RESERVED JUDGMENT.
BENCH-1

THE UTTAR PRADESH REAL ESTATE APPELLATE TRIBUNAL
AT
LUCKNOW

1. APPEAL NO. 563 of 2020

Adesh Kumar Kaushik. ………………..Appellant.

Versus

Greater Noida Industrial Development Authority. …………….Respondent.

With

2. APPEAL NO. 736 of 2021

Greater Noida Industrial Development Authority. ……………Appellant.

Versus

Adesh Kumar Kaushik. …………………Respondent.

With

3. APPEAL NO. 562 of 2020

Mrs. Charanjit Kaur. ………………..Appellant.

Versus

Greater Noida Industrial Development Authority. …………….Respondent.

With

4. APPEAL NO. 738 of 2021

Greater Noida Industrial Development Authority. ……………Appellant.

Versus

Charanjit Kaur. …………………Respondent.

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

1. These cross appeals have been filed against the composite order dated 17.07.2020 passed by the Uttar Pradesh Real Estate Regulatory Authority, Regional Office, Gautam Budh Nagar (hereinafter referred to as 'the Regulatory Authority') in Complaint Nos. NCR144/12/0770/2019 (Adesh Kumar Kaushik Vs. Greater Noida Industrial Development Authority) and

NCR144/12/0833/2019 (Charanjit Kaur Vs. Greater Noida Industrial Development Authority), therefore, they were heard together and are being disposed of by a composite judgment. For the sake of convenience we take Appeal No.563/2020 (Adesh Kumar Kaushik Vs. Greater Noida Industrial Development Authority) as a lead case.

2. The brief facts of these cases have been tabulated below for the sake of convenience:--

Sl. No.	**Appeal Number/ Name of Appellant/Complaint Number.**	**Date of impugned order.**	**Date of proposed possession.**	**Date of offer of possession.**
1	**2**	**3**	**4**	**5**
1.	Appeal No. 563/2020 Adesh Kumar Kaushik. Complaint No. NCR144/12/0770/2019	17.07.2020	28.01.2017	04.07.2019
2.	Appeal No. 736/2021 Greater Noida Industrial Development Authority. Complaint No. NCR144/12/0770/2019	17.07.2020	28.01.2017	04.07.2019
3.	Appeal No.562/2020 Mrs. Charanjit Kaur Complaint No. NCR144/12/0833/2019	17.07.2020	28.01.2017	04.07.2019
4.	Appeal No. 738/2021 Greater Noida Industrial Development Authority. Complaint No. NCR144/12/0833/2019	17.07.2020	28.01.2017	04.07.2019

3. By the impugned order dated 17.07.2020 the Regulatory Authority passed the following directions:--

(1) Respondent/promoter is directed to ensure delivery of possession of the flat to the complainant by 31.08.2020 after completing all the facilities as per allotment letter/brochure.

(2) Respondent/promoter is directed to ensure payment of delay interest on the amount deposited by the complainant at the rate of MCLR+1% from 29.01.2017 till the date of offer of possession i.e. 04.07.2019. The amount of interest will be adjusted towards the final payment. In case the amount of interest exceeds the amount due, the excess amount will be returned as per rules.

(3) Respondent/promoter is directed to provide item wise details of the increased amount to the complainant.

(4) As per Section 2(za)(i) of the RERA Act 2016 if any interest is taken by the promoter for default of the allottee, after coming into force of the Act 2016, then the same rate of interest will be paid by the promoter to the allottee for default of the promoter. Therefore interest at the rate of MCLR+1% will be payable by the complainant on delayed payment.

4. The facts of the lead case (Appeal No. 563/2020), in brief, as culled out from the memo of appeal, are that the appellant applied for allotment of 2 BHK flat in Sector Omicron-1, a project of the Greater Noida Industrial Development Authority (hereinafter referred to as 'the respondent/promoter').

4.1 In the lottery draw held on 15.01.2014 the appellant was selected and he was allotted Flat No.404/B, 4th Floor, Tower-B, Sector Omicron-1, Greater Noida. The appellant was issued allotment letter dated 29.01.2014 by the respondent/promoter containing necessary terms and conditions. As per allotment letter the amount deposited as registration money was Rs.2,57,000/-. The total cost of the flat was Rs.25,25,700/-. After adjusting the registration money of Rs.2,57,000/- the remaining amount of Rs.22,68,700/- was to be paid by the allottee before 29.04.2014.

4.2 As per Clause 8 of the allotment letter if at the time of the lease deed it is found that the actual dimension of the flat varies, the total cost of the flat will also vary and the increased cost shall be borne by the allottee proportionately.

4.3 As per the conditions of clause M of the Brochure the appellant, after allotment of the flat, completed all necessary documentary formalities and got the agreement to lease executed in his favour on 28.07.2014 after paying the required stamp duty. The agreement to lease declares the total cost of the flat as Rs.25,25,700/-. The proviso of point no. 2 of agreement to lease says that if the installments together with the interest accruing thereon are not paid by or on the due date, the interest at the rate of 12% compounded at six monthly shall be charged for delayed payment for delayed period.

4.4 The appellant opted for cash down payment plan and paid the entire cost of the allotted flat within stipulated period.

4.5 As per the terms of point no. N of the Brochure, the possession of the allotted flat was to be delivered within a period of three years from the date of allotment and after the issuance of offer of possession the allottees were required to get the lease deed executed in their favour by the respondent.

4.6 As per conditions of point no. G of the Brochure, the area of multistoried flat may slightly vary at the time of handing over the possession. The premium of the multistoried flat will proportionately vary due to such variation. If such variation is less than or equal to 10%, no change in location or surrender shall be allowed. However, if such variation is more than 10% then the allottee will have the option of surrendering the allotment and take back the entire money deposited by him/her with 4% simple interest. This condition clearly reveals that at the time of allotment the respondent/promoter assured the allottee that the premium/cost of the flat allotted to the appellant will not increase more than 10% even in case of increase in the area of the allotted flat. In case the price is increased more than 10% the allottee has the right to rescind the contract.

4.7 When, after passage of more than 3 years from the date of allotment i.e. 28.01.2017, the respondent did not offer possession of the flat, the appellant enquired about the project and he came to know that the project was incomplete. When he asked the respondent/promoter for the tentative date of delivery of possession, he was not given any satisfactory reply. He was asked to wait for some more period without giving any particular date of delivery of possession.

4.8 After passage of more than 2 years and 6 months from the promised date of delivery of possession i.e. 28.01.2017, the respondent/promoter sent a letter to the appellant through registered post on 04.07.2019 raising demand of Rs.5,18,895/- and asking to take possession of incomplete flat even without basic amenities required for living.

4.9 When the appellant asked for the reason behind the price escalation, no answer was given to him from any official of the respondent/promoter. When the appellant further inquired about the occupancy certificate and completion certificate, the respondent/promoter replied that neither CC nor OC has been received from the competent authority.

4.10 Feeling aggrieved with negligent, arbitrary and unprofessional behavior of the respondent/promoter, the appellant filed the complaint before the Regulatory Authority for getting the refund of his deposited amount along with interest. The said complaint was decided by the Regulatory Authority vide impugned order dated 17.07.2020, in the manner stated in para 2 and 3 above.

5. The complainant/allottee has challenged the impugned order dated 17.07.2020 passed by the Regulatory Authority, on the following grounds:--

A. Because, as per the provisions of Section 18 of the RERA Act 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, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

The language used in present section clearly says that it is the right of the Allottee to ask for the refund of its entire deposited money in case promoter fails to deliver the possession in time. Even the proviso of the section says that when allottee does not intend to withdraw from the project, which clearly suggests the fact that only the intention of the Allottee is important under provisions of this section. If in case the promoter fails to deliver the possession in time it is on allottee's will whether to take possession or ask for the refund. The Real Estate Regulatory Authority which is formed according to the provisions of the RERA Act to look after the implementation of the provisions of the Act cannot go beyond the scope of the Act. So the Regulatory Authority has erred in law and exceeded its authority by not permitting prayer of refund of the appellant.

B. Because the respondent/Promoter inspite of receiving the total sale consideration and other dues towards the flat and after the passage of more than 6 years from the date of allotment of the Flat, failed to offer possession of the flat to the appellant after completing all necessary formalities as required under RERA Act, as such GNIDA completely failed to deliver the possession of the flat and even at present no Completion Certificate or Occupancy Certificate has been obtained by the promoter for the project. But GNIDA is illegally asking to take the possession of the unfinished flat, which is against the true spirit of law. The Regulatory Authority erred in law while giving delay interest only till 04/07/2019 because the promoter is not eligible to offer the possession of the flat legally before obtaining both Occupancy and Completion Certificates.

C. Because as per the reply filed by the Respondent before the Regulatory Authority the delay caused due to not getting the permission from the concerned Government Departments which shows that the respondent did not have the legal permissions at the time of the agreement, as such the respondent had defective title over property, which fact further attracts the provisions of Section 18(2) of the Act 2016 which says that the promoter shall compensate the allottee in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this subsection shall not be barred by limitation provided under any law for the time being in force.

In the light of the above section the Respondent is liable to pay the compensation to the appellant in addition to the delay interest.

D. Because the Regulatory Authority has miserably failed to appreciate the provisions of Section 2(za)(i) of the Act 2016, which provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee in case of default and Point No.2 of the agreement to lease provides that if the installments together with the interest accruing thereon are not paid by or on the due date, the interest at the rate of 12% compounded at six monthly shall be charged for delayed payment for delayed period. In this manner awarding delay interest @ MCLR + 1% for delayed period starting from 29/01/2017 to 04/07/2019 is not justified according to the law and moreover the promoter willfully delayed the project for earning mesne-profit from the hard earned money of the appellant.

E. Because the Regulatory Authority failed to acknowledge the fact that everywhere in the allotment letter as well as in the Agreement to Lease the premium for the flat in question is mentioned as Rs.25, 25,700/- and nowhere it is written that price is tentative, but at the time of final demand the respondent is asking for deposit of Rs. 5,18,895/- which is more than 20% of the total premium, without any justification. As such as per the terms of the Brochure even if the area of the flat was increased and due to which the price would have escalated by more than 10% even then the allottee has the right to get the refund of his deposited money along with requisite interest on it. In the present case the respondent is escalating the premium of the flat without any justification. So in this situation the allottee has the right of getting refund of his deposited money along with the interest according to provisions of section 2(z)(a) of the Act 2016 i.e. equal to the rate of interest which was to be charged by promoter from the allottee in case of delayed payment, which was @12% compounded every six month. In this way the Regulatory Authority erred in law while awarding delay Compensation @ MCLR +1% for the period of delay.

F. Because in its Order dated 17/07/2020 the Regulatory Authority while deciding the issue No. 3 has mentioned the provisions of Section 32 of the Act 2016 which says that the Regulatory Authority shall in order to facilitate the growth and promotion of a healthy, transparent, efficient and competitive real estate sector make recommendations to the appropriate Government or the competent authority, as the case may be. The language clearly says that the Regulatory Authority will recommend the appropriate Government for taking the necessary steps. The Regulatory Authority is not supposed to take voluntary steps that are beyond the scope of the Act 2016.

G. Because the Regulatory Authority erred in law while relying on the precedence made by Apex Court in Bikram Chaterji Vs Union of India as the facts of both cases are different. In the present case the respondent has not taken the Occupancy Certificate.

H. Because while putting reliance on the Bombay High Court in Neelkamal Realtors Sub Urban Pvt. Ltd. Vs Union of India the portion has been reproduced in the order of the Regulatory Authority wherein no where it is written that the Regulatory Authority can go beyond the scope of the Act 2016. Where Act 2016 expressly provides a right to the complainant to have refund of his entire deposited amount along with interest from the promoter in case of any default by the promoter, the Regulatory Authority cannot deny that right to the complainant. So the order dated 17/07/2020 passed by the Regulatory Authority is liable to be set aside.

I. Because the Regulatory Authority while relying on the order passed by the Hon'ble Supreme Court in Chitra Sharma Vs Union of India failed to acknowledge the fact that the order was passed by the Apex Court, which exercises a vide discretionary powers guaranteed to it by the Constitution of India, so it can pass the judgment beyond the Act but the Regulatory Authority is constituted as per the provisions of the Act 2016, with a purpose to look after the effective implementation of the Act and as such the Regulatory Authority cannot go beyond the scope of the Act. In this way the Regulatory Authority has exceeded its authority while passing the order dated 17/07/2020 and the same is liable to be set aside.

J. Because while deciding the **Writ C No. 3347 of 2019 Vinod Kumar Gautam and others Vs. State of U.P. and others** a writ petition of similar nature against same respondent (GNIDA) and the case was related to the similar project developed by the respondent in Omicron-1A the Hon'ble Allahabad High Court observed that there is no factual dispute involved in the petition and the petitioners are also not at fault at any point of time, therefore they are entitled for refund of the entire money along with 15% interest per annum from the date of deposit as they are required to pay GNIDA in case of default of payment. Therefore considering the facts and circumstances of the case, the writ petition is partly allowed with the direction to respondents to refund the entire amount of the petitioner maximum within two months from the date of production of certified copy of this order alongwith 15% interest from the date of deposit.

The present case was based on similar facts against the respondent and documentations like allotment letter, agreement to lease and lease deed, delay in delivery of possession were same. So by the view of the Hon'ble High Court it is crystal clear that the appellant is entitled to get refund of his entire money along with the interest which was to be charged by GNIDA in case of delay in payment of the premium. In the light of the above Judgment of the Hon'ble High Court, the order passed by the Regulatory Authority is liable to be set aside.

K. Because Hon’ble Supreme Court in Civil Appeal Nos. 3207-3208 of 2019 Marvel Omega Builders Pvt. Ltd. and Anr. Vs Shrihari Gokhale and Anr. held that even assuming that the villa is now ready for occupation (as asserted by the appellants), the delay of almost five years is a crucial factor and the bargain cannot now be imposed upon respondents. The latter were, therefore, justified in seeking refund of the amounts that they had deposited with reasonable interest on the said deposited amount. The view taken by the Hon'ble Apex court made it crystal clear that in case of delay in delivery or any other default on the part of the developer, the purchaser has a right to get refund of his entire deposited money along with requisite interest. In the light of the above judgment of the Hon'ble Supreme Court the order passed by the Regulatory Authority is liable to be set aside.

L. Because Hon'ble National Consumer Dispute Redressal Commission in Smita Uban V. Pioneer Urban Land & Infrastructure Ltd. (Consumer Case No. 1430 of 2017), decided on 23-07-2020 observed that the respondent/flat purchaser has made out a clear case of deficiency of service on the part of the appellant/ builder. The respondent/flat purchaser was justified in terminating the apartment buyer agreement by filing the consumer complaint, and cannot be compelled to accept the possession whenever it is offered by the builder. The respondent/purchaser was legally entitled to seek refund of the money deposited by him along with appropriate compensation. In the light of the above order of the Hon'ble National Commission the order passed by the Regulatory Authority is liable to be set aside.

M. Because the Regulatory Authority has failed to appreciate the fact that the respondent failed to complete the project in a considerable amount of time and as such there is an extra- ordinary delay of more than 3 years and even now no proper offer of possession is made by the respondent. The Occupancy Certificate or Completion Certificate have yet not been obtained. In these circumstances the project should have been included in the category of ongoing project under the provisions of Act No.16 of 2016.

N. Because the respondent/promoter is malafidely trying to extract money from the appellant by illegally escalating the premium cost of the flat. As such the impugned order passed against the appellant by the Regulatory Authority is liable to be set aside.

O. Because the Regulatory Authority failed to appreciate the fact that the appellant invested his hard earned money but due to malafide, fraudulent and negligent behaviour of the respondent the money of the appellant got withheld due to which the appellant has to face enormous problems at the medical emergency and suffered a great mental agony but the Regulatory Authority did not award any compensation towards his mental agony.

P. Because while waiting for the delivery of the flat the appellant has suffered from many financial problems one of his family member (real Bhavi Ji) is suffering from Blood Cancer and undergoing from Chemotherapy in Rajiv Gandhi Cancer Institute and Research Centre New Delhi resulting in expenditure of huge sum of money in her treatment and now the appellant is not in a position to pay escalated premium of the flat. The appellant had already deposited the entire amount and got the Agreement to Lease executed in the office of the Sub Registrar, Gautam Budh Nagar, only with the objective to reside in the flat but the respondent delayed the possession of the flat and furthermore GNIDA is demanding additional amount of Rs. 5.19 lakh which is more than 20% of the agreed cost of flat. Due to the financial hardship the appellant is not in a position to pay the escalated premium amount and get the lease deed executed in his favour. So the order dated 17/07/2020 passed by the Regulatory Authority will defeat the basic purpose of the Act 2016 and the same is liable to be set aside.

Q. Because the impugned order is not in consonance with true spirit of law and is illegal, incorrect and otherwise invalid in the eyes of law, as such the same deserves to be rescinded, varied and set aside to meet out ends of justice.

6. The complainant/allottee has prayed for the following reliefs:--

(i) Set aside the order dated 17/07/2020 passed by the Regulatory Authority and consequently allow the present appeal permitting the refund of the appellant's money along with compound interest @ 12% compounded six monthly starting from 18/11/2013 till the date of actual payment.

(ii) The respondent may be directed to provide a sum of Rs.5,00,000/- to the complainant/appellant for mental Agony, stress and harassment being suffered by the appellant due to the negligent and unprofessional behavior due to which delay in delivery of possession of the flat was caused.

7. The promoter filed its objection to the memo of appeal and submitted that built-up housing scheme (BHS-17) was published on 02.10.2013 and closed on 11.11.2013.

7.1 In clause A of the Brochure of the project it is clearly mentioned that the cost of the flat is tentative. It is clearly mentioned in the allotment letter that in case there will be any variation in the dimension of the flat, the total cost of the flat shall also vary. The costs of the flats are calculated on an approximate cost basis which may vary or may not vary as per the circumstances.

7.2 The allottee/appellant opted to pay the tentative cost of the flat with one time option and did pay the tentative cost of the flat. The allottee/appellant is liable to pay the increased cost at the time of finalization of the cost of the flat.

7.3 In clause N of the Brochure it is clearly mentioned that the possession is likely to be offered to the allottees within a period of three years from the date of issue of allotment letter. The date for possession was not fixed or determined. It was projected date for possession.

7.4 The built-up housing scheme is delayed due to delay in permission for excavation and ban on ground water exploitation by Central Ground Water Authority and construction ban by NGT in respective years for particular period in each year in Delhi NCR due to pollution. In case any Hon'ble Court or Tribunal passed stay order even for one month, that directly impacts upon delay in progress and completion of project from one to two years. Same has happened with this project.

7.5 In clause G of the Brochure it is clearly mentioned that in case the variation in the area of the allotted flat is more than 10%, the allottee shall have the option of surrendering the allotment and taking the entire money deposited by him/her with 4% simple interest. Nothing is mentioned in clause G about price variation/increase.

7.6 The respondent kept on updating to its allottees from time to time with regard to ban on construction imposed by NGT for respective period. Even the notices for ban on construction by NGT were published by NGT in all National News Papers and Media and the respondent also published the same on its web portal.

7.7 Letter for offer of possession and getting lease deed executed was issued by the respondent to the appellant on 21.05.2019. In the offer of possession letter dated 04.07.2019 the balance of Rs.5,18,895.05 was shown against final cost.

7.8 Government duties and taxes on respective essential items, the cost of building material and related services increased beyond inflation rate from time to time which directed affected the anticipated expenditures increasing the cost of the flats.

7.9 The flat was ready for possession well before issuance of offer of possession letter dated 04.07.2019. Further, CC/OC has been issued to the respondent on 08.09.2020 for the complete project. The project has not been delayed by the respondent/promoter.

7.10 The appellant has not executed the lease deed and taken possession even after repeated requests/reminders/notices and order passed by the Regulatory Authority.

7.11 There is no option for refund of deposited amount once the limitation period for surrender is over.

8. In reply to the objection of the promoter the complainant denied the averments made by the promoter in its objection and reiterated the averments made in the memo of appeal. The complainant further submitted that the promoter has failed to submit any orders and directions of judicial and administrative authorities which led to delay in construction.

8.1 The project was delayed. Neither completion certificate nor occupancy certificate was received by the respondent at the time of filing of complaint. The OC/CC for the project was obtained by the respondent on 08.09.2020. It is quite clear that the project has been delayed by more than 3.5 years. The respondent failed to explain any suitable reason for the delay caused in delivery of the flat in question. The respondent completely failed to produce any evidence before the Regulatory Authority as well as before the Tribunal showing any valid reason for the delay in delivery of possession. No intimation was sent by the respondent to the appellant regarding the delay of the project.

8.2 Not a single family is staying in the project and the project is not suitable for living even at present.

8.3 The respondent illegally escalated the cost of the flat by more than 20%. In clauses A and A-2 of the Brochure the term 'tentative cost' has not been used anywhere. As per clause G of the Brochure an allottee is liable to get refund of deposited amount if due to change in dimension the escalation is more than 10% of the original cost of the flat.

8.4 In July 2017 the Government of India introduced Goods and Services Tax (GST) which has been hailed as a revolutionary tax reform. Provisions under the new tax regime give the developer the benefit of input tax credit enabling the real estate developer to pass on this benefit to the home buyers. With GST, it is believed that the home buyers will be able to save some money on the final cost of the flat. In fact Government duties and taxes have come down and cost of flat should have come down. On the other hand the respondent (GNIDA) is giving reason that cost had raised due to government duties and taxes which is contrary to GOI orders.

9. The promoter (Appellant of Appeal Nos. 736 of 2021 and 738 of 2021) has not mentioned any grounds in its appeals to challenge the impugned order dated 17.07.2020. However, during the course of arguments on 16.05.2023 the learned counsel for the promoter requested that the points mentioned under the heading 'Facts of the case' in the memo of appeal be treated as grounds and pressed point nos. (viii), (ix) and (x) which are as under:--

(viii) That the Allottee/Respondent is defaulted in payment of Principal amount of INR 5,18,896/- (Five Lakh eighteen thousand eight hundred ninety six only) against the increased cost of Flat.

(ix) That the Allottee/Respondent was facilitated to pay in two half yearly equal interest free installments of INR 2,59,448.00 (Two Lakh fifty nine thousand four hundred forty eight).

(x) That as further order passed by Hon'ble Real Estate Regulatory Authority Greater Noida vide para no. 3, the appellant has share the reason for increase in project/flat cost.

h- That the increase in government duties and taxes on respective essential items, the cost of building material and related services increased beyond inflation rate, on time to time, which directly affect the anticipated expenditure reflecting which the cost of flats increased.

i- That in the brochure published for Built-up Housing Scheme-BHS-17/2013, it was clearly mentioned for the cost of flat as 'Tentative cost of Built-up House'. The cost of flats is determined with consideration of actual expenditures/anticipated expenditures.

j- That Greater Noida Industrial Development Authority is not profit making organization, it works on No profit No Loss principle.

10. The promoter (appellant of Appeal Nos.736 of 2021and 738 of 2021) has prayed for the following reliefs:--

(I) To accept the appeal.

(II) To review the order passed by the Regulatory Authority in Complaint Nos. NCR144/12/0770/2019 & NCR144/12/0833/2019.

(III) To direct the respondent/complainant/allottee to pay the amount of INR 5,18,896/- with interest on account of default in installment.

11. Heard Sri Siddharth Vikram Asthana, learned counsel for the allottees/complainants, and Sri Rishindra Vikram Singh, learned counsel for the promoter/Greater Noida Industrial Development Authority.

11.1 The learned counsel for the promoter, in order to press ground no. x, drawn our attention on chart at page 46 of the Brochure, wherein the cost of built-up house has been mentioned as tentative. A query was made from learned counsel for the promoter as to whether there is specific clause in the Brochure for costing of the unit and that will be done at the time of offer of possession. The learned counsel for the promoter fairly submitted that there is no such clause in the Brochure.

11.2 The learned counsel for the promoter was asked as to whether there is any evidence in his favour with respect to enhanced cost which was required to be given to the allottee/complainant while demanding the same from the allottee and if not, then why this ground (ground no. x) has been taken for challenging the impugned order. The learned counsel for the promoter submitted that the promoter is aggrieved with the direction of providing evidence and the said direction should not have been issued by the Regulatory Authority while deciding issue no. 2. The learned counsel for the promoter submitted that in the Brochure, it has been mentioned that the possession is likely to be offered to the allottees within a period of three years from the date of issue of allotment letter, thus the possession date was not fixed and firm. Therefore, the date of offer of possession cannot be treated as 04.07.2019.

11.3 The learned counsel for the promoter further submitted that the RERA has not examined the objection of the appellant/promoter in response to the complaint of the respondents/allottees with respect to ban imposed by the authorities on account of which the project could not be completed in time. The learned counsel for the promoter was asked as to under which provision of the Act and Rules, the Regulatory Authority was required to examine the issue of ban imposed on the promoter while examining the complaint under Section 31 of the Act. The learned counsel for the promoter drew our attention at para-14 of the objection filed in the cross appeal of the allottee, wherein, in paras 6 and 7, it has been mentioned that possession was offered to the allottee on 04.07.2019 with a request to execute the lease deed within six months without payment of any delay penalty.

11.4 The learned counsel for the promoter was asked as to when the project in question was to be completed and when the requisite certificates have been applied before submitting an application for issuance of OC/CC by the competent authority of the promoter itself. The learned counsel for the promoter submitted that there is no correspondence on record, but temporary OC/CC was issued by the competent authority on 08.09.2020, which is on record at page 80 of the appeal. On examination of Temporary OC/CC dated 08.09.2020, a defect with respect to Environment (EIA) NOCs was required to be submitted by the promoter and the temporary OC was for 18 months for the project in question subject to condition the defect/discrepancies mentioned in the same will get corrected and a fresh completion certificate will be submitted to the Chief Executive Officer for further necessary action.

The learned counsel for the promoter is not aware of the environment clearance and also not aware about submission of application for issuance of completion certificate. Subsequently, the learned counsel for the promoter submitted that vide written submission dated 21.06.2022, the certificate issued by the competent authorities have already been brought on record.

11.5 The learned counsel for the promoter does not want to cite any provisions of Act 2016 and any judgment in support of his claim.

12. In order to examine the issue involved in the instant appeals and on the basis of pleadings, record and submissions of learned counsel for the partries, we deem it proper to frame the following questions:-

(i) Whether the Regulatory Authority passed the impugned order beyond the pleadings and prayer of the complainant/allottee/ appellant?

(ii) Whether reliance placed on the case of ***Chitra Sharma Vs. Union of India (Civil Appeal No. 744/2017, decided on 09.08.2018)*** while deciding issue no. 1 relating to refund of the amount of the complainant, is correctly appreciated?

(iii) Whether the claim of the appellants/allottees for refund of their deposited amount along with interest is in consonance with the provisions of Section 18 of the Act, 2016?

(iv) Whether the project in question of the respondent is delayed?

(v) Whether it is necessary and mandatory for the Promoter to have first Completion Certificate (C.C.) and Occupation Certificate (O.C.) under the provisions of the Act of 2016 and Rules of 2016, read with the U.P. Apartments (Promotion of Construction, Ownership and Maintenance) Act 2010 before offering possession as well as asking the allottee to settle the account and satisfy the final demand?

(vi) Whether the allottees/complainants are entitled for interest for the delay in completion of the Project under the scheme of Act, 2016 and if yes, what rate of interest is required to be paid by the Promoter to the allottees?

13. **Vide question no. (i),** we are required to examine, as to whether the order passed by the Regulatory Authority is beyond the pleadings and prayers of the complainant (allottee).

The issues of pleading, prayer & moulding of reliefs have been examined time & again by Hon'ble Supreme Court as well as by the Judicial Forums holding therein that the rights of the parties stand crystallized on the date of institution of the proceeding and no party should be permitted to travel beyond the pleadings & prayer.

13.1 In ***Bhagwati Prasad vs. Shri Chandramaul AIR 1966 SC 735*****,** the Hon'ble Supreme Court was pleased to observe that:-

> *"The importance of the pleadings cannot, of course, be ignored, because it is the pleading that lead to the framing of issues and a trial in every civil case has inevitably to be confirmed to the issues framed in the suit. The whole object of framing the issues would be defeated if parties allowed to travel beyond them and claim or oppose reliefs on grounds not made in the pleadings and not covered by the issues."*

13.2 In ***S.S. Sharma and Ors. Vs. Union of India (UOI) and Ors. AIR 1981 SC 588*****,** the Hon'ble Supreme Court observed that:-

> *"We are of the opinion that the Courts should ordinarily insist on the parties being confined to their specific written pleadings and should not be permitted to deviate from them by way of modification or supplementation except through the well-known process of formally applying for amendment. We do not mean that justice should be available to only those who approach the Court confined in a strait-jacket. But there is a procedure known to the law, and long established by codified practice and good reason, for seeking amendment of the pleadings. If undue laxity and a too easy informality is permitted to enter the proceedings of a court it will not be long before a contemptuous familiarity assails its institutional dignity and ushers in chaos and confusion undermining its effectiveness. Like every public institution, the Courts function in the security of public confidence, and public confidence resides most where institutional discipline prevails. Besides this, oral submission raising new points for the first time tend*

to do grave injury to a contesting party by depriving it of the opportunity, to which the principles of natural justice hold it entitled, of adequately preparing its response.”

13.3 In the case of ***Krishna Priya Ganguly and Anr. vs. University of Lucknow and Ors. reported in 1984 SCC 307,*** while dealing with a matter arising out of a writ petition where the writ-petitioners prayed for merely consideration of his case for admission, Hon’ble Supreme Court was pleased to observe that a court cannot go a step further and grant the relief which the petitioner did not ask for, and held:-

“We do not see any proper material for this conclusion to which the High Court has suddenly jumped apart from the fact that admissions were not to be given by the High Court according to its own notions.

Finally, in his own petition in the High Court, the respondent had merely prayed for a writ directing the State or the college to consider his case for admission yet the High Court went a step further and straightaway issued a writ of mandamus directing the college to admit him to the M.S. course and thus granted a relief to the respondent which she herself never prayed for and could not have prayed for.”

13.4 The Hon’ble Supreme Court in ***Ram Sarup Gupta (dead) by LRs. v. Bishun Narain Inter College MANU/SC/0043/1987*** : [1987] 2SCR805 was pleased to observe:-

“……It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise……”

13.5 The Hon’ble Supreme Court in ***Orissa Cement Ltd. Vs. State of Orissa, 1991 Supp (1) SCC 430 (at page 498)*** has been pleased to observe that it is well settled proposition that it is open to the court to grant, mould or restrict the relief in a manner most appropriate to the situation before it in such a way as to advance the interests of justice.

13.6 The Hon'ble Supreme Court in the case of ***Bachhaj Nahar vs Nilima Mandal &Ors; reported in (2008) 17 SCC 491,***was pleased to observe thata Court cannot make out a case not pleaded. The Court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.

13.7 In ***Om Prakash vs. Ram Kumar (1991) 1 SCC 441,*** the Hon'ble Supreme Court observed**:-**

> *"A party cannot be granted a relief which is not claimed, if the circumstances of the case are such that the granting of such relief would result in serious prejudice to the interested party and deprive him of the valuable rights under the statute."*

13.8 In ***Shiv Kumar Sharma Vs. Santosh Kumari(2007) 8 SCC 600*** the Apex Court observed that the appellate court had no power to grant relief not prayed for in the suit.

13.9 The issue was again examined by the Hon'ble Supreme Court in the case of ***Bharat Amratlal Kothari and Anr. Vs. Dosukhan Samadkhan Sindhi and Ors.; (2010) 1 SCC 234*** and the Hon'ble Supreme Court in paras 29 and 30 of the judgment was pleased to examine and observe that "normally the Court will grant only those reliefs specifically prayed for by the petitioner". The relevant paras 29 and 30 are quoted as under:

> *"29. The approach of the High Court in granting relief not prayed for cannot be approved by this court. Every petition under Article 226 of the Constitution must contain a relief clause. Whenever the petitioner is entitled to or is claiming more than one relief, he must pray for all the reliefs. Under the provisions of the Code of Civil Procedure, 1908, if the plaintiff omits, except with the leave of the court, to sue for any particular relief which he is entitled to get, he will not afterwards be allowed to sue in respect of the portion so omitted or relinquished.*

30. Though the provisions of the Code are not made applicable to the proceedings under Article 226 of the Constitution, the general principles made in the Civil Procedure Code will apply even to writ petitions. It is, therefore, incumbent on the petitioner to claim all reliefs he seeks from the court. Normally, the court will grant only those reliefs specifically prayed for by the petitioner. Though the court has very wide discretion in granting relief, the court, however, cannot, ignoring and keeping aside the norms and principles governing grant of relief, grant a relief not even prayed for by the petitioner."

13.10 The Hon'ble Supreme Court in ***Civil Appeal No. 973 of 2007 Manohar Lal (D) by Lrs. Vs. Ugrasen (D) by Lrs. &Ors.*** (decided on 03.06.2010) while examining the issue, whether the court can grant **relief** which had not been asked for, was pleased to observe that the court cannot grant relief which has not been specifically prayed by the parties. Relevant para nos. 29 to 33 are extracted as follows:-

*"29. In **Messrs. Trojan & Co. Vs. RM.N.N. NagappaChettiar AIR 1953 SC 235**, this Court considered the issue as to whether relief not asked for by a party could be granted and that too without having proper pleadings. The Court held as under:-*

"It is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint, the Court was not entitled to grant the relief not asked for and no prayer was ever made to amend the plaint so as to incorporate in it an alternative case."

"30. A similar view has been re-iterated by this Court in Krishna Priya Ganguly etc.etc. Vs. University of Lucknow &Ors. etc. AIR 1984 SC 186; and Om Prakash &Ors. Vs. Ram Kumar &Ors., AIR 1991 SC 409, observing that a party cannot be granted a relief which is not claimed."

"31. Dealing with the same issue, this Court in Bharat Amratlal Kothari Vs. DosukhanSamadkhan Sindhi &Ors., AIR 2010 SC 475 held:

"Though the Court has very wide discretion in granting relief, the court, however, cannot, ignoring and keeping aside the norms and principles governing grant of relief, grant a relief not even prayed for by the petitioner."

"32. In Fertilizer Corporation of India Ltd. & Anr. Vs. Sarat Chandra Rath &Ors., AIR 1996 SC 2744, this Court held that "the High Court ought not to have granted reliefs to the respondents which they had not even prayed for."

"33. In view of the above, law on the issue can be summarised that the Court cannot grant a relief which has not been specifically prayed by the parties."

13.11 The Hon'ble Supreme Court in ***Civil Appeal No. 4887 of 2014 (Arising out of SLP (C) No 22742 of 2005) with Civil Appeal No. 4888 of 2014 (Arising out of SLP (C) No 22772 of 2005) Gaiv Dinshaw Irani &Ors. Vs. Tehmtan Irani &Ors.***(decided on 25.04.2014) while examining the issue, whether the High Court taking note of the subsequent events can mould a relief, observed as follows in para nos. 34, 35:-

"34. Considering the aforementioned changed circumstances, the High Court taking note of the subsequent events moulded the relief in the appeal under Section 96 of the Code of Civil Procedure and the same has been challenged by the appellants before us. In ordinary course of litigation, the rights of parties are crystallized on the date the suit is instituted and only the same set of facts must be considered. However, in the interest of justice, a court including a court of appeal under Section 96 of the Code of Civil Procedure is not precluded from taking note of developments subsequent to the commencement of the litigation, when such events have a direct bearing on the relief claimed by a party or one the entire purpose of the suit the Courts taking note of the same should mould the relief accordingly. This rule is one of ancient vintage adopted by the Supreme Court of America in Patterson vs. State of Alabama followed in Lachmeshwar Prasad Shukul vs Keshwar Lal Choudhury. The aforementioned cases were recognized by this Court

in Pasupuleti Venkateswarlu vs. The Motor and General Traders wherein he stated that:

> *"…If a fact, arising after the lis has come to court and has a fundamental impact It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fairplay is violated, with a view to promote substantial justice — subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myriad. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the Court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed."*

"The abovementioned principle has been recognized in a catena of decisions. This Court by placing reliance on the PasupuletiVenkateswarlu Case (supra), held in Ramesh Kumar vs. Kesho Ram that:

> *"6. The normal rule is that in any litigation the rights and obligations of the parties are adjudicated upon as they obtain at the commencement of the lis. But this is subject to an exception.*

Wherever subsequent events of fact or law which have a material bearing on the entitlement of the parties to relief or on aspects which bear on the moulding of the relief occur, the court is not precluded from taking a 'cautious cognizance' of the subsequent changes of fact and law to mould the relief."

"This was further followed in Lekh Raj vs. Muni Lal &Ors.. This Court in Sheshambal (dead) through LRs vs. Chelur Corporation Chelur Building &Ors. while discussing the issue of taking cognizance of subsequent events held that:

"19. To the same effect is the decision of this Court in Om Prakash Gupta case where the Court declared that although the ordinary rule of civil law is that the rights of the parties stand crystallised on the date of the institution of the suit yet the court has power to mould the relief in case the following three conditions are satisfied:...

(i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted;

(ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and

(iii) that such subsequent event is brought to the notice of the court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise."

"This Court in ***Rajesh D. Darbar and Ors. vs. NarasinghroKrishnaji Kulkarni and Ors.*** *, a matter regarding the elections in a registered society, held that the courts can mould relief accordingly taking note of subsequent events. Furthermore, in Beg Raj Singh vs. State of Uttar Pradesh &Ors. while deciding on the issue of renewal of a mining lease held that:*

"....A petitioner, though entitled to relief in law, may yet be denied relief in equity because of subsequent or intervening events i.e. the events between the commencement of litigation and

the date of decision. The relief to which the petitioner is held entitled may have been rendered redundant by lapse of time or may have been rendered incapable of being granted by change in law. There may be other circumstances which render it inequitable to grant the petitioner any relief over the respondents because of the balance tilting against the petitioner on weighing inequities pitted against equities on the date of judgment."

"Even this Court while exercising its powers under Article 136 can take note of subsequent events (See: Bihar State Financial Corporation &Ors. vs. Chemicot India (P) Ltd. &Ors., Parents Association of Students vs. M.A. Khan & Anr. , State of Uttar Pradesh &Ors. vs. Mahindra & Mahindra Ltd.)"

"35. Thus, when the relief otherwise awardable on the date of commencement of the suit would become inappropriate in view of the changed circumstances, the courts may mould the relief in accordance with the changed circumstances for shortening the litigation or to do complete justice."

13.12 The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the Court for its consideration. Pleadings made in a case lead to framing of issues to be examined by the Courts. Further when the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the Court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. No party should be permitted to travel beyond its pleadings and the Courts are to avoid making out a case not pleaded.

13.13 Similarly, when there is no prayer for a particular relief and no pleadings to support such a relief, and when defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief.

13.14 Further it is well established principle that in an action where a party has prayed for a larger relief it is always open to the Court to grant him any smaller relief that he may be found to be entitled in law and thereby render substantial justice. The Court can undoubtedly take note of changed circumstances or subsequent events and suitably mould the relief to be granted to the party concerned in order to meet out justice in the case. As far as possible, the anxiety and endeavour of the Court should be to remedy an injustice when it is brought to its notice.

13.15 It is our considered view that the Regulatory Authority had passed the impugned order directing the promoter to give possession of the apartment to the allottee without appreciating the pleading & prayer of the allottee, in other words the impugned directions for giving possession to the allottee is beyond the pleading and relief sought by the Allottee. The Regulatory Authority in the name of moulding relief passed orders against and contrary to the prayer of the allottee/appellant, which is also against the object and spirit of the provisions of Section 18 as well as other provisions of the Act, 2016. Further, while deciding a complaint the administrative functions of the Regulatory Authority provided in Sections 32 and 34 of the Act, 2016 cannot be clubbed and complaint ought to have been decided on its merit after examining the pleading and prayer. **Question no. (i)** is answered accordingly.

14. **Question No.(ii):** The Regulatory Authority in the impugned order has placed reliance on the judgment of Hon'ble Supreme Court in the case of ***Chitra Sharma and others Vs. Union of India and others*** [Writ Petition (Civil) No. 744 of 2017 decided on 9th August, 2018]. The examination of the said judgment reveals that the proceedings were initiated under Article 32 of the Constitution of India for protecting the interest of home buyers in the project floated by Jaypee Infratech Ltd., who had been left in lurch and faced with a situation of human distress, occasioned by the failure of the developers to meet their contractual obligations and a legal regime as it then stood under the IBC which provided no solace to home buyers. The Hon'ble Supreme Court taking into consideration the fact that an amount of Rs. 750

crores was lying in deposit before the Hon'ble Supreme Court in pursuance to the interim direction along with interest accrued and some home buyers have earnestly sought the issuance of interim direction to facilitate a pro-rata disbursement of this amount to those of the home buyers who seek a refund, declined to accede the request of home buyers for the reason that during the pendency of the CIRP, it would be a matter of law, be impermissible for the Court to direct a preferential payment being made to a particular class of financial creditors, whether secured or unsecured. Further directing disbursement of the amount of Rs. 750 crores to the home buyers, who seek refund would be manifestly improper and cause injustice to the secured creditors since it would amount to a preferential disbursement to a class of creditors and once recourse to the discipline of the IBC has been taken, it is necessary that its statutory provisions be followed to facilitate the conclusion of the resolution process. Secondly, the figures available on the web portal opened by the amicus curiae, indicate that 8% of the home buyers have sought refund of their money while 92% would evidently prefer possession of the homes, which they have purchased. They would have a legitimate grievance if the corpus of Rs. 750 crores (together with accrued interest) is distributed to the home buyers who seek a refund. The purpose of the process envisaged by the IBC for the evaluation and approval of a resolution plan is to form a composite approach to deal with the financial situation of the corporate debtor. Allowing a refund to one class of financial creditors will not be in the overall interest of a composite plan being formulated under the provisions of the IBC. Further RBI had moved before the Court seeking permission to initiate an insolvency resolution process, etc.

14.1 In our considered view, the observations of Hon'ble Supreme Court in para-40 of judgment rendered in the case of ***Chitra Sharma*** (supra) was in a peculiar facts and circumstances of the said case and do not apply to the cases of home buyers seeking refund on account of delay in completion of the Project/giving possession of the apartment/flat to a home buyer in accordance with the terms of the agreement for sale under the scheme of Act 2016. **Question no. (ii)** is answered accordingly.

15. **Question No. (iii)** is as to whether the claim of the appellants/allottees for refund of their deposited amount along with interest is in consonance with the provisions of Section 18 of the Act 2016.

The Real Estate (Regulation & Development) Act*,* 2016 has been enacted to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the Adjudicating Officer and for matters connected therewith or incidental thereto . The Real Estate (Regulation & Development) Act, 2016 delineates functions and duties of promoter in Chapter 3, and rights and duties of allottees in Chapter 4. The Real Estate Regulatory Authority has been assigned functions and have been given powers as detailed out in Chapter 5.

15.1 A perusal of the statement of objects and reasons of the Act of 2016 makes it clear that the Real Estate Sector had been largely unregulated and the Consumer Protection Act, 1986 was not adequate to address all the concerns of the buyers in the Real Estate Sector, and therefore the present Act of 2016 has been promulgated with a view to protect the interests of the consumers in the Real Estate Sector and to ensure greater accountability towards consumers and to significantly reduce frauds and delays, and also to curb the current high transaction costs.

15.2 The Act spells out the obligations of the Promoter of a real estate project and the consequences if the Promoter fails to fulfill those obligations. Some of those obligations are enumerated in Section 11,12,13 and 18 of the Act which are as follows:--

"11. Functions and duties of promoter.—

(1)………………………

(2)………………………

(3)………………………

(4) The promoter shall—

(a)be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the

case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be: Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.

(b) be responsible to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees, as the case may be;

(c) be responsible to obtain the lease certificate, where the real estate project is developed on a leasehold land, specifying the period of lease, and certifying that all dues and charges in regard to the leasehold land has been paid, and to make the lease certificate available to the association of allottees;

(d) be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees;

(e) enable the formation of an association or society or co-operative society, as the case may be, of the allottees, or a federation of the same, under the laws applicable:

Provided that in the absence of local laws, the association of allottees, by whatever name called, shall be formed within a period of three months of the majority of allottees having booked their plot or apartment or building, as the case may be, in the project;

(f) execute a registered conveyance deed of the apartment, plot or building, as the case may be, in favour of the allottee along with the undivided proportionate title in the common areas to the association of allottees or competent authority, as the case may be, as provided under section 17 of this Act;

(g) pay all outgoings until he transfers the physical possession of the real estate project to the allottee or the associations of allottees, as the case may be, which he has collected

from the allottees, for the payment of outgoings (including land cost, ground rent, municipal or other local taxes, charges for water or electricity, maintenance charges, including mortgage loan and interest on mortgages or other encumbrances and such other liabilities payable to competent authorities, banks and financial institutions, which are related to the project):

Provided that where any promoter fails to pay all or any of the outgoings collected by him from the allottees or any liability, mortgage loan and interest thereon before transferring the real estate project to such allottees, or the association of the allottees, as the case may be, the promoter shall continue to be liable, even after the transfer of the property, to pay such outgoings and penal charges, if any, to the authority or person to whom they are payable and be liable for the cost of any legal proceedings which may be taken therefor by such authority or person;

(h) after he executes an agreement for sale for any apartment, plot or building, as the case may be, not mortgage or create a charge on such apartment, plot or building, as the case may be, and if any such mortgage or charge is made or created then notwithstanding anything contained in any other law for the time being in force, it shall not affect the right and interest of the allottee who has taken or agreed to take such apartment, plot or building, as the case may be;

(5)…………………..

(6)…………………..

12. Obligations of promoter regarding veracity of the advertisement or prospectus.—*Where any person makes an advance or a deposit on the basis of the information contained in the notice advertisement or prospectus, or on the basis of any model apartment, plot or building, as the case may be, and sustains any loss or damage by reason of any incorrect, false statement included therein, he shall be compensated by the promoter in the manner as provided under this Act:*

Provided that if the person affected by such incorrect, false statement contained in the notice, advertisement or prospectus, or the model apartment, plot or building, as the case may be, intends to withdraw from the proposed project, he shall be returned his entire investment along *with interest at such rate as may be prescribed and the compensation in the manner provided under this Act.*

13. No deposit or advance to be taken by promoter without first entering into agreement for sale. –

(1) A promoter shall not accept a sum more than ten per cent of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

(2) The agreement for sale referred to in sub-section (1) shall be in such form as may be prescribed and shall specify the particulars of development of the project including the construction of building and apartments, along with specifications and internal development works and external development works, the dates and the manner by which payments towards the cost of the apartment, plot or building, as the case may be, are to be made by the allottees and the date on which the possession of the apartment, plot or building is to be handed over, the rates of interest payable by the promoter to the allottee and the allottee to the promoter in case of default, and such other particulars, as may be prescribed.

15.3 A plain reading of Section 11 and 12 of the Act reveals that a promoter has an obligation and responsibility towards the allottees in terms of the Agreement for Sale. The promoter is also responsible for obtaining the C.C. and/or O.C. from the Competent Authority, as well as for execution of the registered conveyance deed in favour of the allottees. Further, in case a person is aggrieved on account of misinformation or false information, he/she has a right to withdraw from the project, and the promoter is liable to return his entire investment alongwith interest and/or compensation. Section 13 imposes responsibilities on the promoter for not accepting a sum of more than 10 percent of the cost of the apartment without first entering into and registering an agreement for sale, which should indicate the payment schedule for the allottees as well as the date on which possession of the apartment is to be handed over to the allottees.

15.4 Section 18 deals with the issue of return of amount and compensation, the relevant portion of Section 18(1) is extracted as follows:-

> ***"Section 18- Return of amount and compensation –(1)*** *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, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act :*
>
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

Section 18(1) of the Act provides that if an allottee wishes to withdraw from the project on the ground that the promoter has failed to complete or is unable to give possession of the property in accordance with the agreement for sale within the date specified therein, or due to discontinuance of the promoter's business on account of suspension or revocation of its registration or for any other reason, then the promoter shall return the amount received from the allottee in respect of that property with interest and compensation, on the allottee's demand. Further, if an allottee does not wish to withdraw from the project, he shall be paid by the promoter interest for every month of delay till the handing over of the possession, at such rate as may be prescribed.

As per the provisions of Section 18 of the Act, the option of either withdrawing from the project or staying in the project remains with only the allottee. The intent of the legislature is quite clear that the right of exercising the option of either staying in the project or for withdrawing from it is unqualified and if the option is availed by the allottee to withdraw from the project, the money deposited by the allottee has to be refunded by the promoter along with interest at such rate as may be prescribed.

15.5 Section 19 deals with the Rights and Duties of allottees. Sub-section (4) is relevant for the present case and the same is reproduced hereinbelow:--

> "***19. Rights and duties of allottees.—***
>
> *(1) …………………………..*
>
> *(2)…………………………..*
>
> *(3)…………………………..*
>
> *(4) The allottee shall be entitled to claim the refund of amount paid along with interest at such rate, as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder."*

15.6 From the conjoint reading of these provisions, it is evident that if the Promoter/developer fails to fulfill his obligations to hand over the possession as per terms of the agreement, the allottee is entitled to claim refund, along with interest and compensation.

15.7 The Hon'ble Bombay High Court in the case of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. Union of India, W.P.No. 2737/2017, 2017 SCC Online Bom 9302,*** decided on 06.12.2017 was pleased to observe as under:-

> *"……The plain language of Section 18(1)(a) shows that if the promoter fails to complete or is unable to give possession of an apartment, plot or building in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date*

specified therein, he would be liable to return the amount received by him together with interest including compensation. In case the allottee does not intend to withdraw from the project, the promoter is liable to pay interest for every month's delay till handing over of possession. The purpose of Section 18(1)(a) is to ameliorate the buyers in real estate sector and balance the rights of all the stake holders. The provisions of RERA seek to protect the allottees and simplify the remedying of wrongs committed by a promoter. …….."

15.8 The Hon'ble Supreme Court, while dealing with the provisions of Section 18 of the Act, 2016, in the case of ***M/S Imperia Structures Ltd. Vs. Anil Patni and another***, Civil Appeal Nos. 3581-3590 of 2020, decided on 02.11.2020, in para 23, observed as under:-

"23. *In terms of Section 18 of the RERA Act, if a promoter fails to complete or is unable to give possession of an apartment duly completed by the date specified in the agreement, the Promoter would be liable, on demand, to return the amount received by him in respect of that apartment if the allottee wishes to withdraw from the Project. Such right of an allottee is specifically made "without prejudice to any other remedy available to him". The right so given to the allottee is unqualified and if availed, the money deposited by the allottee has to be refunded with interest at such rate as may be prescribed. The proviso to Section 18(1) contemplates a situation where the allottee does not intend to withdraw from the Project. In that case he is entitled to and must be paid interest for every month of delay till the handing over of the possession. It is upto the allottee to proceed either under Section 18(1) or under proviso to Section 18(1). The case of Himanshu Giri came under the latter category. The RERA Act thus definitely provides a remedy to an allottee who wishes to withdraw from the Project or claim return on his investment."*

15.9 The Hon'ble Supreme Court in ***Civil Appeal No. 12238/2018 (Pioneer Urban Land Infrastructure Ltd. Vs. Govind Raghwan***) has observed as follows:-

"We see no illegality in the Impugned Order dated 23.10.2018 passed by the National Commission. The Appellant – Builder failed to fulfill his

contractual obligation of obtaining the Occupancy Certificate and offering possession of the flat to the Respondent – Purchaser within the time stipulated in the Agreement, or within a reasonable time thereafter. The Respondent – Flat Purchaser could not be compelled to take possession of the flat, even though it was offered almost 2 years after the grace period under the Agreement expired. During this period, the Respondent – Flat Purchaser had to service a loan that he had obtained for purchasing the flat, by paying Interest @10% to the Bank. In the meanwhile, the Respondent – Flat Purchaser also located an alternate property in Gurugram. In these circumstances, the Respondent – Flat Purchaser was entitled to be granted the relief prayed for i.e. refund of the entire amount deposited by him with Interest."

15.10 The Hon'ble Supreme Court in ***M/s Fortune Infrastructure (now known as HICON Infrastructure) and Anr. Vs. Trevor D'Lima & Ors*** (Civil Appeal No. 3533-3534 of 2017 decided on 12.03.2018) was pleased to observe that a person cannot be made to wait indefinitely for the possession and if there is no delivery period mentioned in the agreement, a reasonable time has to be taken into consideration, and had observed that in such a situation a period of 3 years would have been reasonable for completion of the contract.

15.11 The Hon'ble Supreme Court in ***Civil Appeal No. 3182/2019 (Kolkata Best International City Pvt. Ltd. Vs. Devashish Rudra***), while examining the issue of delay in possession beyond reasonable period and refund of the amount of home buyer, has been pleased to observe as follows:-

"It would be manifestly unreasonable to construe the contract between the parties as requiring the buyer to wait indefinitely for possession. By 2016, nearly seven years had elapsed from the date of the agreement. Even according to the developer, the completion certificate was received on 29 March 2016. This was nearly seven years after the extended date for the handing over of possession prescribed by the agreement. A buyer can be expected to wait for possession for a reasonable period. A period of seven years is beyond what is reasonable. Hence, it would have been manifestly unfair to non-suit the buyer merely on the basis of the first prayer in the reliefs sought before the SCDRC. There was in any event a

prayer for refund. In the circumstances, we are of the view that the orders passed by the SCDRC and by the NCDRC for refund of moneys were justified."

15.12 The Hon'ble Supreme Court in ***Civil Appeal No. 3207-3208/2019 (Marvel Omega Builders Pvt. Ltd&Ors. Vs. Shri Hari Gokhle***) has observed as follows:-

"Even assuming that the villa is now ready for occupation (as asserted by the Appellants), the delay of almost five years is a crucial factor and the bargain cannot now be imposed upon the Respondents. The Respondents were, therefore, justified in seeking refund of the amounts that they had deposited with reasonable interest on said deposited amount. The findings rendered by the Commission cannot therefore be said to be incorrect or unreasonable on any count."

15.13 Recently Hon'ble Supreme Court in ***Civil Appeal No. 62 of 2021 M/S Nexgen Infracon Pvt. Ltd. Vs. Manish Kumar Sinha and another*** vide judgment dated 11th January, 2021, while examining the issue of non-willingness of the allottee to take possession of the apartment and his willingness to be satisfied in taking refund of the amount deposited by him with interest at such rate as may deem appropriate by the Court, pleased to observe that "we see no reason to take a different view in respect of the entitlement of the respondents to seek refund of the amount deposited by them. We, therefore, hold that the respondents were justified in seeking refund."

15.14 Further, in terms of Sub-Section 5 of Section 4 of the U.P. Apartments Act 2010, *"an apartment may be transferred by the promoter to any person only after obtaining the completion certificate from the prescribed sanctioning authority concerned as per building bye-lays."*

15.15 Evidently, there is a delay in completion of the Project/Tower, in which the flat in question was allotted to the appellant, and delay is also admitted by the respondent no.1 in its reply that it applied for OC in March 2017, whereas as per clause 26 of Flat Allotment Agreement dated 18th May 2014 the complex was proposed to be completed by December 2015 and in the event of delay in possession, the respondent no.1 has to pay delay interest at the rate of Rs.5/- per sq. ft. per month, therefore, we conclude that the delay is solely attributable to the respondent/promoter and allottee cannot be bound to take possession of the Unit/Flat.

15.16 On the basis of the aforesaid analysis we are of the considered view that the claim of the allottee/appellant for seeking refund of her deposited amount along with interest on account of delay in completion of the Project/handing over of possession of the allotted Unit/Flat is in consonance with the provisions of Section 18 of the Act, 2016. **Question no. (iii)** is answered accordingly.

16. **Vide Question No. (iv)** we are required to examine as to whether the project in question of the respondent is delayed?

16.1 From the pleadings on record it is evident that the appellant applied for allotment of a 2 BHK flat in Sector Omicron-1, a project of the Greater Noida Industrial Development Authority (GNIDA). In the lottery draw held on 15.01.2014 the appellant was selected and he was allotted Flat No. 404/B, 4th Floor, Tower-B, Sector Omicron-1, Greater Noida. The appellant was issued allotment letter dated 29.01.2014 by GNIDA and agreement to lease was executed in his favour on 28.07.2014.

16.2 As per terms of point no. N of the Brochure, the possession of the allotted flat was to be delivered within a period of three years from the date of allotment. The allotment was made on 29.01.2014, therefore, the proposed date of possession comes to 28.01.2017.

16.3 As per averments of the allottee/appellant, when after passage of more than 3 years from the date of allotment i.e. 28.01.2017, the promoter did not offer possession of the flat, the appellant enquired about the project and he came to know that the project was incomplete. When he asked the promoter for the tentative date of delivery of possession, he was not given any satisfactory reply and he was asked to wait for some more period.

16.4 Admittedly, after passage of more than 2 years and 6 months from the promised date of delivery of possession i.e. 28.01.2017, the promoter sent a letter to the allottee through registered post on 04.07.2019 raising demand of Rs.5,18,895/- and offering possession.

16.5 The GNIDA/promoter, in its objections to the grounds of appeal, has admitted that the built-up housing scheme has been delayed due to delay in permission for excavation and ban on ground water exploitation by Central Ground Water Authority and construction ban by NGT in respective years for particular period in each year in Delhi NCR due to pollution. The OC/CC has been issued to the promoter on 08.09.2020. Further, cause shown for delay, does not warrant consideration as per the provisions of the Act and Rules 2016 and proposed period of completion/possession does not permit a promoter to ask the allottees to wait for an indefinite period for possession of their dream home.

16.6 We have examined the pleadings on record and come to the conclusion that the project of GNIDA/promoter was delayed. The **question no. (iv)** is answered accordingly.

17. **Question No. (v)** is as to whether offer of possession can be given by a promoter without completion and occupation certificate or is it necessary and mandatory to obtain the same before offering possession and asking the allottee to settle the account and satisfy the final demand, under the scheme of Act & Rules 2016, read with U.P. Apartments Act 2010.

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

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

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

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

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

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

17.5 Further, Section 11(4)(b) and Section 17 of the Act 2016 mandate the promoter to obtain completion certificate or occupancy certificate or both, as applicable, from the competent authority and make it available to the allottees individually or to the association of allottees, as the case may be, and execute a registered conveyance deed in favour of allottee along the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the possession within three months from the date of issue of occupancy certificate and corresponding obligation has been imposed upon the allottee to take physical possession of the unit within a period of two months of the occupancy certificate issued for the said apartment, plot or building, as the case may be, vide Section 19(10) of the Act 2016.

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

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

18. **Question No (vi)** relates to the entitlement of the appellants for the interest on account of delay in completion of the Project under the scheme of Act, 2016 and the rate of interest required to be paid by the Promoter to the allottee for delay.

18.1 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.

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

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

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

18.4 Recently the Hon'ble Supreme Court, while dealing with the provisions of Section 18 of the Act, 2016, in the case of ***M/S Imperia Structures Ltd. Vs. Anil Patni and another***, Civil Appeal Nos. 3581-3590 of 2020, decided on 02.11.2020, vide para 23, was pleased to observe that the right so given to the allottee is unqualified and if availed, the money deposited by thee 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).

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

Rule 9.2(ii)

The Allottee shall have the option of terminating the Agreement in which case the Promoter shall be liable to refund the entire money paid by the Allottee under any head whatsoever towards the purchase of the apartment, along with interest at the rate equal to MCLR (Marginal Cost of Lending Rate) on home loan of State Bank of India + 1% unless provided otherwise under the Rules, within forty-five days of receiving the termination notice:

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

Rule 9.3

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

Rule 9.3(i)

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

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

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

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

18.8 It is important to mention herein that the **Hon'ble Supreme Court** in ***Civil Appeal No. 4910-4941/2019 DLF Homes Panchkula Pvt. Ltd. Versus D. S.***

Dhanda etc. etc. while examining the issue of compensation, was pleased to observe as under;-

> *"If compensation comprises of two parts, (i) by way of interest on the deposited amount from the assured date (milestone date) of completing construction and handling over possession to the actual date of handling over possession, and, (ii) lumpsum amount, we find nothing wrong in it. We do not agree with the builder co.'s contentions that interest on the deposited amount should not be provided since it is not a case of refund but a case of delay in possession. The interest on the deposited amount has to be viewed in the light of the purpose for which it is intended. It is but a way of computing compensation for delay in possession that is commensurate with the amount deposited by the complainant, and here it has been computed after adopting a milestone date as per the builder co.'s own (unfair and deceptive) letter of 05.06.2013. There can be and is no question of not agreeing to an endorsing the award of interest from the said milestone date. Here we may however add that the rate of interest also cannot be arbitrary or whimsical, some reasonable and acceptable rationale has to be evident, subjectivity has to be minimized, a logical correlation has to be established. Albeit detailed arithmetic or algebra is not required. Logical (to the extent feasible) objective parameters should be adopted. Rounding off simplification etc. to make the computation doable could be adopted. We feel it appropriate that, considering that the subject units in question are dwelling units, in a residential housing project, the rate of interest for house building loan for the corresponding period in a scheduled nationalized bank (take, State Bank of India) would be appropriate and logical, and, if 'floating'/varying/different rates of interest were/are prescribed, the higher rate of interest should be taken for this instant computation."*

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

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

18.10 On the basis of aforesaid analysis the **question no. (vi)** is answered in affirmative in favour of allottees/complainants.

19. The Hon'ble Supreme Court vide its judgments (i) Civil Appeal No. 3182 of 2019 ***Kolkata West Industrial City Pvt. Ltd. Vs. Devashish Ryudra,****(ii)*Civil Appeal No. 3207 & 3208 of 2019***Marvel Omega Builders Pvt. Ltd. & others Vs. S. Wiharis Gokhale & others,*** *(iii)*(2018)5 SCC 442 ***Fortune Infrastructure and another Vs. Trevor D. Lima & others,*** *(iv)*(2007)6 SCC 711 ***Bangalore Development Authority Vs. Syndicate Bank*** *and (v)* Civil Appeal Nos.3581-3590 of 2020 ***M/s Imperia Structure Ltd. Vs. Anil Patni and others*** was pleased to observe that it would be unreasonable to require the allottee to wait indefinitely for possession of the unit and the allottee is entitled to seek refund of the amount paid by him along with compensation.

20. As far as claim of the allottees/appellants for compensation is concerned, the complaints were filed by the allottees/appellants before the Regulatory Authority, whereas issue of compensation under the scheme of the Act, 2016 can only be considered by the Adjudicating Officer and for which a complaint is required to be filed as per Rule 34(1) on Form N of Rules,

2016, hence claim of the compensation is not maintainable in the instant proceedings.

21. On the basis of the aforesaid analysis we are of the considered view that the judgment and order dated 17.07.2020 passed by the Regulatory Authority in Complaint Nos. NCR144/12/0770/2019 (Adesh Kumar Kaushik Vs. Greater Noida Industrial Development Authority) and NCR144/112/0833/2019 (Charanjit Kaur Vs. Greater Noida Industrial Development Authority) is not sustainable in the eyes of law.

22. Accordingly, composite judgment and order dated 17.07.2020 passed by the Regulatory Authority in Complaint Nos. NCR144/12/0770/2019 (Adesh Kumar Kaushik Vs. Greater Noida Industrial Development Authority) and NCR144/112/0833/2019 (Charanjit Kaur Vs. Greater Noida Industrial Development Authority) is hereby **set aside.** Appeal No. 736/2021 (Greater Noida Industrial Development Authority Vs. Adesh Kumar Kaushik) and Appeal No. 738/2021 (Greater Noida Industrial Development Authority Vs. Charanjit Kaur) are **dismissed.** The Appeal Nos. 563/2020 (Adesh Kumar Kaushik Vs. Greater Noida Industrial Development Authority) and Appeal No. 562/2020 (Charanjit Kaur Vs. Greater Noida Industrial Development Authority) are **allowed** with the following directions:--

(i) The promoter (Greater Noida Industrial Development Authority) is directed to refund the deposited amount to the complainants/allottees.

(ii) The promoter (Greater Noida Industrial Development Authority) is further directed to pay interest to the complainants/allottees on the deposited amount from the date of deposit till the refund of the amount at the rate of MCLR+1% per annum.

(iii) The promoter (Greater Noida Industrial Development Authority)is further directed to comply this order within 45 days from the date of receipt of this order.

(iv) The complainants/allottees are at liberty to approach the U.P. Real Estate Regulatory Authority for execution of this order in case of non-compliance within the time frame fixed by this Tribunal.

23. 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.

23.1 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.

23.2 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.

23.3 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.

23.4 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.

23.5 In the instant case, since the appeals of the promoter have been dismissed, we direct the Registry to scrutinize the details of the amount deposited by the promoter under the provisions of Section 43(5) of the Act and inform the

Accounts Department. The Accounts Department, after verifying the same either from the record or from the Bank, will transfer the amount to the concerned account of the U.P. Real Estate Regulatory Authority (U.P. RERA). Further, we direct the UP RERA to dispose of this amount during the execution proceedings in accordance with its order dated 17.07.2020 passed in complaint case nos. NCR144/121/0770/2019 and NCR144/12/0833/2019.

24. No order as to costs.

(K. K. Jain) **(D. K. Arora)**

Dated:31st May, 2023.
Shakir.