RESERVED JUDGMENT

BENCH-1

THE UTTAR PRADESH REAL ESTATE APPELLATE TRIBUNAL, AT LUCKNOW.

APPEAL NO. 119/2022

U.P. Avas Evam Vikas Parishad …………Appellant.

Versus

Surendra Kumar Dubey ………Respondent.

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

1. The present appeal has been preferred by U.P. Avas Evam Vikas Parishad (hereinafter referred to as the 'appellant') under Section 44 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the 'Act, 2016') against the order dated 22.12.2021 passed by the U.P. Real Estate Regulatory Authority, Lucknow (hereinafter referred to as the 'Regulatory Authority') in Complaint No. LKO162/06/75155/2021 (Surendra Kumar Dubey Vs. U.P. Avas Evam Vikas Parishad, Lucknow) whereby the following directions were given:--

   (1) The appellant/promoter was directed to ensure delivery of possession of the unit to the complainant within 45 days from the date of uploading of the order on the portal, after taking stamp fee and executing the sale deed as per rules.

   (2) The appellant/promoter shall ensure payment of delay interest to the complainant at the rate of State Bank of India's MCLR+1% for the delay period from 27.01.2019 till issuance of allotment letter dated 22.03.2021. The amount of interest shall be adjusted towards final payment. If the amount of interest exceeds the amount due then the excess amount shall be returned to the complainant. Keeping in view the force majeure the delay interest shall not be calculated from 25.03.2020 to 25.09.2020.

(3) The appellant/promoter is directed that if any rate of interest is charged by the promoter for default of the allottee as per Section 2(za)(i) after coming into force of the Act 2016 then as per the provisions of Section 2(za) (i) same rate of interest shall be paid to the allottee for default of the promoter. Therefore, the complainant shall also pay delay interest at the rate of MCLR+1%. If any higher amount has been taken from the allottee for the delay then interest for the delay period shall be calculated at the same rate.

2. The facts of the case, in brief, as culled out from the memo of appeal, are that in Samajwadi Housing Scheme-2015, Avadh Vihar Yojna of the appellant, situate at Gomti Enclave, Lucknow, registration for allotment of flat had been opened and Registration Booklet had been issued.

2.1 Clause 1 of the Registration Booklet provides that the cost mentioned in the registration booklet is the estimated cost and the proposed period of completion of construction is 36 months. Further, on completion of construction of the flat and after final costing, the final cost would be payable.

2.2 Clause 3 of the Registration Booklet provides that location charges would be payable by the allottees of 1^{st} to 3^{rd} floor. Clause 4 provides that car parking charges would be payable. Clause 4.4 provides for refund of registration amount on submission of refund voucher before the eligibility draw. Clause 4.5 provides for refund without interest after deduction of 20% of registration amount upto 3 months and 50% deduction after 3 months of issue of demand letter. Clause 4.6 provides that due to delay if the appellant could not allot the flat upto or after six months of payment of last installment, on the demand of the allottee the amount would be refunded along with interest at the rate payable on the saving account by the Nationalized Bank or at the rate prescribed by the Parishad.

2.3 Clause 9.1 of the Registration Booklet provides that 30 months' proposed period of completion of the flat from the date of issuance of demand letter. Clause 9.2 provides that the delivery of possession would be made after full payment of the cost of the flat payable after final costing and after execution of sale deed in favour of the allottee.

2.4 After accepting the terms and conditions of the Registration Booklet the respondent had applied for allotment of 2 BHK type-A flat by depositing the registration amount of Rs.47,000/-. Thereafter in the eligibility draw the respondent had been declared successful for allotment of 2 BHK type-A flat. Thereafter, on the basis of estimated cost of Rs.23,25,000/-, the demand letter dated 27.01.2016 had been issued to the respondent. As per demand letter dated 27.01.2016 an amount of Rs.1,16,000/- of the estimated cost was to be paid within 30 days from the date of issue of the demand letter and thereafter 36 installments of Rs.21,830/- each were to be paid w.e.f. 01.03.2016. Thereafter, at the time of issue of allotment letter/physical possession the amount of Rs.3,49,000/- was to be paid. Thereafter 84 monthly installments of Rs.23,050/- each were to be paid w.e.f. 01.03.2019. In the demand letter dated 27.01.2016 it was specifically mentioned that if the amount is not paid within the stipulated period then 13.5% additional interest would be payable for the delayed period. The respondent had not deposited the installments of estimated cost within the stipulated period and as such the additional interest had been charged from the respondent.

2.5 After final costing of the project, the final allotment letter dated 22.03.2021 had been issued to the respondent. By the said allotment letter dated 22.03.2021, flat no. 8/C2-908/Gomti (2-A) had been allotted to the respondent. In the allotment letter dated 22.03.2021 the construction cost of the flat has been shown as Rs.21,29,386/-, land cost Rs.3,71,334/-, free hold charges Rs.44,600/-, total cost of the flat as Rs.25,45,320/-. In the final allotment letter dated 22.03.2021, after adjusting the amount of Rs.25,29,529/- deposited by the respondent in installments, the balance amount of Rs.2,33,241/- was shown due which the respondent was directed to deposit as balance cost of the flat and also to deposit the miscellaneous charges mentioned in the allotment letter dated 22.03.2021, and complete the formalities for execution of sale deed and take possession up to 30.04.2021 failing which additional interest at the rate of 13.5% would be payable on the balance cost of the flat and Rs.75/- per day would be payable for delay in taking possession.

2.6 The respondent neither deposited the balance cost of the flat nor deposited the miscellaneous charges, nor completed the formalities for execution of sale deed, nor took possession of the flat within the stipulated period.

2.7 In the meantime, after enforcement of the Act 2016, the project of the appellant had been registered by the Real Estate Regulatory Authority in which the period of completion of the project had been provided by the RERA upto 28.02.2020. During the period provided by the RERA for completion of the project, the project had been completed and Completion Certificate dated 20.08.2020 had been issued by the competent authority.

2.8 In order to save himself from the liability of payment of additional interest and delayed charges due to non payment of balance cost of the flat and miscellaneous charges and not taking possession of the flat within the stipulated period, the respondent filed Complaint No. LKO162/06/75155/2021 on 02.06.2021 before the Regulatory Authority seeking relief of possession and delay payment.

3. Though the appellant has challenged the impugned order dated 22.12.2021 passed by the Regulatory Authority on various grounds, but during the course of arguments on 04.08.2022 the learned counsel for the appellant placed reliance on grounds I, J, K & L which are as under:-

(I) Because the learned Authority had not considered the fact that clause 4.6 of Registration Booklet provides that due to delay if the appellant could not allot the flat upto or after six months of the last installment, on the demand of complaint, the amount would be refunded along with interest at the rate payable on the saving account by the Nationalized Bank or at the rate prescribed by the Parishad.

(J) Because Section 31(1) of the Act read with Section 33(1) of the Rules provide that any aggrieved person may file a complaint before the Regulatory Authority under the Act or the Rules and Regulations made thereunder, save as those provided to be adjudicated by the Adjudicating Officer, in form M and in the present matter the respondent had filed his complaint case in Form M under Section 31(1) of the Act read with Section 33(1) of the Rules seeking the relief of delay penalty and the matter was to be adjudicated by the Adjudicating Officer and the judgment and order passed by the Regulatory Authority is illegal, against the pleadings and prayer and is without jurisdiction.

(K) Because Section 71 of the Act read with Section 34(1) of the Rules provides that any aggrieved person may file a complaint in Form N before the Adjudicating Officer for compensation under Sections 12,14,18 and 19 and the Adjudicating Officer may decide the quantum of compensation by considering the factors mentioned in Section 72 of the Act and in the present matter the respondent had filed his complaint in Form M before the Regulatory Authority under Section 31(1) of the Act read with Section 33(1) of the Rules seeking the relief of delay penalty and as such the learned Authority has no jurisdiction to entertain and decide the complaint of respondent and the order passed by the Regulatory Authority is without jurisdiction.

(L) Because the learned Authority had erred in law in not holding that the Rera Authority had provided the period of completion of project to the appellant upto 28.02.2020 and the project had been completed by the appellant within the stipulated period as provided by the RERA Authority and the Completion Certificate had been issued o n 20.08.2020 by the competent authority and the respondent is not entitled to get the interest on the deposited amount after 20.08.2020 and as such the order dated 22.12.2021 is illegal and not sustainable in the eye of law.

4. The appellant has prayed for setting aside the judgment and order dated 22.12.2021 upto the extent of awarding MCLR+1% interest for the period from 27.01.2019 to 22.03.2021, passed by the learned Chairman, RERA Authority, in Complaint Case No. LKO162/06/75155/2021.

5. The respondent filed his objection to the memo of appeal and stated that there is no clause in the Registration Booklet regarding 13.5% additional interest for the delayed payments.

5.1 The respondent has paid all the dues along with additional interest, as per final allotment letter dated 22.03.2021 and got the sale deed registered in his name on 23.03.2022 and obtained physical possession certificate dated

28.03.2022 from the appellant, but the appellant did not adjust the amount of delay possession period in the final allotment letter dated 22.03.2021.

5.2 It is false to say that the project was completed within the stipulated time. The appellant mentioned the date of completion of the project in RERA registration as 28.02.2020, whereas the appellant has obtained the completion certificate of the project on 20.08.2020, after expiry of the period of completion which is against the provisions of U.P. Apartment Act 2010.

5.3 After obtaining the completion certificate, the appellant sent the final allotment letter dated 22.03.2021 with a delay of about 32 months from the due date of possession i.e. 27.07.2018 (30 months from the date of demand letter dated 27.01.2016). Therefore, the appellant cannot escape from the liability to pay delay interest to the respondent.

5.4 The intention of the respondent for filing the complaint before the Regulatory Authority is to get compensated for the delay in handing over possession of the allotted unit. Sections 18(1) and 19(4) of the Act 2016 provide for claiming the delay interest for the delay in handing over possession of the apartment/unit.

5.5 It is evident from perusal of Registration Booklet that the proposed period for completion of the project was only 30 months. The period of 30 months expired on 27.07.2018 since the date of demand letter dated 27.01.2016, but the appellant failed to complete the project within the proposed period, as per Clause 9.1 of the Registration Booklet.

5.6 The provisions of the Act 2016 and Rules 2016 override all terms and conditions of the Registration Booklet when the project was registered with the RERA. Therefore, as per Section 18(1) of the Act, the appellant is bound to pay delay interest to the respondent for the period considered by the Regulatory Authority in its order dated 22.12.2021. There is no illegality or perversity in the impugned order dated 22.12.2021 passed by the Regulatory Authority. The appeal is liable to be dismissed with cost.

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

6.1 In para 5.3 of the Registration Booklet it has been specifically mentioned that if the amount mentioned in the demand letter is not deposited within the stipulated period, 13.5% additional interest would be payable for the delay period. The respondent has not deposited the installments of estimated cost within the stipulated period and as such the additional interest has been correctly charged from the respondent.

6.2 After passing the order dated 22.12.2021 by the Regulatory Authority, the appellant issued a letter dated 12.01.2022 to the respondent mentioning therein the details of the balance cost of the flat and miscellaneous charges and stamp duty and directing him to deposit the balance cost of the flat and miscellaneous charges and complete the formalities for execution of sale deed and, thereafter, the respondent deposited the balance cost of the flat and miscellaneous charges and completed the formalities for execution of sale deed and got the sale deed executed in his favour on 22.03.2022 and took physical possession of the flat on 28.03.2022, as such it is clear that the respondent himself made delay in taking possession of the flat.

6.3 Clauses 1 and 9.1 of Registration Booklet do not provide the period of 30 months for delivery of possession of the flat.

6.4 The Regulatory Authority has not decided the actual controversy as to whether the appellant deliberately delayed the project and utilized the money deposited by the respondent and whether the respondent has suffered loss due to alleged delay of project and whether the respondent is not compensated due to increase in the value of property.

6.5 The order under challenge is arbitrary, illegal, unjust and without jurisdiction in as much as the Regulatory Authority does not have the power to pass the order for interest and compensation.

7. Heard Sri N. N. Pandey, learned counsel for the appellant and Sri Jayant Gupta, learned counsel for the respondent.

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

(1) Whether under the scheme of the Act 2016 and Rules 2016 any mechanism has been provided for determination of the interest or the compensation for delay in handing over possession of the flat/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 the Regulatory Authority ought to have examined the complaint of the respondent only on the basis of agreed terms and conditions mentioned in the Registration Booklet read with allotment letter?

(3) Whether date of completion/handing over of possession of the allotted/booked unit is to be as per the Registration Booklet/allotment letter/Buyer Builder Agreement or the date of completion mentioned by the promoter while registering the project with UPRERA?

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

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

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

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

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

9.3 Section 18 of the Act talks of the consequence of the failure by the promoter to complete or to be unable to give possession of an apartment, plot or building either in terms of the agreement for sale or failure to complete the project by the date specified therein or on account of discontinuance of his business either on account of suspension or revocation of the registration under the Act or for any other reason. In the event of either of the above contingencies under Section 18 (1) (a) of the Act, the promoter is made liable on the demand of the allottee:

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

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

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

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

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

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

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

Extract of Section 31 of the Act

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

Explanation

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

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

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

Extract of Rule 33(1) of Rules-

(1) Any aggrieved person may file a complaint with the regulatory authority for any violation under the Act or the rules and regulations, made there under, save as those provided to be adjudicated by the adjudicating officer, in Form M which shall be accompanied by a fee of rupees one thousand in the form of a demand draft drawn on a nationalized bank, in favour of regulatory authority and payable at the main branch of that bank at the station, where the seat of the said regulatory authority is situated.

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

5 of the Form M specifically requires a complainant to indicate the relief(s) sought.

9.9 We have examined Rule 34(1) of the Rules which relate to filing of a complaint with the Adjudicating Officer for compensation. Rule 34(1) reads as follows :-

Extract of Rule 34(1)

(1) Any aggrieved person may file a complaint with the adjudicating officer for compensation under Section 12, 14, 18 and 19 in Form N, which shall be accompanied by a fee of rupees one thousand in the form of a demand draft drawn on a nationalized bank in favour of regulatory authority and payable at the main branch of that bank at the station, where the seat of the said regulatory authority is situated.

9.10 It is clear from Rule 34 (1) of the Rules that a complaint for "compensation" under Sections 12, 14, 18 and 19 of the Act is to be filed before the Adjudicating Officer in Form N. It is mentioned on top of Form N itself that it is an application to Adjudicating Officer for claim of compensation under Rule 34(1) of the Rules and under Section 31 of the Act read with Section 71 of the Act. A complainant is required to indicate in Column 5 of Form N, the compensation sought.

9.11 Thus, it is our considered view that Form N is to be filed before an "Adjudicating Officer" for only claiming "compensation" under Rule 34(1); whereas Form M is to be filed before the Regulatory Authority under Rule 33(1) of the Rules for all types of reliefs, barring "compensation", for any violation under the Act, Rules or Regulations.

9.12 We have also examined the provisions of Sections 71 and 72 of the Act. The opening words of Section 71 (1) of the Act make it clear that the scope and functions of the Adjudicating Officer (AO) are only for ‘adjudging compensation under Sections 12, 14, 18 and 19 of the Act’. If the legislative intent was to expand the scope of the powers of the AO, then the wording of Section 71 (1) ought to have been different. On the contrary, even the opening words of Section 71 (2) of the Act make it clear that an application before the AO is only for ‘adjudging compensation’. Even in Section 71 (3) of the Act, it is reiterated that the

AO may direct ‘to pay such compensation or interest as the case may be, as he thinks fit’ in accordance with provisions of Sections 12, 14, 18 and 19 of the Act. This has to be seen together with the opening words of Section 72 of the Act, which read *“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,…………….”*

On a collective reading of Sections 71 and 72 of the Act, the legislative intent becomes explicit. This is to limit the scope of the adjudicatory powers of the AO for determining “compensation or interest as he thinks fit” in the event of violation of Sections 12, 14, 18 and 19 of the Act.

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

9.14 Further, the Hon’ble Bombay High Court in the case of ***Neelkamal Realtors Suburban Pvt. Ltd. And others Vs. Union of India,(2018) 1 Bom R 558*** observed as follows:-

> *"Section 18(1)(b) lays down that if the promoter fails to complete or is unable to give possession of an apartment due to discontinuance of his business as a developer on account of suspension or revocation of the registration under the Act or for any other reason, he is liable on demand to the allottees, in case the allottee wishes to*

> *withdraw from the project, without prejudice 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".*

The provisions of Act 2016 have further been examined and upheld 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. & Ors)*** decided on 11.11.2021.

9.15 From the aforementioned discussion, it is clear that the Act of 2016 provides a mechanism for determination of interest and/or compensation for the delay in handing over possession of the unit to the allottee, if the allottee wishes to stay with the project and/or refund with interest if allottee wants to withdraw from the Project. **Issue no. (1) is decided** accordingly.

10. **Issue no. (2)** is regarding whether the Regulatory Authority ought to have examined the complaint of the respondent only on the basis of agreed terms and conditions mentioned in the Registration Booklet read with allotment letter?

10.1 We now examine the relevant Clauses of the Registration Booklet and the conditions of the Allotment letter dated 22.03.2021.

Approximate English version of Clauses 4.5, 4.6, 4.7, 9.1 & 9.2 of the Registration Booklet is as follows:--

Clause 4.5 If an applicant applies to get his registration amount back within 3 months after the eligibility selection, then the balance amount will be returned to him without interest after deducting 20 percent of the registration amount. But if such an application is submitted after 3 months, the balance registration amount will be refunded without interest after deducting 50 percent of the registration amount, and the registration will be cancelled. The prescribed refund voucher and acknowledgment receipt will have to be submitted along with the application form to the concerned property management office to receive the registration amount. No claim will be accepted for reviving the registration so cancelled at a later stage.

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

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

Clause 9.1 The construction of the flats is proposed to be completed within a period of 30 months from the date of issue of demand letter.

Clause 9.2 The allottee is required to pay the price of the flat and all other dues including stamp duty before the registry/sale deed is executed in his favour. The physical possession of the unit will be handed over only after payment of stamp duty, registry charges and after execution of the conveyance deed.

The allotment letter dated 22.03.2021, states as follows:-

Terms and conditions– (7) If the payment as indicated in the allotment letter is not made by the prescribed date, then the installment amount due will be liable for payment of delay charges as per the rules of the Parishad along with additional interest @ 13.5% (11.50 + 2.00). If the requisite formalities are not completed within the prescribed period, then the delay penalty @ Rs. 75.00 per day will be payable till payment of amount.

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

> *"These ideas have to a large extent lost their appeal today. "Freedom of contract", it has been said, "is a reasonable social ideal only to the extent that equality of*

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

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

10.3 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………".

10.4 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."

10.5 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.

10.6 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.

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

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

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

10.8 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.*"

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

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

> *injurious or harmful to the public good or the public interest has varied from time to time."*

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

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

10.10 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.

10.11 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".*

10.12 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."*

10.13 The appellant/promoter has submitted that the impugned order dated 22.12.2021 is illegal, arbitrary and unjust in as much as the Regulatory Authority does not have the power to pass the order of interest at the rate of MCLR+1% on the deposited amount. The appellant has further submitted that clause 4.6 & clause 4.7 of the Registration Booklet provide that the amount deposited by the respondent would be refunded alongwith interest at the rate payable on the savings bank account of the

Nationalized Bank, if the appellant could not allot the flat after six months of the payment of last instalment, on demand of refund by the respondent.

10.14 The Hon'ble Supreme Court in Civil Appeal Nos. 1232 and 1443-1444 of 2019 ***(R. V. Prasannakumaar and Ors. Vs. Mantri Castles Pvt. Ltd. and Ors)*** decided on 11.02.2019, reported in MANU/SC/0235/2019, while examining the award of interest by the National Consumer Disputes Redressal Commission (NCDRC) for delay in giving possession by the Builder/Promoter to the allottee/home buyer, pleased to observe that the jurisdiction of the NCDRC to award just compensation under the provisions of the Consumer Protection Act, 1986 could not in the circumstances be constrained by the terms of the agreement if the agreement is one sided and does not provide sufficient recompense to the flat purchasers. The relevant paras 8 and 9 of the said judgment are reproduced below:-

> *"8. We will at the outset deal with the submission of the developer that the NCDRC was not justified in awarding interest at the rate of 6 per cent per annum and that the terms of the flat purchase agreements must prevail.*
>
> *9. We are in agreement with the view of the NCDRC that the rate which has been stipulated by the developer, of compensation at the rate of 3 per sq. ft. per month does not provide just or reasonable recompense to a flat buyer who has invested money and has not been handed over possession as on the stipulated date of 31 January 2014. To take a simple illustration, a flat buyer with an agreement of a flat admeasuring a 1000 sq.ft. would receive, under the agreement, not more than Rs.3000/- per month. This in a city such as Bangalore does not provide just or adequate compensation. The jurisdiction of the NCDRC to award just compensation under the provisions of the Consumer Protection Act, 1986 cannot in the circumstances be constrained by the terms of the agreement. The agreement in its view is one sided and does not provide sufficient recompense to the flat purchasers."*

10.15 In the light of above, we are of the view that the appellant in the present case is a corporation of the State Government having wide powers for acquisition of land and for development of residential projects. The rules, terms & conditions provided in the Registration Booklet and the Demand letter are heavily loaded in favour of the promoter (i.e. appellant) and the buyer (respondent) is in an obvious disadvantaged position and has no real choice, but to agree to the rules, terms & conditions of the Registration Booklet and of the Demand Letter in order to buy a residential flat of his dreams, using his hard earned savings. Such terms and conditions of agreement, called by any name whatsoever, fall in the category of "dotted line" agreements or "one sided, unfair and unreasonable" agreements, as observed by the Hon'ble Apex Court in several cases. We thus while rejecting the argument of the appellant that Regulatory Authority's order is not sustainable merely on the ground that it has ordered the appellant to pay to the respondent an interest which is higher in rate than what is provided in the Registration Booklet, 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, hold that the Regulatory Authority is required to examine a complaint as per the provisions of the Act, Rules and Regulations and not merely on the basis of the terms and conditions of the Registration Booklet or as provided in the Demand Letter only. **Issue no. (2)** is accordingly answered against the appellant/promoter.

11. Vide **Issue no. (3)** we are required to examine as to whether the date of completion/handing over of possession of the allotted/booked unit is to be as per the Registration Booklet/allotment letter/Buyer Builder Agreement or the date of completion mentioned by the promoter while registering the project with UPRERA.

11.1 The provisions of Section 18 of the Act 2016 very categorically provide that if the promoter fails to complete or is unable to give possession of an apartment, plot or building (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act, or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot or 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.

11.2 The issue was examined by Hon'ble Bombay High Court in ***Neelkamal Realtors Suburban Private Ltd. and another Vs. Union of India and others decided on 06.12.2017*** with regard to agreement entered into between the parties even prior to coming into force of the Act 2016 and the Hon'ble Bombay High Court was pleased to observe vide paras 119, 255 and 256 as follows:--

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter. The promoter would tender an application for registration with the necessary preparations and requirements in law. While the proposal is submitted, the promoter is supposed to be conscious of the consequences of getting the project registered under RERA. Having sufficient experience in the open market, the promoter is expected to have a fair assessment of the time required for completing the project. After completing all the formalities, the promoter submits an application for registration and prescribes a date of completion of project. It was submitted that interest be made payable from the date of registration of the project under RERA and not from the time-line consequent to execution of private agreement for sale entered between a promoter and a allottee. It was submitted that retrospective effect of law, having adverse effect on the contractual rights of the parties, is unwarranted, illegal and highly arbitrary in nature."*

> *"255. ……………………. The intention of RERA is to bring the complaints of allottees before one Authority and simplify the process. If the interpretation os-wp-2737-17 & ors-RERA-JT.doc suggested by the petitioners, namely, that the provision is applicable only after coming into force RERA is accepted, this would result in allottees having to approach different fora*

for interest prior to RERA and subsequent to RERA. In fact Section 71 of RERA provides that the cases pending before the Consumer Court can be transferred to Authority. Reference to pending cases is obviously a reference to claims for interest and / or compensation pending when the RERA came into force.

256. Section 4(2)(l)(C) enables the promoter to revise the date of completion of project and hand over possession. The provisions of RERA, however, do not rewrite the clause of completion or handing over possession in agreement for sale. Section 4(2)(l)(C) enables the promoter to give fresh time line independent of the time period stipulated in the agreements for sale entered into between him and the allottees so that he is not visited with penal consequences laid down under RERA. In other words, by giving opportunity to the promoter to prescribe fresh time line under Section 4(2)(l)(C) he is not absolved of the liability under the agreement for sale."

11.3 As the provisions of Section 4(2)(ℓ)(C)of the Act 2016 enables the promoter to give fresh time line for completion of the project independent of the time period stipulated in the agreement for sale entered into between the promoter and the allottee, he is not absolved of the liability under the agreement for sale as there is no provision which empowers the promoter to ask the Regulatory Authority to re-write the clauses of completion or handing over possession in the agreement for sale. **Issue no. (3)** is decided accordingly.

12. **Issue no. (4)** requires us to examine as to whether the project of the appellant/promoter is delayed?

12.1 The appellant launched Samajwadi Housing Scheme-2015, Avadh Vihar Yojna at Gomti Enclave, Lucknow. As per Clause-1 of the Registration Booklet, the cost mentioned in the booklet was the estimated cost and 36 months' period was mentioned as proposed period of completion of construction, whereas Clause 9.1 of the Registration Booklet provides 30 months' period for completion of the flat. In pursuance to the application of the respondent for 2 BHK Type-A Flat, a demand letter dated 27.01.2016 was issued by the appellant to the respondent. The Completion Certificate was issued by the competent authority to the appellant on 20.08.2022. After final costing of the flat, the final allotment letter dated

22.03.2021 was issued bearing number of the unit as Flat No. 8/C2-908/Gomti (2-A). The respondent was to complete formalities for execution of the sale-deed and taking possession upto 30.04.2021. The respondent paid all the dues along with additional interest as per final allotment letter dated 22.03.2021. The sale-deed was executed by the appellant in favour of the respondent on 23.03.2022.

12.2 From the perusal of the record, it is evident that appellant sent final allotment letter dated 22.03.2021 after obtaining the Completion Certificate with a delay of about 32 months from the date of possession i.e. 27.07.2018 (30 months from the date of demand letter dated 27.01.2016 as per clause 9.1 of the Registration Booklet).

12.3 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 D'lima & Ors (2018) 5SCC 442*** observed as follows –

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

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

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

12.5 We are of the considered view that appellant/promoter failed to give possession of the booked unit within the time prescribed in the Registration Booklet. There was delay of about 30 months on the part of the appellant in handing over possession of the flat in question to the respondent. Thus, we hold that the project of the appellant/promoter was delayed. The **issued no. (4) is decided** accordingly.

13. **Issue No. (5)** is that whether the respondent is entitled for interest and/or compensation on account of delayed possession under the scheme of the Act, 2016 and whether the rate of interest granted by the Regulatory Authority is in accordance with the provisions of the Act 2016, Rule 2016?

13.1 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.

13.2 The Hon'ble Bombay High Court in the case of ***Neelkamal Realtors Suburban Pvt. Ltd. And others Vs. Union of India (2018)1 Bom R 558*** observed 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 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.

13.3 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.

13.4 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).

13.5. 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 paras10, 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.

……………………………………………….”

13.6 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)***.

After promulgation of the Act 2016, the concerned issues relating to the Real Estate is to be examined and decided in pursuance to the provisions of the Act 2016. Further the provisions of Act 2016 has been examined and upheld by the ***Hon'ble Bombay high Court in Neelkamal Realtors Suburban Pvt. Ltd. Vs. Unionof jIndia (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. & Ors)*** decided on 11.11.2021.

13.7 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 as follows :-

<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.

<u>Rule 9.3</u>

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

<u>Rule 9.3(i)</u>

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.

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

13.9 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........."*

13.10 It is important to mention herein that the **Hon'ble Supreme Court** in ***Civil Appeal No. 4910-4941/2019 DLF Homes Panchkula Pvt. Ltd. Versus D. S. Dhanda etc. etc.*** while examining the issue of compensation, was pleased to observe as under;-

> *"If compensation comprises of two parts, (i) by way of interest on the deposited amount from the assured date (milestone date) of completing construction and handling over possession to the actual date of handling over possession, and, (ii) lumpsum amount, we find nothing wrong in it. We do not agree with the builder co.'s contentions that interest on the deposited amount should not be provided since it is not a case of refund but a case of delay in possession. The interest on the deposited amount has to be viewed in the light of the purpose for which it is intended. It is but a way of computing compensation for delay in possession that is commensurate with the amount deposited by the*

complainant, and here it has been computed after adopting a milestone date as per the builder co.'s own (unfair and deceptive) letter of 05.06.2013. There can be and is no question of not agreeing to an endorsing the award of interest from the said milestone date. Here we may however add that the rate of interest also cannot be arbitrary or whimsical, some reasonable and acceptable rationale has to be evident, subjectivity has to be minimized, a logical correlation has to be established. Albeit detailed arithmetic or algebra is not required. Logical (to the extent feasible) objective parameters should be adopted. Rounding off simplification etc. to make the computation doable could be adopted. We feel it appropriate that, considering that the subject units in question are dwelling units, in a residential housing project, the rate of interest for house building loan for the corresponding period in a scheduled nationalized bank (take, State Bank of India) would be appropriate and logical, and , if 'floating'/ varying/different rates of interest were/ are prescribed, the higher rate of interest should be taken for this instant computation."

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 interest at MCLR+1 percent will balance 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.

13.11 On the basis of aforesaid analysis the **issue no. (5) is decided** in affirmative in favour of respondent.

14. On the basis of aforesaid analysis, we do not find any force in the grounds of appeal as pressed by the learned counsel for the appellant. There is no illegality and perversity in the impugned order dated 22.12.2021 passed by the Regulatory Authority and the same does not warrant any interference by this Tribunal.

15. Accordingly, while upholding the impugned order of the Regulatory Authority dated 22.12.2021, **we dismiss the appeal.**

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 dated 22.12.2021, dismissed the appeal of the promoter, accordingly, we direct the Registry to transfer the entire amount deposited by the promoter under the provisions of Section 43(5) of the Act to the concerned account of the U.P. Real Estate Regulatory Authority (U.P. RERA). Further, we direct the Regulatory Authority to dispose of this amount during the execution proceedings in accordance with its order dated 22.12.2021 passed in in Complaint No. LKO162/06/75155/2021.

Dated: 08.09.2022
Shakir/Tanveer/- **(K.K. Jain)** **(D.K. Arora)**