RESERVED JUDGMENT
BENCH-1

THE UTTAR PRADESH REAL ESTATE APPELLATE TRIBUNAL, AT LUCKNOW.

APPEAL NO. 141/2019

Cmde Chaitanya Shivram Shiroor ……………Appellant.

Versus

Air Force Naval Housing Board. …………Respondent.

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

1. The present appeal has been preferred by Cmde Chaitanya Shivram Shiroor (hereinafter referred to as the 'appellant') against the order dated 10.07.2018 passed by the Vice Chairman, Agra Development Authority, Jaipur House, Agra (hereinafter referred to as the 'Regulatory Authority') in Complaint No.220187454 whereby the promoter/respondent was directed to freeze last casting of the allotted flat, complete the construction work, deliver possession as well as get the registry executed in favour of the allottee within 90 days and not to demand any additional amount till the delivery of possession and execution of registry.

2. The facts of the case, as culled out from the memo of appeal, are that the appellant booked a flat with the respondent in the project named Jal Vayu Vihar Meerut Scheme, Meerut. This project is registered with the Uttar Pradesh Real Estate Regulatory Authority having Registration No. UPRERAPRJ11406.

2.1 The appellant vide allotment letter No. MRE0073 dated 27.10.2011 was allotted a flat admeasuring 1630 sq.ft., Type A-1.

2.2 As per clause 17 of the allotment letter the dwelling unit/flat would have been ready for possession by mid June 2012.

2.3 The original cost of the flat at the time of booking was Rs.27.98 lacs which was ultimately escalated to Rs.36.95 lacs.

2.4 Till the last payment and filing of the complaint the appellant had already paid Rs.34,44,672/-.

2.5 The respondent had entered into a Builder's Agreement with Omaxe Infrastructure & Construction Ltd. Thereafter the respondent terminated the agreement with Omaxe Infrastructure & Construction Ltd. and the project is still incomplete.

2.6 The said project has already delayed by six years and the respondent is further demanding additional cost of escalation.

2.7 The appellant was attaining the age of superannuation on 30th September 2011, hence the appellant had booked the flat in the said project so that he could lead a retired life with his family in peace.

2.8 The unexpected delay and escalation of cost of the flat caused financial burden on the appellant and the appellant had to arrange an alternative flat for dwelling.

2.9 Being aggrieved by the aforesaid act of the respondent, the appellant preferred a complaint before the Regulatory Authority praying for refund of the total deposited amount along with interest and compensation.

3. The appellant has challenged the impugned order dated 10.07.2018 passed by the Regulatory Authority on the following grounds:--

(A) The respondent after taking full payment for the flats from most of the allottees has further recovered 25% to 50% additional cost and is also demanding additional cost from some allottees, referring to the escalated cost of construction.

(B) The respondent has not chosen an able contractor for the construction and completion of construction of the project.

(C) The construction work could not start on time at the project site due to technically unsound contractor chosen by the respondent.

(D) The respondent has defaulted and is guilty in not completing the project in the specified time frame, not giving possession to the allottees and for demanding additional cost escalated due to delay in construction.

(E) The Regulatory Authority failed to consider that the project has already delayed by six years and has lost its relevance with the appellant who had booked the flat for the purpose of dwelling after his retirement.

(F) The Regulatory Authority failed to consider that during the period of delay the appellant had already made an alternate arrangement permanently, after putting in all his savings and taking additional financial assistance.

(G) The Regulatory Authority also did not consider the fact that despite the appellant having already paid Rs.34,44,672/- to the respondent, paid substantial amount for alternate arrangement and took a home loan, hence the appellant is financially overburdened.

(H) The Regulatory Authority further did not consider that the appellant is a retired person with very limited source of income and savings.

(I) The respondent failed to honour the terms of covenants available in the shape of allotment letter.

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

(i) Refund of total consideration of Rs.34,44,672/- paid by the appellant.

(ii) Interest on the total consideration already paid i.e. Rs.34,44,672/- at the rate of 18%.

(iii) Compensation for mental and physical agony caused by the respondent to the tune of Rs.2,50,000/-.

(iv) Cost of litigation incurred to the tune of Rs.1,25,000/-.

(v) Any other relief deemed fit by this learned Appellate Forum in view of the present facts and circumstances of the case may also be granted in favour of the appellant.

(vi) Impugned order dated 10.07.2018 may kindly be modified to the aforesaid extent.

5. The respondent filed its reply/objection to the memo of appeal and submitted that the respondent is a welfare housing society registered under

the Societies Registration Act 1860 with objective of providing residential houses to the serving Air Force and Naval Personnel and widows of these services only on 'no profit no loss' basis under self-financed housing scheme.

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

5.2 In consonance with its objective, the respondent launched its self financed housing project in Meerut in 2008. The land for this project was allotted by Meerut Development Authority. The cost initially intimated to all allottees in 2008 i.e. prior to award of contract to civil contractor, was tentative and for planning purpose only. After award of contract for civil work to M/S Omaxe Infrastructure Construction Limited (M/s OICL) on 05.05.2010 the revised cost according to area of flats was intimated to all the allottees. The respondent after due selection process, had selected one of the known builders but the reasons for delay were beyond the control of the respondent.

5.3 The cost and area of the dwelling unit intimated to the allottees vide allotment letter was tentative and the same was subject to change depending upon various factors such as super area, cost of award of contract, development changes and any other changes by the Meerut Development Authority. These aspects are well clarified in the allotment letter issued to the allottees.

5.4 Vide clause 3 of the allotment letter it was also clarified that in addition to the basic cost, the following heads will be charged extra: (a) LTMF, (b) VAT, (c) Service Tax, (d) Parking Area, (e) Equalization Charges, (f) Cost of additional area, if any.

5.5 The allotment letter also clarifies that due to possible increase in prices of land, material, labour, taxes or other mandatory charges, change in specifications & area etc. as per norms of civil contracts, escalation is payable by the allottees.

5.6 Clause 17 of the allotment letter further clarifies that in case of any delay in completion of project, no compensation shall be payable because the project is self financed and compensation, if any, has to be booked in the project cost. Ultimately, these are to be contributed by the allottees of the project themselves as the respondent has no funds of its own nor does it enjoy any profit as the respondent works on 'no profit no loss' basis. These terms and conditions are duly agreed and accepted by the allottee/complainant.

5.7 The date of completion of the project mentioned in the allotment letter was tentative and depended on various factors such as hindrances and force majeure. It has been clarified vide Clause 17 of the Allotment Letter that *"due to unforeseen circumstances beyond the control of AFNHB if the completion of project gets delayed, no interest and/or compensation shall become payable."*

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

5.9 The appellant vide his letter dated 28.04.2018 demanded refund of the amount paid by him along with interest and compensation. The respondent vide its reply dated 20.06.2018 informed the appellant that as per policy matters/terms of Master Brochure there is no provision for compensation. Thereafter various telephonic discussions were held with the appellant on this issue. Ultimately, the appellant agreed for refund of principal amount deposited by him. Accordingly, the respondent cancelled the registration of appellant and principal amount of Rs.34,44,672/- was refunded to him on 15.02.2019 after deduction of cancellation charges as per policy on the subject.

5.10 The appellant raised no objection to refund of the principal amount. However, vide his letter dated 12.03.2019 the appellant returned the cheque stating to be non-CTS cheque. The appellant also provided his bank details and requested to transfer the amount through RTGS.

Accordingly the amount of Rs.34,29,672/- was transferred by the respondent to the bank account of the appellant through RTGS on 13.03.2019.

5.11 The Regulatory Authority has passed the impugned order dated 10.07.2018 without taking into consideration the facts and circumstances of the matter. The respondent has already filed an appeal against the said order.

5.12 The cost of dwelling units in Meerut Scheme has already been frozen vide letter dated 06.02.2018 as directed by the Regulatory Authority.

5.13 The appellant has already been refunded his principal amount on 13.03.2019 which has been duly received by the appellant. At that time the appellant did not raise any objection regarding payment of interest/compensation. If the prayer of the appellant for payment of interest/compensation is considered then it would be great injustice to the respondent.

6. The appellant filed his rejoinder/reply to the objection of the respondent denying the averments made in the objection of the respondent and reiterating the averments made in the memo of appeal.

6.1 The appellant further submitted that the responsibility casted upon the respondent is not limited to the extent of no profit no loss but to ensure and secure the interest of its members to whom it acts as a promoter by arranging funds and deciding its expenditure.

6.2 The respondent could not select the able contractor and failed to perform its duty for extraneous considerations.

6.3 The escalation of cost during the prescribed period is market dependent but the cost escalation due to deliberate delay of project is altogether a different aspect which is subject to penalty. Further the government levies were never disputed. The delay of project was not due to force majeure but due to lack of ability of the contractor chosen by the respondent, hence it is the liability of the respondent to bear the consequences.

6.4 The reason for the delay stated before the Regulatory Authority was not accepted by the Regulatory Authority and in its order dated 10.07.2018 categorical finding has been given against the respondent.

6.5 The respondent categorically denied the claim of the appellant before the Regulatory Authority, hence the appellant pressed his complaint before the Regulatory Authority.

6.6 Despite the order of the Regulatory Authority to deliver possession the respondent failed to deliver the possession. Realizing that the respondent will face the wrath of the Tribunal, the respondent cooked up a story of cancellation and taking cognizance of the letter of the appellant which was sent way back in April 2018 the respondent refunded the principal amount after deducting certain amount in lieu of cancellation charges which apparently was not done by the appellant.

6.7 The appeal filed by the respondent against the impugned order was dismissed.

6.8 The appellant had received a cheque from the respondent in the month of March 2019 after filing of the instant appeal which was later returned by the appellant as it was a Non-CTS cheque and upon the telephonic conversation held with one of the representatives of the respondent, Sri Manish Gupta, the appellant agreed to accept the amount under protest subject to the final decision of the instant appeal. Sri Manish Gupta convinced the appellant that he must accept the amount which is being returned by the respondent and assured that the interest or any other additional amount fixed by the Tribunal will be paid by the Board/respondent after the final decision of the instant appeal.

6.9 In view of the facts and circumstances stated herein above the appeal deserves to be allowed with cost throughout.

7. Heard Sri Prakhar Mishra, learned counsel for the appellant and Sri Kushagra Dikshit, learned counsel for the respondent.

8. On the basis of examination of the pleadings, record of appeal and submissions of learned counsels for the parties, the admitted facts of the case are that the appellant was allotted a flat admeasuring 1630 sq.ft., Type A-1, vide allotment letter dated 27.10.2011. As per clause 17 of the allotment letter the dwelling unit/flat was to be ready for possession by mid June 2012. The original cost of the flat at the time of booking was Rs.27.98 lacs which was ultimately escalated to Rs.36.95 lacs. Till the

last payment and filing of the complaint the appellant had already paid Rs.34,44,672/-. The respondent had entered into a Builder's Agreement with Omaxe Infrastructure & Construction Ltd. Thereafter the respondent terminated the agreement with Omaxe Infrastructure & Construction Ltd. and the project is still incomplete. The said project has already delayed by six years and the respondent is further demanding additional cost of escalation. The appellant was attaining the age of superannuation on 30th September 2011, hence the appellant had booked the flat in the said project so that he could lead a retired life with his family in peace. The unexpected delay and escalation of cost of the flat caused financial burden on the appellant and the appellant had to arrange an alternative flat for dwelling. Being aggrieved by the aforesaid act of the respondent, the appellant preferred a complaint before the Regulatory Authority praying for refund of the total deposited amount along with interest and compensation.

9. Before proceeding in the matter we deem it proper to examine the provisions of Allotment Letter dated 27th October, 2011. The relevant provisions of the same are extracted as follows:--

2. *The Board is pleased to confirm the allotment of dwelling unit to you in the Meerut Scheme. The details are given below:--*

Type of Dwelling Unit	***Super Area (Tentative)***	***Tentative cost (Rupees in Lacs)***
Type A-1	*1630 Sq. Ft.*	*Rs. 27.98 Lacs*

Tentative Accommodation *Drawing/Dining, 3 Bedrooms, 3 Toilets, Kitchen & Balconies.*

12. ***Cancellation of Allotment.*** *The installments demanded should be paid on or before the dates mentioned in this letter or as per revised schedule of payment when so intimated. In case of default in payment of scheduled instalment beyond 120 days, the Board reserves the right to cancel allotment without any further notice.*

13. ***Withdrawals.*** *Since the Dwelling Units are being constructed based on the demand of the allottees, withdrawals can be permitted only if a waiting list exists and the waitlisted allottee steps in the vacancy likely to be created by a withdrawal. If a withdrawal is approved the following amount will be deducted:-*

		Officers	*Others*
(a)	*After receipt of Regn. Fees and prior to issue of this Allotment Letter.*	*Rs.5,000*	*Rs.3,500/-*
(b)	*Upto 45 days after issue of Allotment Letter.*	*Rs.7,500*	*Rs.5,000/-*
(c)	*All after (b) above.*	*Rs.15,000*	*Rs.10,000/-*

*17. **Completion of Scheme.** As per the existing plans, the dwelling units are expected to be ready for possession by Mid 2012. However, due to unforeseen circumstances beyond the control of AFNHB if the completion of project gets delayed, no interest and/or compensation shall become payable. The rules and regulations of local Authority and other State Authorities, can at times become the governing determinants affecting the completion of project.*

*18. **Escalation.** Every effort is being made to ensure that cost of the dwelling unit does not exceed the cost given at para 2 above. However, escalation cannot be ruled out due to possible increase in prices of land, material, labour, taxes or other mandatory charges or any other reason by Local Authorities as also change in specification, areas etc. Similarly in case the actual super area works out to be different than what is indicated at this stage, the cost would alter accordingly. The additional compensation towards land/cost if ordered by the Courts in favour of Land Owners or due to any other reason shall also be payable on pro-rate basis by the allottees.*

10. In order to examine the issue involved in the instant appeal and on the basis of the record we deem it proper to frame the following issues:--

1. Whether the Regulatory Authority passed the impugned order beyond the pleadings and prayer of the complainant/allottee/ appellant?

2. Whether the Regulatory Authority ought to have examined the complaint of the appellant only on the basis of agreed terms and conditions mentioned in the Registration Booklet read with allotment letter?

3. Whether the claim of the appellant/allottee for refund of his deposited amount along with interest is in consonance with the provisions of Section 18 of the Act, 2016?

4. Whether the project in question of the respondent is delayed?

5. Whether the appellant is entitled for interest for the delay in completion of the Project under the scheme of Act, 2016 while

seeking refund due to delay and if yes, what rate of interest is required to be paid by the Promoter to the allottee?

11. **Vide Issue no. (1),** 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.

11.1 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."*

11.2 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.”

11.3 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.”

11.4 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……”

11.5 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.

11.6 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 that a 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.

11.7 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."*

11.8 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.

11.9 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."

11.10 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. Nagappa Chettiar 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. Dosukhan Samadkhan 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."

11.11 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 Pasupuleti Venkateswarlu 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 crystallized 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. Narasinghro Krishnaji 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."

11.12 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.

11.13 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.

11.14 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.

11.15 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. **Issue no. (1)** is answered accordingly.

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

12.1 We have examined the relevant Clauses of the Flat Buyers Agreement already extracted above.

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

> *"These ideas have to a large extent lost their appeal today. "Freedom of contract", it has been said, "is a reasonable social ideal only to the extent that equality of bargaining power between contracting parties can be assumed, and no injury is done to the economic interests of the community at large." Freedom of contract is of little value when one party has no alternative between accepting a set of terms proposed by the other or doing without the goods or services offered. Many contracts entered into by public utility undertakings and others take the form of a set of terms fixed in advance by one party and not open to discussion by the other. These are called "contracts d'adhesion" by French lawyers. Traders frequently contract, not on individually negotiated terms, but on those contained in a standard form of contract settled by a trade association. And the terms of an employee's contract of employment may be determined by agreement between his trade union and his employer, or by a statutory scheme of employment. Such transactions are nevertheless contracts notwithstanding that freedom of contract is to a great extent lacking.*
>
> *Where freedom of contract is absent, the disadvantages to consumers or members of the public have to some extent been offset by administrative procedure for consultation, and by legislation. Many statutes introduce terms into contracts which the parties are forbidden to exclude, or declare that certain provisions in a contract shall be void. And the courts have developed a number of devices for refusing to implement exemption clauses imposed by the economically stronger party on the weaker, although they have not recognised in themselves any general power (except by statute) to declare broadly that an exemption clause will not be enforced unless it is reasonable. Again, more recently, certain of the judges appear to have recognised the possibility of relief from contractual*

obligations on the ground of "inequality of bargaining power".

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

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

12.4 Recently, the Hon'ble Supreme Court in ***Pioneer Urban Land & Infrastructure Ltd. Vs. Govindan Raghavan, II (2019) CPJ 34(SC)***, rejected the plea of the builder that it should not be directed to pay interest at the rate of 10.7% as the agreement provided for 6% interest. The Hon'ble Supreme Court observed that :-

> *"6.7. A term of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder. The contractual terms of the Agreement dated 08.05.2012 are ex-facie one-sided, unfair, and unreasonable. The incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice as per Section 2 (r) of the Consumer Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling the flats by the Builder.*
>
> *7. In view of the above discussion, we have no hesitation in holding that the terms of the Apartment Buyer's Agreement dated 08.05.2012 were wholly one-sided and unfair to the Respondent – Flat Purchaser. The Appellant – Builder could not seek to bind the Respondent with such one-sided contractual terms."*

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

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

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

> *"30. In Grocier New Webster's Dictionary (page 304) "Policy" has been defined as a selected, planned line of conduct in the light of which individual decisions are made and coordination achieved. In Legal Glossary (1993, page 250) "policy" means a course of action adopted as advantageous or expedient. According to the Oxford Dictionary the word "Policy" means political sagacity, State-craft, prudent conduct, sagacity, craftiness, 'course of action adopted by Government'. According to Webster's New International Dictionary "policy" means a settled or definite course or method adopted and followed by a Government, institution, body or individual; a civil or ecclesiastical policy; Government; the science of Government.*
>
> *31. In Law Lexicon with Legal Maxims it has been mentioned that the general head of "public policy" covers a wide range of topics, such as for example, trading with*

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

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

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

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

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

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

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

12.10 Thus, where the terms of a contract show that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder, then certainly the contractual terms of the Agreement are one sided, unfair and unreasonable. It would also be referred as an unconscionable bargain. An unconscionable bargain would be one which is irreconcilable with what is right or reasonable or the terms of which are so unfair and unreasonable that they shock conscience of the Court.

12.11 Now again the question is that under which head an unconscionable bargain would fall? If it falls under the head of undue influence, it would be voidable but if it falls under the head of being opposed to public policy, it would be void. The word "unconscionable" is defined in the *Shorter Oxford English Dictionary,* 3rd Edn., Vol. II, p. 2288, when used with reference to actions etc, as *"showing no regard for conscience; irreconcilable with what is right or reasonable".*

12.12 The Hon'ble Supreme Court in the case of ***DLF Universal Ltd. Vs. Town & Country Planning Deptt.*** reported in ***(2010) 14 SCC*** was pleased to quote in the heading **"Interpretation of contract"** as follows:-

"Interpretation of contract

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

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

a basic principle of the Common Law of Contract is that the parties are free to determine for themselves what primary obligations they will accept….Today, the position is seen in a different light. Freedom of contract is generally regarded as a reasonable, social, ideal only to the extent that equality of bargaining power between the contracting parties can be assumed and no injury is done to the interests of the community at large.

15. *The Court assumes:*

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

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

"8. We will at the outset deal with the submission of the developer that the NCDRC was not justified in awarding interest at the rate of 6 per cent per annum and that the terms of the flat purchase agreements must prevail.

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

12.14 In the light of above, we are of the view that the terms & conditions provided in the Flat Buyer Agreement are heavily loaded in favour of the promoter and the buyer is in an obvious disadvantaged position and has no real choice, but to agree to the rules, terms & conditions of the Flat Buyers Agreement in order to buy a residential flat of his dreams, using his hard earned savings. Such terms and conditions of agreement, called by any name whatsoever, fall in the category of "dotted line" agreements or "one sided, unfair and unreasonable" agreements, as observed by the Hon'ble Apex Court in several cases.

12.15 In view of the above, we are of the considered view that the Regulatory Authority is required to examine a complaint as per the provisions of the Act, Rules and Regulations and not merely on the basis of the terms and conditions of the Registration Booklet or Brochure or as provided in the Demand/Allotment Letter only, taking into consideration the observations of Hon'ble Supreme Court in Civil Appeal No(s). 6745-6749 of 2021 ***(M/s Newtech Promoters & Developers Pvt. Ltd. Vs. State of U.P. & others)*** dated 11.11.2021 regarding terms of the contract to the effect that promoter cannot shirk from the responsibilities/liabilities under the Act and the Contractual terms do not have an overriding effect to the retrospective applicability of the authority under the provisions of the Act. **Issue no. (2)** is accordingly answered against the respondent/promoter.

13. **Vide Issue No. (3)** we are required to examine as to whether the claim of the appellant/allottee for refund of his deposited amount along with interest is in consonance with the provisions of Section 18 of the Act 2016.

13.1 The Real Estate (Regulation & Development) Act, 2016 has been enacted to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, 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.

13.2 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.

13.3 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.

13.4 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.

13.5 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.

13.6 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."

13.7 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.

13.8 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. ……."

13.9 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."*

13.10 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."*

13.11 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.

13.12 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."

13.13 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."

13.14 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."

13.15 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."*

13.16 Evidently, there is a delay in completion of the Project/Tower, in which the flat in question was allotted to the appellant, 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.

13.17 On the basis of the aforesaid analysis we are of the considered view that the claim of the allottee/appellant for seeking refund of his 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. **Issue no. (3)** is answered accordingly.

14. **Vide Issue No. (4)** we are required to examine as to whether the project in question of the respondent is delayed?

14.1 From the pleadings on record it is evident that the appellant was allotted a flat admeasuring 1630 sq.ft., Type A-1, vide allotment letter dated 27.10.2011. The original cost of the flat at the time of booking was Rs.27.98 lacs which was escalated to Rs.36.95 lacs. The appellant deposited Rs.34,44,672/- with the respondent towards the cost of the flat.

14.2 As per clause 17 of the allotment letter the possession of the flat was to be delivered by mid June 2012. The respondent had entered into a Builder's Agreement with Omaxe Infrastructure & Construction Ltd. Thereafter the respondent terminated the agreement with Omaxe Infrastructure & Construction Ltd. Consequently the project could not be completed and the project is still incomplete.

14.3 The project has already delayed by about six years.

14.4 The respondent submitted that despite best efforts the respondent was not able to complete the construction of the subject project within the time frame solely due to the reasons which were beyond the control of the respondent.

14.3 The Regulatory Authority while examining the complaint came to the finding that there was delay in completion of the project and the respondent was responsible for not completing the project and not delivering the possession within the promised period.

14.4 We have examined the pleadings on record and come to the conclusion that as per clause of the allotment letter the possession of the flat was to be delivered by mid June 2012. On the pretext of 'tentative/likely possession' the respondent cannot take the word 'tentative/likely' in its favour and offer the possession with unreasonable delay.

14.5 The delay is admitted by the respondent, may be due to certain compelling circumstances, but the fact remains that the project was delayed. **Issue no. (4)** is answered accordingly.

15. **Issue No (5)** relates to the entitlement of the appellant for the interest on account of delay in completion of the Project under the scheme of Act, 2016 while seeking refund due to delay, and if yes, what rate of interest is required to be paid by the Promoter to the allottee for delay.

15.1 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.

15.2 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".*

15.3 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.

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

15.5 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.

<u>Rule 9.3</u>

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

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

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

15.6 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.

15.7 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.........”*

15.8 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.”*

15.9 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.

15.10 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.

15.11 On the basis of aforesaid analysis the **Issue no. (5)** is answered in affirmative in favour of appellant.

16. 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*** *and (iv)*(2007)6 SCC 711 ***Bangalore Development Authority Vs. Syndicate Bank*** 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.

17. As far as claim of the appellant for compensation is concerned, the complaint was filed by the appellant 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.

18. As per averments of the respondent, an amount of Rs.34,29,672/-, after deduction of cancellation charges, as per policy on the subject, has been transferred in the bank account of the appellant through RTGS on 13.03.2019. The receipt of the said amount has also been accepted by the appellant in its replication/rejoinder subject to outcome of the present appeal with respect to interest etc.

19. On the basis of the aforesaid analysis we are of the considered view that the judgment and order dated 10.07.2018 passed by the Regulatory Authority in Complaint No. 220187454 (Cmde Chaitanya Shivram Shiroor Vs. Air Force Naval Housing Board) is not sustainable in the eyes of law. Accordingly, the same is hereby set aside and **we allow the appeal** with the following directions:--

(i) The respondent is directed to refund the entire amount deposited by the appellant, after deducting the amount of Rs. 34,29,672/- transferred in the appellant's bank account through RTGS on 13.03.2019.

(ii) The respondent is further directed to

(a) pay interest to the complainant/appellant on the amount of Rs. 34,29,672/-/- from the date of deposit till its transfer in the appellant's bank account through RTGS on 13.03.2019,at the rate of MCLR+1% per annum.

(b) pay the same interest i.e. MCLR+1% per annum on the rest of the amount from the date of deposit till the refund of the same.

(iii) The respondent is further directed to comply this order within 45 days from the date of receipt of this order.

(iv) The appellant is 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.

(v) No order as to costs.

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

Dated: 27.09.2022
Shakir