RESERVED JUDGMENT

BENCH NO.1

THE U.P. REAL ESTATE APPELLATE TRIBUNAL
AT
LUCKNOW.

(1) Appeal No. 340 of 2019

Bishnu Kumar Agarwal (HUF) .... Appellant.

Versus

M/s. Himalaya Realestate Pvt. Ltd. ……….......Respondent.

(2) Appeal No. 341 of 2019

Bishnu Kumar Agarwal (HUF) .... Appellant.

Versus

M/s. Himalaya Realestate Pvt. Ltd. ……….......Respondent.

(3) Appeal No. 342 of 2019

Bishnu Kumar Agarwal (HUF) .... Appellant.

Versus

M/s. Himalaya Realestate Pvt. Ltd. ……….......Respondent.

(4) Appeal No. 343 of 2019

Anshu Agarwal .... Appellant.

Versus

M/s. Himalaya Realestate Pvt. Ltd. ……….......Respondent.

(5) Appeal No. 344 of 2019

Anshu Agarwal .... Appellant.

Versus

M/s. Himalaya Realestate Pvt. Ltd. ……….......Respondent.

(6) Appeal No. 345 of 2019

Anshu Agarwal .... Appellant.

Versus

M/s. Himalaya Realestate Pvt. Ltd. ……….......Respondent.

(7) Appeal No. 370 of 2019

Bishnu Kumar Agarwal (HUF) .... Appellant.

Versus

M/s. Himalaya Realestate Pvt. Ltd. ……….......Respondent.

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

1. Since the facts and issues involved in the above mentioned 7 appeals are identical and the appeals have been filed against the composite judgment/order dated 28.03.2019, therefore, they were heard together and are being disposed of by a common judgment. For the sake of convenience we take Appeal No. 370 of 2019 [Bishnu Kumar Agarwal (HUF) Vs. M/s Himalaya Realestate Pvt. Ltd.] as leading case.

2. The present appeals have been preferred by the allottee/complainant under Section 44(1) of the Real Estate (Regulation and Development) Act 2016 (hereinafter referred to as 'the Act 2016') against the composite order dated 28.03.2019 passed by the U.P. Real Estate Regulatory Authority, Gautam Budh Nagar (hereinafter referred to as 'the Regulatory Authority'), whereby the Regulatory Authority has directed as under:-

   (i) The complainant and promoter were directed to execute agreement according to notification dated 17.10.2018, notified under the RERA ACT & RULES, 2016, and the promoter was also directed to provide possession after obtaining OC/CC as per booking plan without charging any interest on the balance amount.

   (ii) If, direction No.1 is not complied by the promoter/respondent, the promoter/respondent is directed to refund the total amount after deducting 15% as per booking plan form Note 15 alongwith interest @ MCLR+1%.

3. Review Application No. REC/237/2019 filed against the order dated 28.03.2019 passed in Complaint Nos. 11201825246, 11201825250, 11201825256, 11201825253, 11201825254, 11201825259, 11201825241 were also decided by the Regulatory Authority on 15.07.2019, whereby the Regulatory Authority has rejected the prayer for modification of the order, on the ground that substantial changes cannot be made in the original order on review application under Section 39 of the Act.

4. The facts of the case, in brief, as culled out from the pleadings of the leading case are that the appellant, booked a flat on 10.10.2012 after reading terms and conditions mentioned in the booking application form of Himalaya Pride Project at Noida, launched by the respondent on 01.11.2012. The total price of the unit was Rs. 28,21,220/-, and the appellant paid Rs.2,90,000/- as booking amount. The respondent acknowledged the booking and also wrote a letter regarding left over formalities and remaining paper work and issued receipt which states that allotment is purely provisional and it does not entitle the appellant to claim any right title or interest over apartment.

4.1 Even after receiving 20% of total cost as mentioned in booking form which was signed at the time of booking, the respondent had not executed BBA. Without execution of BBA, the respondent was continuously making illegal and unjustified demands. In addition to booking amount, all payments made by the appellant constituted more than 50% of the total cost of the flat. On 11.10.2013, the respondent communicated through e-mail regarding allotment.

4.2 The respondent sent one sided unilaterally drafted blank BBA alongwith the allotment letter printed on Non Judicial Stamp Paper showing date of allotment as 10.10.2013, the appellant refused to sign on such blank BBA without receiving complete terms and conditions. The respondent also changed some terms and conditions regarding total basic price, PLC etc. After making more than 50% payment of flat the appellant refused to make further payment without execution of BBA and stopped payment of unjustified and illegal demands.

4.3 The respondent communicated cancellation of allotment many times since 2013 but delayed the refund intentionally to use the appellant’s money. The respondent also threatened the appellant and was continuously forcing the appellant to make payments and also to execute blank BBA.

4.4 The respondent was responsible for non execution of BBA because the respondent had deliberately changed/manipulated/breached terms and conditions of booking unilaterally and misled the appellant. The respondent cancelled booking unilaterally and falsely alleging non-compliance of payment scheduled in BBA/Allotment Letter signed/executed by the appellant, whereas no BBA had been executed at the time of booking.

4.5 In the month of October, 2018, respondent sent Rs.50,000/- to the appellant as part refund out of amount deposited by the appellant and after receiving part refund, the appellant filed complaint before Regulatory Authority seeking direction to the respondent for payment of balance amount alongwith interest.

4.6 While checking the portal of Regulatory Authority, the appellant found that in his complaint, the order has been reserved, and on 27.03.2019, the appellant uploaded his objection against the reply filed by the respondent. The appellant's complaint has been disposed of vide order dated 28.03.2019 and the order was uploaded on 30.04.2019. From perusal of order dated 28.03.2019 the appellant found that there were various mistakes regarding name of complainant, date of refund, status of BBA and reliefs sought etc.

4.7 On 11.06.2019, the appellant filed a review application which was rejected by the Regulatory Authority vide order dated 15.07.2019, hence the present appeal.

5. The appellant has filed the instant appeal on the following grounds:-

"A. Because the review application was filed against the order dated 28.03.2019 passed in seven complaints but the order dated 15.07.2019 specify number of only one complaint and does not specify number of remaining six complaints.

B. Because the Regulatory Authority has acted illegally, arbitrarily in highly casual manner, without having requisite jurisdiction and ignored well established laws and principle of natural justice and mis-applied the judgment of Hon'ble Supreme Court.

C. Because the finding recorded in the order dated 28.03.2019 by the Regulatory Authority are completely against the record as Regulatory Authority has ignored all the submissions as well as evidences submitted by the appellant and passed the order without considering the factual aspects of the case.

D. *Because the Regulatory Authority has erred both of facts and in law in order dated 28.03.2019 by accepting the false submissions and confirming unlawful actions of the respondent particularly regarding execution/non execution of blank BBA with blank undertaking, blank consents/NOCs on the ground of similar set of BBA for all allottees, and regarding so called refusal made by the appellant of refund offered by the respondent to the appellant in 2013 on disagreement on terms and conditions of booking/BBA.*

E. *Because, Regulatory Authority has erred both on facts and in law in stating in Order dated 28.03.2019 that present Complaint was filed by the Appellant against the Respondent for execution of BBA whereas present Complaint was filed for the refund of entire amount paid by the Appellant, minus meager amount of Rs. 50,000/- returned by the Respondent (after withdrawal / cancellation of allotment made by the Respondent) alongwith interest thereon as per the RERA Act for compensation being in the nature of charges for withdrawal / cancellation of allotment @15% of flat cost, as per T&C mentioned in Note No. 15 of Booking Form incorporated pursuant to provision of section 4(2)(c) of UP Apartment Act; and also for compensation for mental agony, harassment and legal cost.*

F. *Because Regulatory Authority has erred both of facts and in law in stating in Order dated 28.03.2019 that during the pendency of the Complaint with Regulatory Authority allotment of the Appellant has been withdrawn cancelled by the Respondent whereas said allotment was already withdrawn/ cancelled by the Respondent and meager amount of Rs. 50,000/- was also sent by the Respondent to the Appellant before filing of the Complaint by the Appellant.*

G. *Because Regulatory Authority has erred both of facts and in law in stating in Order dated 28.03.2019 that on Note No. 15 it is mentioned that the Respondent shall be entitled for adjustment (deduction) @ 15% of amount in case of withdrawal cancellation of allotment for any reason whereas Note No. 15 of Booking Form simply states that Cancellation Charges will be 15% of flat cost; and this Note No. 15* *was incorporated by the Respondent pursuant to the provisions of section 4(2)(c) of the UP Apartment Act which is applicable to both parties and is payable by the party who makes withdrawal / cancellation of allotment.*

H. *Because Regulatory Authority has erred both of facts and in law in stating in the Order dated 28.03.2019 that in the Complaint, Anutosh (Relief) is not specifically mentioned; whereas complete details of relief sought as well as details of payment like date and amount of each installment, interest and compensation etc. were submitted in the Complaint and also during hearing; and the Authority has also mentioned the amount paid by the Appellant to the Respondent.*

I. *Because Regulatory Authority has erred both on facts and in law in issuing direction in the Order dated 28.03.2019, vide Direction No. 1, to execute BBA in specified format notified in 2018, but after withdrawal / cancellation of allotment of flat.*

J. *Because Regulatory Authority has erred both of facts and in law in issuing direction in the Order dated 28.03.2019, vide Direction No. 2, in case of non compliance of Direction No. 1, to the Respondent to make payment of balance amount (after making adjustment for Rs. 50,000/- which has been paid in past) with MCLR+1 % interest after making deduction @15% of flat cost pursuant to Note No. 15 of Booking Form.*

K. *Because Regulatory Authority has erred both on facts and in law in passing the Order dated 28.03.2019 without giving the Appellant a fair and reasonable opportunity to present the case, to submit rejoinder as well as to cross examine the Respondent.*

L. *Because the Appellant craves leave to add, amend or alter any of the grounds of appeal."*

6. The appellant has sought the following reliefs in the instant appeal:-

"i. *Re-call the Case File of the said Review Application (Misc. Case No. REC/237/2019) and also Re-call the Case File of the said Complaint*

No. 11201825250 from the lower forum i.e. Bench II and Bench I, UP RERA Regulatory Authority, Gautam Budh Nagar, respectively.

ii. *Set aside the said Order dated 15.07.2019, passed in said Review Application filed under section 39 of Act.*

iii. *Modify the said Order dated 28.03.2019, passed in said complaint, as under:*

(a) Delete Direction No. 1 completely;

(b) Rectify Direction No. 2 by directing the Respondent to pay to the Appellant withdrawal / cancellation charges (instead of making deduction) @15% of flat cost in terms of Note No. 15 of Booking Form read with provisions of section 4(2)(c) of the UP apartment Act, alongwith entire amount received from the Appellant with interest thereon as per RERA Act from the date of receipt of each instalment (after making adjustment of Rs . 50,000/- paid by the Respondent in October, 2018); and

(c) Direct the Respondent to pay to the Appellant other compensation also which this Hon'ble Appellate Tribunal think fit for mental agony, harassment and legal cost."

7. The respondent filed objections to the grounds of appeal stating therein the appellant has filed the present appeal before the Tribunal based on contrary and false facts and there is no substantial and technical error in the order dated 28.03.2019 passed by Regulatory Authority.

7.1 The respondent submitted that the appellant has not disclosed the factual scenario before the Tribunal because prior to commencement of the Real Estate (Regulation and Development) Act, 2016, the appellant applied after seeing the project model "Himalaya Pride" of the respondent and also after going through the terms and conditions as laid down in the application form available with the broker M/s Sara India reality, Noida, the appellant agreed totally with the terms & conditions as detailed at page No.2 of the application form. On receiving the application and registration amount from the appellant through M/S Sara India reality, Noida the respondent allotted a flat No. A-11/9 on 11th floor of Tower "A" in favour of the appellant.

7.2 The respondent further submitted that the respondent prepared allotment letter/ agreement of the appellant in the month of February 2013 after sanction of plan of the project and called the appellant at his project office and requested to sign the agreement of the aforesaid allotted flat. The appellant came to the project office and gone through the agreement prepared on the prescribed format, but he did not agree to sign the same agreement however, the appellant desired amendments according to his own will. The respondent expressed its inability to amend the agreement. The respondent suggested the appellant to receive the deposited amount but the appellant did not want to leave the allotted flat. Thereafter the appellant left the place saying that he will think over it in presence of his family members and then only he will put his signature thereon. The respondent requested in the month of October 2013 to the appellant for signing the agreement. It is pertinent to mention here that the appellant has not raised demand to refund his deposited amount in February 2013. The appellant has made payment of due installment for the allotted flat in the month of May-2013, October-2013 and March-2014 and thereupon the respondent has assumed the consent of the appellant on the allotment letter/ agreement.

7.3 The respondent further submitted that the appellant had not made any payment after the fifth installment according to CLPP as mentioned in the application form and he became defaulter. The appellant never contacted to the respondent till 02.04.2018 prior to the legislation since 29.10.2014 while respondent had continuously raised demand for the due installment with the warning of cancellation of the flat.

7.4 The Greater Noida Authority issued part occupancy certificate to Tower A and B of the project on 19.06.2018. After issuance of part occupancy certificate, the Respondent sent demand letter dated 24.08.2018 through speed post containing the dues and due installments including offer of possession to the allottee, but in spite of several requests, the appellant did not pay heed to make payment of due amount. Final demand letter dated 24.08.2018 was sent through registered post intimating him that allotment of his flat would be cancelled if, appellant does not make payment of due installments and requested him to sign the allotment letter/agreement. In spite of several request, the appellant neither signed the allotment letter/ agreement nor deposited the due amount.

7.5 The respondent was compelled to cancel the allotment of allotted flat just because of non-payment of due amount since 2014 by the appellant. The respondent sent intimation letter dated 06.10.2018 to the appellant enclosing therewith a demand draft of Rs. 50000/- (Rupees Fifty Thousand Only) and requested the appellant to come for clearing the full and final transaction payment of his cancelled flat but the appellant did not turn up and filed complaint before the Regulatory Authority.

7.6 Even after the model agreement formulated by RERA authority, the respondent through its written argument, once more submitted proposal on 07.03.2019 before the Regulatory Authority to deliver the possession of the flat.

7.7 The respondent after making payment of commission to the broker M/S SARA India Reality, Noida, completed construction process of the allotted flat according to its promise availing loan from the financial institutions/ banks and made payment of government dues like service tax, labour cess etc. and other expenses during the construction of the flat. Though the appellant even after consenting for making payment as per CLPP (constriction Link Payment Plan), did not make payment of the due installments, and accordingly he became defaulter.

8. The appellant filed reply to the objections of the respondent and submitted that the name of the appellant is mis-spelled as it should be Bishnu Kumar Agrawal (HUF). It is further submitted that the amount sent by the respondent to the appellant, through RTGS/ Banker's Cheques and credited into the bank account of the appellant, but after filing of appeal, it has been treated as part payment against the claims of the Appellant. The amount sent by the respondent is not in accordance with the direction no. 2 of the impugned order passed by the Regulatory Authority because as per the respondent, interest has been paid from the date of cancellation (October, 2018) to actual date of payment, whereas, interest must be paid, as per the

provisions of the Act and various judgments have been passed for interest from the date of receiving of each installment to actual date of payment. He further submitted that this fact has also been observed by the Hon'ble Tribunal during hearing and the same was also accepted by the respondent, who then made commitment to deposit the Demand Draft for the unpaid interest, for attributable period starting from the date of receiving of each installment to the date of cancellation, on next date of hearing but the respondent did not keep its commitment. He also submitted that the respondent has neither provided interest calculation sheet so far, nor disclosed the rate of MCLR+1% actually considered by the respondent, whereas prevailing SBI's MCLR+1% as on the date of impugned order was 9.75%.

8.1 The appellant stressed that the respondent has submitted that it has allotted the flat in question on 01.11.2012, after receiving the application from its broker namely SARA India Reality, whereas in the proceeding of 07.02.2019 before the Regulatory Authority stated that as per the respondent, the application form has not been handed over by its broker to the respondent till 07.02.2019.

8.2 The respondent has falsely submitted that it has prepared allotment letter/agreement (BBA) and called the appellant to execute the same in February, 2013 and the appellant refused for certain reasons to sign the same and left the place, whereas in reply dated 07.03.2019 submitted before the Regulatory Authority, the respondent had submitted that it has called the appellant to execute the BBA on 02.09.2013, whereas e-mail dated 11.10.2013 sent by the respondent for intimation of allotment states otherwise and disapprove this claim of the respondent. The above submissions of the respondent are highly contradictory, inaccurate and false which show that the respondent has made inaccurate and false submissions before all the legal forums. The e-mails sent by the respondent also show that - (i) allotment / agreement (BBA) or even intimation of allotment sent on e-mail has not been made in February, 2013 nor on 02.09.2013; (ii) Blank BBA was sent to the appellant, only after 11.10.2013 and just before March, 2014, only to take payment of 5 installments; (iii) all was not well between the appellant and the respondent as claimed by the respondent.

Further, the appellant had made objections (i) immediately when the respondent had electronically sent intimation of allotment, very first time, in October, 2013, (ii) when the respondent sent the blank BBA for execution; (iii) when the respondent had started disputes in September, 2014, for non-payment of further installments by the appellant without execution of such blank BBA; and (iv) when the respondent had given threats to the applicant. The appellant was always ready to execute BBA on T&Cs of booking; provisions of UP Apartment Act and provisions of the then prevailing laws, but not after suo moto cancellation of the booking in October, 2018. The respondent had falsely submitted on 07.03.2019 before the Regulatory Authority that the appellant had made payment of due installments on 24.09.2013, but it has nowhere mentioned this payment in its reply dated 10.01.2020.

8.3 It is remarkable that the respondent is admitting that five installments were made on time by the appellant but the respondent has not clarified that why a reminder-cum-cancellation notice/letter dated 12.07.2013 was sent only after so-called repeated follow-ups, as claimed in the said letter, regarding final process of cancellation due to non-payments of demands.

8.4 The part occupancy certificate also proves that there was a substantial delay in completion of the project. It is further admitted that after receiving the Part Occupancy Certificate the respondent had sent demand letter 24.08.2016 is false.

8.5 The appellant further submitted that the respondent has concealed the facts of non- payment of further installments as the appellant had after making payment of five installments on time, refused to make further payment without execution of BBA on T&Cs of booking, whereas the respondent wanted the appellant to execute blank BBA, in the name of same/standard format for all buyers. It is further submitted that respondent's claim that it had made submission before Regulatory Authority on 07.03.2019 to deliver the possession is false as the respondent had already cancelled the booking in the month of October, 2018.

8.6 The appellant submitted that when he had refused to sign the one sided unilaterally drafted blank BBA incorporating additional terms and conditions, having blank undertaking and blank NOC's/Consent Letters and the appellant was not ready, after making payment of five installments on time, to make further payment without execution of BBA as per agreed terms and conditions of booking then the respondent had made cancellation, *suo moto*, in October, 2018. Further, the appellant had not filed the complaint seeking relief for restoration of booking after *suo moto* cancellation of booking by the respondent. Further, any model agreement would have been considered had the respondent not cancelled the booking *suo moto* or had the appellant sought relief for restoration of booking after *suo moto* cancellation of booking by the respondent. Further, any model agreement cannot change the basic terms and conditions of booking. It is further submitted that when the respondent was absent on 07.02.2019 then how did the respondent submitted all these facts mentioned in the order dated 07.02.2019. It is further submitted that the respondent has admitted before the Tribunal that it had not appeared on 07.02.2019 before the Regulatory Authority, then how the order was reserved on 07.02.2019.

9. Heard Sri Bishnu Kumar Agarwal, the appellant in person and Sri Chandrashekhar Azad, authorized representative of the respondent.

10. The instant appeal has been filed by the appellant Sri Bishnu Kumar Agarwal (HUF) and the respondent-company has not filed any cross appeal against the impugned order. It means that respondent-company is not aggrieved with the impugned order passed by the Regulatory Authority. As per direction No.1 of the impugned order the Regulatory Authority has directed to execute BBA as per rules of RERA with respect to the sales/lease agreement notified on 17.10.2018 and the respondent was also directed to take the balance amount without any interest from the appellant to provide possession with OC/CC within 45 days from the date of passing of order i.e. 28.03.2019. It was also provided in the impugned order that if direction No.1 is not complied by the respondent-company, the respondent-company is directed to refund the total amount after deducting 15% as per booking form Note No. 15 alongwith interest @ MCLR+1%, the amount of Rs. 50,000/- which has been paid in part as refund after cancellation, also to be deducted.

10.1 The appellant booked the flat on 11.10.2012. As per Clause-3 of the booking form on the intimation from the company in regards to commencement/launch of the project on or before expiry of the 03 months from the date of registration, the appellant shall fill in the new prescribed application but appellant has not received any intimation from the company regarding commencement/launch of the project within 03 months and no new application form could be signed. As per Clause-15 of the application form cancellation charge was 15% of the flat cost.

10.2 The respondent-company issued letter dated 01.11.2012 acknowledging the provisional booking of flat No. A-11/9 under C.L.P. plan alongwith receipt of Rs. 2,90,000/- dated 01.11.2012. The appellant continued further payments and also attached receipt dated 08.12.2012 for Rs. 2,70,000/-. The other important terms and conditions of the application form related to the instant case are as under :-

> *"Term No. 3- That upon receiving intimation from the Company in regards commencement/launch of the Project on or before expiry of period of three months from the date of registration, I/we shall fill in the new prescribed application.*
>
> *Term No. 4- I/we will decide the convenient payment plan at the time of filing new prescribed application form only.*
>
> *Note-9 of the application form stated that 18% interest per annum will be charged on the delayed payment, and*
>
> *Note-15 stated that cancellation charge will be 15% of the flat cost".*

10.3 The respondent has further issued a letter dated 12.07.2013 (page No. 130 of the memo of appeal) reminding payment against the booked unit without mentioning the amount and details of unit etc. In this letter it was also stated that loan facility is available from BOB, HDFC Ltd. and UBI. The respondent-company has sent allotment letter dated 10.10.2013 through e-mail on 11.10.2013 which was objected by the appellant and respondent-company has again mailed corrected allotment letter on 12.10.2013 alongwith blank undertakings to be signed by the appellant. The terms of the allotment was again objected by the appellant and BBA/allotment letter could not be signed by both the parties. Meanwhile, appellant kept paying the installments which were due within 30 days and 60 days of booking.

10.4 The respondent raised demand letter dated 04.12.2013 for payment of Rs. 2,83,998/- towards foundation and on 02.02.2014 towards casting of basement. The appellant has further paid Rs. 2,83,998/- on 07.03.2014. In total the appellant has paid 50% of the flat cost to the respondent. As per unsigned allotment letter provided by the respondent to the appellant the unit was to be handed over within 48 months plus 06 months fit-out period after approval of sanctioned plan. The part OC was issued on 19.06.2018.

10.5 As per respondent's reply before the Regulatory Authority dated 07.03.2019, the respondent's project plan was approved on 14.02.2013 by the Greater Noida Industrial Development Authority, on the basis of available records the appellant kept objecting on the terms and conditions of the allotment and without signing the allotment letter respondent continued demanding the installments and cancelled the flat of the appellant vide letter dated 17.10.2018 without mentioning the cancellation charges and refunded an amount of Rs. 50,000/- only to the appellant as part payment and never refunded the rest amount to the appellant.

10.6 After cancellation, the appellant filed a complaint before the Regulatory Authority complaining non execution of BBA and non refunding the amount even after cancellation of the flat. The said complaint of the appellant was disposed of by the Regulatory Authority vide order dated 28.03.2019.

11. In order to examine the issues involved in the instant appeals and dispute between appellant and respondent we deem it fit and proper to frame the following issues :-

(1) Whether in pursuance to clause 3 of the application dated 11.10.2012 for registration of residential area of Himalaya Realestate Private Limited the respondent informed the appellant regarding commencement/launch of the project on or before the expiry of period of three months from the date of registration and asked the appellant to fill-in new prescribed application?

(2) Whether in pursuance to the application dated 11.10.2012 for registration of residential area of Himalaya Realestate Private

Limited the respondent booked Unit No. A-11/9, 2BHK, (948 sq.ft.) with construction linked plan?

(3) Whether any Builder Buyer Agreement was executed between the appellant and the respondent in pursuance to the application of the appellant dated 11.10.2012 and provisional booking of Unit No. A-11/9, 2BHK, (948 sq.ft.) was made by the respondent vide letter dated 01.11.2012?

(4) Whether the respondent raised demands in pursuance to the payment plan indicated in Annexure-2 of the application form of the appellant dated 11.10.2012 and the appellant made payment, if any in pursuance to the demand of the respondent and upto what stage, and whether the cancellation of the allotment of the appellant vide letter dated 17.10.2018 due to non-compliance of the payment schedule and refund of the amount of Rs.50,000/- was just and proper?

(5) Whether the project of the respondent is delayed?

(6) Whether there is any mechanism provided under the provisions of the Act and Rules 2016 for determination of interest for delay in handing over possession of the unit to the allottee and/or refund with interest and compensation, if the allottee does not want to continue/wish to withdraw from the project as well as violation of the provisions of Sections 12,14,18 and 19 of the Act 2016?

12. **Vide Issue No. (1)** we are required to examine as to whether in pursuance to clause 3 of the application dated 11.10.2012 for registration of residential area of Himalaya Realestate Private Limited the respondent informed the appellant regarding commencement/launch of the project on or before the expiry of period of three months from the date of registration and asked the appellant to fill-in new prescribed application.

12.1 A perusal of the application dated 11.10.2012 for registration of residential area of Himalaya Realestate Private Limited reveals that the appellant submitted an amount of Rs.2,90,000/- vide cheque no. 000019 dated

11.10.2012 drawn on Kotak. Clause 3 of the application form provides that upon receiving intimation from the Company in regards to commencement/launch of the project on or before the expiry of period of three months from the date of registration the applicant/appellant will fill-in the new prescribed application. Clause 4 of the said application dated 11.10.2012 further provides that the applicant/appellant will decide the convenient payment plan at the time of filling new prescribed application form only and clause 5 further indicates that in case the applicant/appellant does not opt the booking allotment on any ground, the Company can forfeit the registration money paid by the applicant and the applicant shall not have any right or claim of refund of registration money against the Company.

12.2 The respondent, vide letter dated 01.11.2012, while congratulating the appellant on being the most recent addition to Himalaya Group, informed that based on his application the respondent has provisionally booked Unit No. A-11/9, 2BHK (948 sq.ft.) in CLP (Construction Linked Plan) in their project 'Himalaya Pride' at Greater Noida (West). The letter further indicates that the respondent will get in touch with the appellant to complete a few left over formalities and paper work.

12.3 There is nothing on record and neither of the parties in their respective pleadings have mentioned anything about taking action in pursuance to clause 3 of the application form dated 11.10.2012, whereby the respondent was required to intimate the appellant regarding commencement/launch of the project on or before the expiry of period of three months from the date of registration and the appellant was to fill in the new prescribed application. On the basis of the pleadings and record we come to the conclusion that after filling in the application form dated 11.10.2012 no action was taken by the respondent in pursuance to clause 3 of the same. **Issue no. (1)** is answered accordingly.

13. **Vide Issue No. (2)** we are required to examine as to whether in pursuance to the application dated 11.10.2012 for registration of residential area of Himalaya Realestate Private Limited the respondent booked Unit No. A-11/9, 2BHK, (948 sq.ft.).

13.1 On examination of the record we found that vide letter dated 01.11.2012 (page 127 of the memo of appeal) the respondent congratulated the appellant on being the most recent addition to Himalaya Group and informed that based on his application the respondent has provisionally booked Unit No. A-11/9, 2 BHK (948 sq.ft.) under CLP (Construction Linked Plan) and the respondent will get in touch with the appellant to complete a few left over formalities and paper work. Thus, we come to the conclusion that in pursuance to the application of the appellant dated 11.10.2012 for registration residential area of Himalaya Realestate Private Limited the respondent booked Unit No.A-11/9, 2BHK (948 sq. ft.) with construction linked plan. **Issue no. (2)** is answered accordingly.

14. **Vide Issue No. (3)** we are required to examine as to whether any Builder Buyer Agreement was executed between the appellant and the respondent in pursuance to the application of the appellant dated 11.10.2012 and provisional booking of Unit No. A-11/9, 2BHK, (948 sq.ft.) was made by the respondent vide letter dated 01.11.2012.

14.1 On examination of the pleading and record it reveals that in pursuance to the application of the appellant dated 11.10.2012, provisional booking of Unit No. A-11/9, 2 BHK (948 sq.ft.) was intimated by the respondent vide letter dated 01.11.2012 and the respondent also issued a receipt of the amount of Rs.2,90,000/- on 01.11.2012. There is another receipt of Rs.2,70,000/- dated 08.121.2012 on account of payment within 30 days for the unit in question.

14.2 The respondent vide letter dated 11.10.2013 sent allotment letter dated 10.10.2013 after a gap of about one year of accepting the booking amount on 11.10.20121. The appellant objected to various clauses of the same, as well as blank and unfilled most of the particulars except the details of the unit number, area, consideration etc. along with blank undertaking, no objection letter for change in the layout plan of the project and despite correspondence through email and on account of non rectification of the objectionable clauses, no allotment letter could be signed between the parties. The perusal of the allotment letter, which also contained the draft BBA, reveals that the allotment letter was in fact a Builder Buyer

Agreement, which was required to be executed between the parties. The respondent kept on raising demands and as per record last payment of Rs.2,83,998/- was made by the appellant on 07.03.2014 and as per averments of the appellant he has paid 50% of the cost of the unit to the respondent. In view of the above, we conclude that no Builder Buyer Agreement prescribing the terms and conditions as well as other required necessary details has been executed between the parties. **Issue no. (3)** is answered accordingly.

15. **Vide Issue No. (4)** we are required to examine as to whether the respondent raised demands in pursuance to the payment plan indicated in Annexure-2 of the application form of the appellant dated 11.10.2012 and the appellant made payment, if any in pursuance to the demand of the respondent and upto what stage, and whether the cancellation of the allotment of the appellant vide letter dated 17.10.2018 due to non-compliance of the payment schedule and refund of the amount of Rs.50,000/- was just and proper.

15.1 As per record of the memo of appeal the appellant made initial payment of Rs.2,90,000/- at the time of filling in the application form for registration of residential area of Himalaya Realestate Pvt. Ltd., the receipt of the same was issued by the respondent on 01.11.2012. Thereafter another payment of Rs.2,70,000/- was acknowledged by the respondent vide receipt dated 08.12.2012 towards 10% payment within 30 days of the booking.

15.2 The respondent vide letter dated 12.07.2013 issued a reminder to the appellant regarding payment against the booked unit without mentioning the amount and details of the unit etc. In this letter it was also stated that loan facility is available from BOB, HDFC Ltd. and UBI. The respondent raised another demand vide letter dated 04.12.2013 for payment of Rs.2,83,998/- towards foundation and on 02.02.20142 towards casting of basement. The appellant has further paid Rs.2,83,998/- on 07.03.2014 and as per the averments of the appellant he has made payment of 50% of the cost of the unit and thereafter stopped making payment on account of delay in completion of the project as well as non resolution of the objections raised regarding allotment letter/BBA. Thus, it is evident that in pursuance to the application of the appellant dated 11.10.2012 the respondent issued only provisional booking of Unit No. A-11/9, 2BHK (948 sq.ft.) vide letter dated 01.11.2012 and no action has been taken by the respondent in pursuance to clause 3 of the application dated 11.10.2012 whereby the respondent was required to intimate the appellant regarding commencement/launch of the project on or before the expiry of the period of three months from the date of registration i.e. 11.01.2013 and the appellant was required to fill a new prescribed application form.

15.3 The respondent without issuing allotment letter, only on the basis of provisional booking dated 01.11.2012 kept on raising demands indicated in the application form and the appellant also made payment of about 50% of the cost of the unit vide different cheques, whereas as per clause 4 of the application form dated 11.10.2012, the appellant was to choose/decide the convenient payment plan at the time of filling new prescribed application form.

15.4 In our considered view on receipt of the application for registration/request for allotment of a unit a promoter/developer is required to acknowledge the receipt of the application/request and thereafter issue an allotment letter of the booked unit and execute agreement giving details of the project, specifications of the unit, amenities, payment plan etc. The promoter is also under obligation to execute an agreement in pursuance to the provisions of Section 4(2) of the U.P. Apartment (Promotion of Construction, Ownership and Maintenance) Act 2010. Thus, without issuing a formal allotment letter, the demands raised by the respondent in pursuance to the payment pl an mentioned in the application form were not proper on the part of the respondent, specially when the appellant was to choose a payment plan as per clause 4 of the application form at the time of filling new prescribed application form only after receipt of intimation from the respondent with regard to commencement/launch of the project on or before the expiry of period of three months from the date of registration. However, as per averments of the appellant he has made 50% payment of the cost of the unit without there being any formal allotment letter/BBA with the respondent.

15.5 The cancellation of the unit vide letter dated 17.10.2018 was without mentioning the details of refund and without refunding the amount therefore the same cannot be treated as valid cancellation. In our considered view, the cancellation without explaining the amount refundable and without refunding the due amount and sending only token payment of Rs. 50,000/- was not in accordance with the provisions and aims and objective of the Act, 2016 and also not fair on the part of the respondent as the respondent failed to resolve the issue raised with respect to signing of blank undertaking, no objection letter for change in the layout plan of the project etc., resulting in non-signing of Allotment Letter/BBA, which was proposed after one year of booking by the respondent.

15.6 As per record admittedly no agreement was signed between the parties laying down the terms and conditions. Note 15 of the application form talks about 15% charges of the cost of unit on cancellation, but it does not speak about cancellation on whose count. In the instant case it is the respondent who without choosing a payment plan by the appellant raised various demands and the appellant after paying 50% of the cost of the unit stopped responding to the demands of the respondent on account of non-resolution of the issues in the draft allotment letter/BBA and, as such, without there being any clause with respect to cancellation of the unit, for whatsoever reason, the respondent chose to cancel the unit, then the respondent is required to refund the entire deposited amount along with admissible interest. As the respondent itself failed to comply clause 3 of the Application Form, accordingly, in our considered view, the allottee/appellant is entitled to get the entire amount without any deduction along with admissible interest. **Issue no. (4)** is answered accordingly.

16. **Vide Issue No. (5)** we are required to examine as to whether the project of the respondent is delayed.

16.1 As per application form the project was to be commenced/launched on or before the expiry of 03 months from the date of registration of the unit by the appellant. As per respondent's reply before the Regulatory Authority dated 07.03.2019, the respondent's project plan was approved on 14.02.2013 by the Greater Noida Industrial Development Authority. The possession was to be handed over (As per draft allotment letter dated 10.10.2013) within 48 months from the date of sanction of plan + 06 months. The part OC was issued on 19.06.2018 which is enclosed as Annexure R-1 in reply of the respondent.

16.2 The date of proposed possession by counting a period of 48 months comes to 14.02.2017 and after including the grace period of 6 months the possession was required to be offered by the respondent by 14.08.2017. The part OC was issued on 19.06.2018, therefore the project of the respondent was delayed from the possession date of draft allotment letter. The allotment letter itself was issued after a delay of 01 year from the date of booking for signing by the appellant, whereas the allotment letter is to be issued by the respondent and thereafter BBA is required to be signed by both the parties. There is nothing on record that even after receipt of Occupation Certificate on 19.06.2018 from the competent authority the respondent ever gave offer of possession demanding dues even in the absence of any agreement. Thus, we hold that the project of the respondent was delayed. **The issue no. (5)** is answered accordingly.

17. **Vide Issue No. (6)** we are required to examine as to whether there is any mechanism provided under the provisions of the Act and Rules 2016 for determination of interest for delay in handing over possession of the unit to the allottee and/or refund with interest and compensation, if the allottee does not want to continue/wish to withdraw from the project as well as violation of the provisions of Sections 12,14,18 and 19 of the Act 2016.

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

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

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

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

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

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

17.5 It is apparent on a reading of Section 18 of the Act as a whole that upon the contingencies spelt out therein, (i) the allottee can either seek refund of the amount by withdrawing from the project; (ii) such refund could be together with interest as may be prescribed; (iii) the above amounts would be independent of the compensation payable to an allottee either in terms of

Sections 18 (2) or 18 (3) of the Act read with other provisions; (iv) the allottee who does not intend to withdraw from the project will be required to be paid by the promoter interest for every month's delay of handing over possession.

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

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

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

Extract of Section 31 of the Act

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

Explanation

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

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

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

Extract of Rule 33(1) of Rules-

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

payable at the main branch of that bank at the station, where the seat of the said regulatory authority is situated.

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

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

Extract of Rule 34(1)

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

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

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

17.12 We have also examined the provisions of Sections 71 and 72 of the Act. The opening words of Section 71 (1) of the Act make it clear that the scope and functions of the Adjudicating Officer (AO) are only for ‘adjudging compensation under Sections 12, 14, 18 and 19 of the Act’. If the legislative intent was to expand the scope of the powers of the AO, then the wording of Section 71 (1) ought to have been different. On the contrary, even the opening words of Section 71 (2) of the Act make it clear that an application before the AO is only for ‘adjudging compensation’. Even in Section 71 (3) of the Act, it is reiterated that the AO may direct ‘to pay such compensation or interest as the case may be, as he thinks fit’ in accordance with provisions of Sections 12, 14, 18 and 19 of the Act. This has to be seen together with the opening words of Section 72 of the Act, which read *“while adjudging the quantum of compensation or interest, as the case may be, under Section 71, the adjudicating officer shall have due regard to the following factors, namely,…………….”*

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

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

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

> *"Section 18(1)(b) lays down that if the promoter fails to complete or is unable to give possession of an apartment due to discontinuance of his business as a developer on account of suspension or revocation of the registration under the Act or for any other reason, he is liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice in this behalf including compensation. If the allottee does not intend to withdraw from the project he shall be paid by the promoter interest for every month's delay till handing over of the possession. The requirement to pay interest is not a penalty as the payment of interest is compensatory in nature in the light of the delay suffered by the allottee who has paid for his apartment but has not received possession of it. The obligation imposed on the promoter to pay interest till such time as the apartment is handed over to him is not unreasonable. The interest is merely compensation for use of money".*

17.15 The Hon'ble Supreme Court in Civil Appeal No. 3581-3590 of 2020 *M/S Imperia Structures Ltd. Vs. Anil Patni and another* decided on 02.11.2020, while examining the provisions of Section 18 of the Act, 2016, vide para 23, has been pleased to observe 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."

17.16 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.

17.17 The Real Estate (Regulation and Development) Act, 2016 is a special Act and the object of Section 18 is to recompense an allottee for depriving him of the use of the funds paid by him to the Promoter. The Promoter who has received money from the allottee but has failed to adhere to his contractual or statutory obligations, cannot claim that he is entitled to utilize the monies without paying any interest with respect thereto to the allottee. The provisions of the Act ensure that the allottees' money is not misused or unreasonably retained by the promoter. That Act aims at protecting interest of consumers in the real estate sector by establishing an adjudicating mechanism for speedy redressal of disputes. Also, the Act aims at protecting larger interest of allottees/flat or house buyers, who are waiting for getting their possession and are helpless in getting speedy remedy to their endless problems. The provisions of the Act seek to protect the allottees and simplify the remedying of wrongs committed by a Promoter.

17.18 After promulgation of the Act 2016 and Rules 2016 the issues covered under their provisions are required to be examined and decided as per the provisions of the Act 2016 and the Rules 2016. The issues relating to interest, delay in giving possession beyond the period stipulated in the agreement/allotment letter and/or demand of allottee for withdrawal from the project and refund of amount due to delay are to be examined and decided keeping in view the provisions of the Act 2016 and the Rules 2016. Further the provisions of the Act 2016 have also been upheld by Hon'ble Bombay High Court in *Neelkamal Realtors Suburban Pvt. Ltd. Vs. Union of India*, (2018)1 AIR Bom R 558 and subsequently by Hon'ble Supreme Court in *Civil Appeal No (s), 6745-6749 of 2021 (M/s Newtech Promoters & Developers Pvt. Ltd. Vs. State of U.P. & others)* decided on 11.11.2021.

17.19 Further, an allottee deposits amount under the hope and trust that he/she will get the flat within the tie 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 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 case 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.

17.20 From the aforementioned discussion, it is clear that the Act of 2016 provides a mechanism for determination of interest and/or compensation for the delay in handing over possession of the unit to the allottee, if the allottee wishes to stay with the project and/or refund with interest, if allottee wants to withdraw from the project as well as for violation of the provisions of

Sections 12, 14, 18 and 19 of the Act 2016. **Issue no. (6)** is answered accordingly.

18. Now coming to the instant case we found that the appellant raised objection on the allotment-cum-BBA specially with respect to various clauses as well as asking the appellant to sign on the blank undertaking, no objection letter for changing the layout plan of the project as well as blank and unfilled particulars in various pages of the allotment letter/BBA, but keep paying installments.

19. The respondent instead of resolving the issue keep on raising demand from time to time. The appellant stopped payment of instalment after 50% payment of the booked unit on the pretext of non- signing of the BBA and delay of the project. The respondent cancelled the unit on 17.10.2018 due to non compliance of payment schedule and sent demand draft of Rs. 50,000/- to the allottee as part payment of refund of deposited amount, without looking into the request of the appellant through email dated 02.08.2018 wherein it has been specifically mentioned by the appellant that BBA could not be signed because of one sided/unilateral conditions and the respondent is required to do the needful to incorporate all just and logical clauses in BBA so that the same be executed, failing which the appellant requested to refund his money along with interest at the rate the respondent has been charging.

20. The Regulatory Authority, vide direction no. 2, directed that in case of non-compliance of direction no. 1, with respect to signing of the agreement in the format of BBA prescribed by the U.P. Government under the U.P. Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules 2018 within 45 days, the respondent to ensure that as per Note 15 of the Booking Application Form after making deduction at the rate of 15% of the total cost of the flat, the payment of balance amount is made to the appellant (after deducting Rs.50,000/- which has already been paid to the appellant) with interest at the rate of MCLR+1%. The Regulatory Authority failed to take into consideration clause 4 of the Application Form wherein the appellant was to choose and decide the convenient payment plan at the time of filling in new prescribed application form only upon

receiving intimation from the respondent regarding commencement/launch of the project on or before the expiry of period of three months from the date of registration. On account of non-compliance of clause 3 of the Application Form by the respondent the occasion for choosing payment plan as per clause 4 of the Application Form had not arisen and, therefore, coming to the conclusion on the basis of Note-15 of the Booking Application Form with respect to charging 15% of the cancellation charges of the cost of the unit is apparently non-application of mind by the Regulatory Authority in view of the facts and circumstances stated hereinabove. Further, on examining Note-15 of the application form we found that it speaks about charging 15% cancellation charges of the cost of the unit, but it does not speak about cancellation on whose behalf and in the instant case the action of cancellation has been taken by the respondent. Thus, in our considered view, direction no. 2 regarding deduction of 15% of total cost of the flat in pursuance to Note-15 of the Booking Application Form, is not sustainable.

21. The Allotment letter dated 10.10.2013 was allotment letter cum BBA whereas after application dated 10/10/2012 for allotment of the residential Unit in the project of Respondent the provisional allotment of unit was accepted by respondent vide letter dated 1/11/2012, it was duty of the respondent to issue allotment letter as he has already accepted the payments after provisional allotment and allotment letter does not require signature of Allottee, but respondent instead issued allotment letter cum BBA on fixed dotted line format along with blank documents which was to be signed by appellant/ Allottee .

22. The appellant had refused to sign the one sided unilaterally drafted blank BBA incorporating additional terms and conditions, having blank undertaking and blank NOC's/Consent Letters after making payment of five installments on time, and appellant refused to make further payment without execution of BBA as per agreed terms and conditions of booking .

23. In our opinion no prudent person will sign one sided dotted line agreement or any blank undertaking or consent letter for future acts of the promoter therefore appellant has rightly objected on allotment letter cum BBA.

24. The respondent kept accepting the payments from appellant and also issued demand letters without signing BBA. The respondent unilaterally cancelled the Unit of appellant on 17th October 2018, for non payment without indicating refundable amount and refunding only a token amount of Rs 50,000/- without refunding the full amount, the act of respondent was uncalled for and unilateral and also against the provisions of the Act of 2016.

25. The act of the respondent, after accepting the provisional booking, vide letter dated 01.11.2012 sitting tight over the matter and not executing the Builder Buyer Agreement immediately thereafter is violation of the provisions of Section 4(5) of the U.P. Apartment Act 2010. Further the act of the respondent sending a draft allotment letter dated 10.10.2013 on 11.10.2013 for signatures of the appellant, containing blank, unfilled most of the particulars except the details of unit number, area and consideration etc. along with blank undertaking, no objection letter for change of layout plan of the project and despite correspondence through email, not taking any action for rectification of the objectionable clauses by the respondent, ultimately resulted in non-signing of the agreement. Further, despite request of the appellant for refund of the deposited amount along with interest, if issues of the objectionable clauses of allotment letter/BBA are not resolved, cancelling the allotment vide letter dated 17.10.2018, is not only illegal, unethical and arbitrary act of the respondent apart from violative of the provisions of the Apartment Act 2010 as well as the provisions of the Act and Rules 2016. The cancellation order dated 17.10.2018 and the impugned order of the Regulatory Authority dated 28.03.2019 are not sustainable in the eyes of law. In our considered view the Regulatory Authority failed to examine the record.

25. **Accordingly, the cancellation order dated 17.10.2018 and the impugned order dated 28.03.2019 passed by the Regulatory Authority are set aside and the appeals are allowed with the following directions:-**

(i) The respondent is directed to refund the entire amount paid by the appellant alongwith interest @ MCLR + 1% p.a. from the date of deposit till the date of actual refund within 45 days from the date of passing of this order.

(ii) The amount already paid by the respondent, if any, shall be adjusted in the payment.

(iii) In case of non compliance of this order by the respondent, the appellant will be at liberty to approach U.P. RERA for execution of this order.

Dated:31/05/2023
pradeep/-Shakir **(K. K. Jain)** **(D.K. Arora)**