorter Oxford English Dictionary*, 3rd Edn., Vol. II, p. 2288, when used with reference to actions etc, as "*showing no regard for conscience; irreconcilable with what is right or reasonable*".
- 9.12 The Hon'ble Supreme Court in the case of ***DLF Universal Ltd. Vs. Town & Country Planning Deptt.*** reported in (2010) 14 SCC was pleased to quote in the heading "**Interpretation of contract**" as follows:-

"Interpretation of contract

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

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

a basic principle of the Common Law of Contract is that the parties are free to determine for themselves what primary obligations they

will accept....Today, the position is seen in a different light. Freedom of contract is generally regarded as a reasonable, social, ideal only to the extent that equality of bargaining power between the contracting parties can be assumed and no injury is done to the interests of the community at large.

15. The Court assumes:

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

- 9.13 An examination of Section 71 of the Act reveals that an A.O. is to be appointed by the Regulatory Authority in consultation with the Government. The A.O. alone has powers to deal with the applications for adjudging compensation under Section 71 read with Sections 12, 14, 18 & 19 of the Act. Section 71(3) further provides that the A.O. has powers to decide compensation or interest “as he thinks fit” in accordance with the provisions of Section 12, 14, 18 & 19 of the Act.
- 9.14 It is evident from Clause 5.6 of Registration Booklet and Clause 6(a) of Sale Deed that they do not provide a level playing field between the appellant/promoter and the allottee/respondent. We feel that this imbalance is on account of the fact that the buyer/allottee has much less bargaining power as compared to the promoter, and since the buyer/allottee had no choice but to accept such “dotted line, one sided, unjust and unreasonable” terms and conditions of the Registration Booklet, and of the allotment/demand letter, as framed by the appellant/promoter. Such terms and conditions which are one-sided, unjust and unreasonable cannot be made binding on the allottee/respondent.

9.15 In the light of above, we also observe that the appellant in the present case is an undertaking of the State Government having wide powers for acquisition of land and for development of residential projects. The rules, terms & conditions provided in the Registration Booklet, and Sale Deed are heavily loaded in favour of the promoter (i.e. appellant) and the buyer (respondents) are at an obvious disadvantaged position and have no real choice but to agree to the rules, terms & conditions of the Registration Booklet and of the Sale Deed in order to buy a residential flat of their dreams, using their hard earned savings. Such terms and conditions of agreement, called by any name whatsoever, fall in the category of "dotted line" agreements or "one sided, unfair and unreasonable" agreements. Further, the Hon'ble Apex Court in several cases was pleased to observe that an unreasonable, unfair contract or an unreasonable and unfair clause in a contract where Contracting Parties are not equal in bargaining powers and where a man has no choice or rather a meaningful choice but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form as a part of the contract, cannot be allowed to act disadvantageously to the interest of the allottee/home buyer.

9.16 We thus while rejecting the argument of the appellant that Adjudicating Officer's order is not sustainable on the ground that it has ordered the appellant to pay to the respondent an interest in the form of compensation and hold that A. O. is required to examine a complaint as per the provisions of the Act, Rules and Regulations and not merely on the basis of the terms and conditions of the Registration Booklet or as provided in the Demand/Allotment Letter only, taking into consideration the observations of **Hon'ble Supreme Court in Civil Appeal No.(s). 6745-6749 of 2021 (M/s Newtech Promoters & Developers Pvt. Ltd. Vs. State of U.P. & others) dated 11.11.2021** regarding terms of the contract to the effect that

promoter cannot shirk from the responsibilities/liabilities under the Act and the Contractual terms do not have an overriding effect to the retrospective applicability of the authority under the provisions of the Act. Question no. (i) is accordingly answered against the appellant/promoter.

10. The question no. (ii) is regarding determination as to whether there was a delay in handing over of the possession of the unit in question to the allottee.

10.1 The complainant (respondent) filed online complaint no. ADJ/LKO162/12/0045/2019, on 02.12.2019 before the AO seeking direction to the appellant for delay penalty and replacement of construction material on the ground of poor quality material. The A.O., in his order dated 18.12.2020 has directed the appellant/promoter to pay an interest at the rate of MCLR+ 1 percent per annum on the cost of the flat i.e. Rs. 20.88 lac for the delay period i.e. from 30.08.2015 to 21.07.2017 as compensation.

10.2 Learned counsel for the appellant has submitted that no time was stipulated for delivery of the flat. Further it is submitted that once the sale deed was executed, the prior contract of 2013 in the nature of brochure had come to an end and there was no privity of contract existing between both parties at the time of filing the complaint. Further once the allottee had taken possession with open eyes and without any pre-condition, he ceased to be a consumer.

10.3 In terms of Clause 3.1(a) of the Registration Booklet, the construction was “proposed” to be completed within 24 months. Obviously, the possession of the flat in question ought to have been given soon thereafter, within a reasonable time, say in 1 month or so required for final finishing. Although the period specified as 24 months is only an estimated time and there will always be some variation in the actual time, but an

allottee cannot be made to wait indefinitely for handing over of the possession merely on the ground that the time specified is an estimated period. Clause 10.1 of the Registration Booklet clearly mentions that physical possession of the flat is proposed to be given in 24 months from date of demand letter. Accordingly, we are of the view that the possession ought to have been given within 24 months + a month or so required for final finishing.

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

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

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

"..... it would be unreasonable to require a buyer to wait indefinitely for the possession"

- 10.6 It is an accepted fact that the possession of the flat in question was handed over to the allottee (respondent) on 05.06.2018 after execution of the sale deed in favour of the allottee on 08.03.2018. It is also evident from the aforesaid facts that the appellant/promoter has failed in handing over of the possession to the allottee/respondent within the stipulated time i.e. by

30.08.2015 and there has been a delay of about 2 years and 2 months. Moreover, the possession has been handed over before issuance of CC, which was issued by the competent authority of the U.P. Awas Evam Vikas Parishad on 15.12.2018.

- 10.7 It is evident from the pleadings of the appellant/promoter and the order of the AO that the respondent had applied for a 2BHK Flat in the Project Neelgiri Enclave at Vrindavan Yojna, Lucknow and was allotted Unit No. 17-AH/04/T-15 at a total consideration of Rs. 20,88,000/= on 30.08.2013, and the sale consideration of the unit was paid to the appellant/promoter by the specified time. The project was not completed in all respects within 24 months from date of demand letter in terms of Clause 3.1(a) and possession not given in terms of Clause 10.1 of Registration Booklet. Since the possession was not handed over within two years, as promised, and the physical possession of the unit was given to the allottee on 05.06.2018 without OC/CC, the allottee made complaint for compensation to the A.O. and the same was decided by the A.O. on 18.12.2020, directing the appellant/promoter to pay compensation in the form of interest at the rate of MCLR+ 1 percent per annum on the original cost of the flat for the delayed period i.e. from 30.08.2015 to 21.07.2017.
- 10.8 It is evident from the facts mentioned earlier that there has been a delay of about two years and four months in handing over the possession despite the allottee/respondent having made payments on time. The A.O. in his order dated 18.12.2020 has dealt with the delay part in detail and held the appellant/promoter squarely responsible for it but awarded compensation only up to the date of offer of possession raising various demand/amount under different heads vide letter dated 21.07.2017, without receipt of the OC/CC from the competent authority and also executed sale deed on 08.03.2018, thereafter issued possession letter on 09.04.2018 followed by physical possession 05.06.2018, whereas OC/CC was issued to the

appellant on 15.12.2018. It is our considered view that the compensation ought to have been awarded by the A.O. till the physical possession in the absence of OC/CC, but since the respondent has not challenged the period of delay, we are refraining ourselves from examining this issue of delay period in depth.

10.9 From the above facts and analysis, we find that the delay of about 1 year and 11 months in offering the possession is solely on account of the appellant/promoter. Question no. (ii) is answered accordingly.

11. Question no. (iii) is regarding entitlement of the allottee for claiming compensation/interest for the delayed possession, even if the allottee has already taken possession of the flat and Sale Deed executed after allottee agreed to pay the final cost of the flat.

11.1 A perusal of the complaint dated 02.12.2019 made by the respondent before the AO indicates that the respondent had asked for direction to the appellant for delay penalty and replacement of construction material on the ground of poor quality material; mentioning therein that there has been a delay of about two years in completion of the project.

11.2 As per record, the conveyance deed was executed by the appellant/promoter in favour of the respondent on 08.03.2018 and physical possession of the flat was given to the respondent on 05.06.2018, whereas as per the Registration Booklet of the appellant, the possession of the unit/apartment/flat was to be given to the respondent within 24 months from the date of allotment.

11.3 The issue regarding claim for compensation of an allottee for delay in handing over possession of the Unit/Apartment/Flat against promoter/builder after taking over possession, is no more res integra. The Hon'ble Supreme Court in the case of

Wg. Cdr. Arifur Rahman Khan and Aleya Sultan and others Versus DLF Southern Homes Pvt. Ltd. (now known as BEGUR OMR Homes Pvt. Ltd. and others, (reported in SCC online SC 667) while examining the issue whether a flat buyer who seeks to espouse a claim against the developer for delayed possession can as a consequence of doing so be compelled to defer the right to obtain a conveyance to perfect their title, was pleased to observe that it would be manifestly unreasonable to expect that in order to pursue a claim for compensation for delayed handing over of possession, the purchaser must indefinitely defer obtaining a conveyance of the premises purchased or, if they seek to obtain a Deed of Conveyance to forsake the right to claim compensation. Paras 34, 35 and 36 of the aforesaid judgment read as under:-

“34. The developer has not disputed these communications. Though these are four communications issued by the developer, the appellants submitted that they are not isolated aberrations but fit into a pattern. The developer does not state that it was willing to offer the flat purchasers possession of their flats and the right to execute conveyance of the flats while reserving their claim for compensation for delay. On the contrary, the tenor of the communications indicates that while executing the Deeds of Conveyance, the flat buyers were informed that no form of protest or reservation would be acceptable. The flat buyers were essentially presented with an unfair choice of either retaining their right to pursue their claims (in which event they would not get possession or title in the meantime) or to forsake the claims in order to perfect their title to the flats for which they had paid valuable consideration. In this backdrop, the simple question which we need to address is whether a flat buyer who seeks to espouse a claim against the developer for delayed possession can as a consequence of doing so be compelled to defer the right to obtain a conveyance to perfect their title. It would, in our view, be manifestly unreasonable to expect that in order to pursue a claim for compensation for delayed handing over of possession, the purchaser must indefinitely defer obtaining a conveyance of the premises purchased or, if they seek to obtain a Deed of Conveyance to forsake the right to claim compensation. This basically is a position

which the NCDRC has espoused. We cannot countenance that view.

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

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

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

defect in such service would make it accountable before the competent Consumer Forum at the instance of consumers like the respondents.”

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

11.4 In view of the aforesaid judgment it can safely be said that a home buyer does not lose his/her right to claim compensation for the delay in possession even after execution of the conveyance deed and taking possession of the Unit/Apartment/Flat booked by him. The question no. (iii) is answered accordingly.

12. The question no. iv is as to whether there is any illegality or perversity in the impugned order dated 16.07.2021 of the Adjudicating Officer in granting interest as compensation to the respondent for delay in providing possession of the flat by the appellant?

12.1 On examination of the scheme of the Act it is evident that jurisdiction of the Adjudicating Officer is to adjudge compensation under Sections 12,14,18 and 19 in accordance with the procedure laid down in Sections 71 and 72 of the Act. The powers, roles, domain and jurisdiction of the Adjudicating Officer has been clearly defined under the scheme of the Act. On thorough examination we found that ‘compensation’ has not been defined under the Act, 2016. However, ‘compensation’ has been defined in some other statutes like Workman Compensation Act and Land Acquisition Act. To settle the claim under the Motor Vehicle Act, the term ‘compensation’ is being used invariably and compensation is

awarded accordingly. Compensation can be granted under the heads pecuniary and non-pecuniary losses. In the case of ***Mr. R.D. Hattangadi Vs. M/S Pest Control (India) Pvt. Ltd., AIR 1995 Supreme Court, page 755***, the Hon'ble Supreme Court was pleased to observe as under:-

“ Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated in terms of money-, whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may, include expenses incurred by the claimant : (i) medical attendance; (ii) loss of earning of profit upto the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters i.e. on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e. on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.”

12.2 The Hon'ble Supreme Court while examining the issue of entitlement to compensation in ***H.U.D.A. and another versus Shakuntla Devi, (2017) 2 SCC 301*** made some essential observations which are also rudimentary for awarding compensation and quantum of compensation in consumer protection cases concerning real estate matters. The observations of Hon'ble Supreme Court are summarized as under:--

- (a) that the sine qua non for entitlement of compensation is proof of loss or injury suffered by the consumer due to the negligence of the opposite party. Once the said conditions are

satisfied, the consumer forum would have to decide the quantum of compensation to which consumer is entitled.

- (b) that there cannot be any dispute that the computation of compensation has to be fair, reasonable and commensurate to the loss or injury. There is a duty cast on the consumer forum to take into account all the relevant factors for arriving at the compensation to be paid.
- (c) the calculation of damages depends on the facts and circumstances of each case. No hard and fast rule can be laid down for universal application.
- (d) that while awarding of compensation, a consumer forum has to take into account all the relevant factors and assess compensation on the basis of accepted legal principles, on moderation. It is for the consumer forum to grant compensation to the extent it finds it reasonable, fair and proper in the facts and circumstances of a given case according to the established judicial standards where the claimant is able to establish his charge.
- (e) that compensation cannot be uniform and can best be illustrated by considering cases where possession is being directed to be delivered and cases where only monies are directed to be returned. In cases where possession is being directed to be delivered the compensation for harassment will necessarily have to be less because in a way, that party is being compensated by increase in the value of the property, he is getting.
- (f) that in cases where the consumer forum has directed delivery of possession, the party has to a certain extent already got a benefit. The cost of the land/flat would have come up in the meantime. Of course, even in such cases, where the delivery of possession has been directed there could be compensation for harassment/loss. But such compensation has to be worked out

after looking to the facts of each case and after determining the amount of harassment/loss that has been caused to the consumer.

- 12.3 The Hon'ble Supreme Court in the case of ***Bangalore Development Authority versus Syndicate Bank (2007)6 SCC 711*** in the matter of self financing scheme while laying down principles for delay in the delivery of possession was pleased to observe that if some statute steps in and creates any statutory obligation on the part of development authority in the contractual field, the matter will be governed by the provisions of that statute. The relevant portions of paras 10, 10(a) and 10(b) are being extracted hereinbelow: –

“10. Where a Development Authority forms layouts and allots plots/flats (or houses) by inviting applications, the following general principles regulate the granting of relief to a consumer (applicant for allotment) who complains of delay in delivery or non-delivery and seeks redressal under the [Consumer Protection Act, 1986](#) ('Act' for short) - [vide : [Lucknow Development Authority vs. M. K. Gupta](#) - 1994 (1) SCC 243, [Ghaziabad Development Authority vs. Balbir Singh](#) - 2004 (5) SCC 65, and [Haryana Development Authority vs. Darsh Kumar](#) - 2005 (9) SCC 449, as also [Ghaziabad Development Authority vs. Union of India](#) - 2000 (6) SCC 113]:

(a) Where the development authority having received the full price, does not deliver possession of the allotted plot/flat/house within the time stipulated or within a reasonable time, or where the allotment is cancelled or possession is refused without any justifiable cause, the allottee is entitled for refund of the amount paid, with reasonable interest thereon from the date of payment to date of refund. In addition, the allottee may also be entitled to compensation, as may be decided with reference to the facts of each case.

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

.....”

- 12.4 Subsequently, the Hon’ble Supreme Court in **Civil Appeal No. 6051/2002 (Ghaziabad Development Authority Vs. Shakuntala Rohatgi)**, decided on 04.03.2009, placed reliance on the case of **Bangalore development authority versus syndicate Bank** (supra).
- 12.5 After promulgation of the Act of 2016, the issues of interest or compensation for not providing the possession in terms of the provisions of the agreement and/or refund are required to be examined and decided as per the provisions of the Act of 2016. Further, the provisions of the Act have also been upheld by the of **Hon’ble Bombay High Court in Neelkamal Realtors Suburban Pvt. Ltd. Vs. Union of India (2018) 1 AIR Bom R 558** and subsequently by the **Hon'ble Supreme Court in Civil Appeal No.(s). 6745-6749 of 2021 (M/s Newtech Promoters & Developers Pvt. Ltd. Vs. State of U.P. & others)** decided on 11.11.2021.
- 12.6 The word “fail to comply with the provisions of any of the sections as specified in sub section (1)” used in Sub-Section (3) of Section 71, means failure of the promoter to comply with the requirements mentioned in sections 12, 14, 18 and 19. The Adjudicating Officer after holding enquiry while

adjudging the quantum of compensation or interest as the case may be, shall have due regard to the factors mentioned in Section 72. The compensation may be adjudged either as a quantitative or as compensatory interest.

12.7 The Adjudicating Officer, thus, has been conferred with power to direct for making payment of compensation or interest, as the case may be, “as he thinks fit” in accordance with the provisions of Sections 12,14,18 and 19 of the Act after taking into consideration the factors enumerated in Section 72 of the Act.

12.8 On examination of the pleadings on record and submissions it is admitted position that the project of the appellant is delayed. The offer of possession was given to the allottee in 2017 with delay of about 1 years and 11 months and the Adjudicating Officer while examining the claim of the respondent for compensation, in his wisdom, granted interest for the delay period at the rate of MCLR+1%. Since the delay in delivery of possession of the allotted unit is admitted, even if the allottee/respondent fails to give any evidence towards the losses suffered, the allottee/respondent is at least entitled for interest for the delay period and the award of interest at the rate of MCLR+1% by the Adjudicating Officer, in our considered view, is just, fair and equitable.

12.9 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.”

- 12.10 On due consideration, we do not find any illegality or perversity in the impugned order dated 18.12.2020 passed by the Adjudicating Officer of the Regulatory Authority awarding interest as compensation to the respondent for delay in possession of the flat by the appellant. **Issue no. (iv)** is answered accordingly.
13. In view of the preceding observations as well as examining the material on record, grounds of appeal pressed on behalf of the appellant in detail, we do not find any force in the grounds of appeal pressed by the learned counsel for the appellant/promoter. There is no illegality, infirmity or perversity in the order passed by the Adjudicating Officer, and the same do not warrant any interference by the Tribunal. Accordingly, while upholding the orders of the A.O., **we dismiss Appeal No. 306/2021.**
14. 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 the present appeals.
- 14.1 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.

- 14.2 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.

14.3 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.

14.4 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.

- 14.5 In the instant case, this Tribunal while upholding the order of Adjudicating Officer dated 18.12.2020 has **dismissed** the appeal. 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 Adjudicating Officer to dispose of this amount, during the execution proceedings in accordance with its orders dated 18.12.2020 passed in Complaint No. ADJ/LKO162/12/0045/2019.

15. No order as to costs.

Dated: 08.09.2022

GauravSri/-

(K.K. Jain)

(D. K. Arora)