THE U.P. REAL ESTATE APPELLATE TRIBUNAL

AT

LUCKNOW

Bench 1

Reserved Judgment

APPEAL NO. 163/2020
(Complaint No. 6201812606)

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

Vs.

Archana Gautam …………...Respondent.

With

APPEAL NO. 215/2022
(Complaint No. LKO162/07/77494/2021)

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

Vs.

Arun Kumar Dixit. ……...……Respondent.

With

APPEAL NO. 219/2022
(Complaint No. LKO162/07/77694/2021)

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

Vs.

Gaurav Dixit. …………Respondent.

Hon'ble Mr. Justice (Dr.) D. K. Arora, Chairman.
Hon'ble Mr. Sanjai Khare, Judicial Member.

1. Before we proceed to examine the instant matter/issue, we deem it proper to place on record that on demitting office by Technical Member from 26.09.2023 the judicial functioning of the Tribunal had come to stand still with effect from 27.09.2023. On receipt of the notification dated 28.11.2023 with respect to appointment of Judicial Member, in the larger interest as well as to resume the judicial functioning of the Tribunal and to achieve the mandate of Section 44(5) of the Real Estate (Regulation & Development) Act 2016 read with Regulation 22 and 25 a Bench consisting of Chairman and Judicial Member was constituted vide order dated 01.12.2023. The Registry was directed to issue cause list of fresh appeals and re-

schedule the cause list of pending appeals from 27.09.2023 on joining of the Judicial Member. Accordingly an office order dated 02.12.2023 was issued by the Registrar, which reads as under:--

OFFICE ORDER

It is hereby informed to all the concerned that the Tribunal was working with single Bench consisting of Hon'ble Chairman and Hon'ble Technical Member after demitting office by the Hon'ble Judicial Member on 31.12.2022. Hon'ble Technical Member also demitted office on 26.09.2023 and Hon'ble Administrative Member being on unauthorized leave from 30.09.2022 (who finally resigned on 29.10.2023) resulting the judicial functioning of the Tribunal to tune to standstill with effect from 27.09.2023.

The State Government vide Notification dated 28.11.2023 has appointed Hon'ble Judicial Member and as such presently, Hon'ble Chairman and Hon'ble Judicial Member having judicial back ground are available.

As per Section 43(3) of the Act 2016 every Bench of the Appellate Tribunal is to consist of at least one Judicial Member and one Administrative or Technical Member. The Appellate Tribunal is required to scrutinize judicially the appeals against the order of Regulatory Authority or Adjudicating Officer. Rule 30 of the Rules 2016 empowers the Appellate Tribunal to call upon such experts or consultants from the fields of economics, commerce, accountancy, real estate, competition, construction, architecture or engineering or from any other discipline as it deems necessary, to assist the Appellate Tribunal in the conduct of any enquiry or proceedings before it.

Section 55 of the Act 2016 protects the acts and proceedings of the Appellate Tribunal from being invalid merely for the reason of any vacancy in, or any defect in the constitution of the Appellate Tribunal or any defect in the appointment of a person acting as a Member of the Appellate Tribunal or any irregularity in the procedure of the Appellate Tribunal not affecting the merits of the case.

Accordingly in the larger interest and expeditious disposal of appeals as per mandate of Section 44(5) of the

> *Act 2016 the Bench for hearing of appeals is constituted with Hon'ble Chairman & Hon'ble Judicial Member for judicial scrutiny of the appeals and in case any expert opinion/assistance is required the same will be taken as per provisions of Rule 30 of the Rules 2016 in appropriate cases or such cases will be deferred till availability of Administrative/Technical Member.*
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> *On joining of Hon'ble Judicial Member, the Registry is directed to issue cause list of fresh appeals and re-schedule the cause list of pending appeals from 27.09.2023 and upload the same on the website of the Tribunal and also inform all the parties/legal representatives about the same.*
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> *This order is issued with the approval of Hon'ble Chairman.*

The judicial functioning of the Tribunal resumed with effect from 18.12.2023 after joining of the Judicial Member and the said Bench is still continuing on account of non-appointment of Technical and Administrative Members.

2. Now we proceed to deal with the instant matter.

3. The instant 3 appeals have been filed by the U.P. Awas Evam Vikas Parishad ("the appellant/promoter") under Section 44 of the Real Estate (Regulation and Development) Act, 2016 ("the Act") challenging the orders dated 06.02.2019 and 01.12.2021 passed by the Real Estate Regulatory Authority ("the Authority) in Complaint Nos.6201812606, LKO162/07/77494/2021 and LKO162/07/77694/2021 made by the allottees.

4. Since the issues involved in these appeals are identical, therefore, they are being disposed of by a composite order. For the sake of convenience, we take Appeal No.163/2020 as the lead case.

5. The facts of the lead case (Appeal No. 163/2020), as culled out from the memo of appeal, are that the respondent had applied for allotment of Type 2 (3BHK) Flat under self finance Group Housing Project in Sikhar Enclave Sector 15, Ghaziabad and upon the application for allotment moved by the respondent she was selected for allotment in

the said scheme, as such demand letter dated 05/07/2011 was sent to the respondent and thereby the respondent was informed to deposit Rs.6,65,000/- on 31/07/2011 and thereafter to make payment in seven quarterly installments @ 6,00,000/- from 31/10/2011, 31/01/2012, 30/04/2012, 31/07/2012, 31/10/2012, 31/01/2013, and 30/04/2013 respectively.

5.1 The delay in completing the project was on account of the interim order passed by Hon'ble High Court, Allahabad in writ C No 54818 of 2013 in which Hon'ble High Court has observed that no fresh contract shall be awarded to any other person till the next date of listing.

5.2 Despite repeated efforts having been made for setting aside the interim orders granted by the Hon'ble High Court, the said interim orders could not be vacated, as such ultimately a compromise was entered between the parties out of court, as such the writ petition was dismissed as withdrawn vide order dated 21/01/2016.

5.3 During the pendency of the aforesaid writ petition, no progress was done for the said project, as such there became a delay in completion of the project in question, which was beyond the control of the appellant.

5.4 Moreover, the appellant had also applied for permission for cutting of trees standing on the side vide letter dated 23/07/2011, the said permission was granted only on 08/12/2011 by the concerned department and thus this was also the reason for the delay in the project.

5.5 After the petition was dismissed the appellant issued allotment letter on 13/10/2016 and as per the said letter, the respondent was required to pay the requisite amount and to complete the required formalities and to get the sale deed executed by 31/12/2016.

5.6 Thereafter an order dated 30/12/2016 was passed at the headquarter level and the complainant was issued revised allotment letter dated 01/02/2017 and by means of the same, the complainant was granted interest @ 6% w.e.f. 01/11/2013 to November 2016, due to delay in the project.

5.7 The respondent deposited the requisite amount as detailed in the new allotment letter dated 01/02/2017, after adjusting the interest availed by her as awarded by the appellant, as such the respondent has accepted the rate of interest as awarded by the appellant regarding delay in delivery of possession.

5.8 As per clause 2.1 of the brochure, the cost is tentative and final demand shall be raised after completion of the project and by applying for the allotment, respondent has consented to said clause.

5.9 Moreover, the project in question is registered under RERA ACT and the date of completion of work has been mentioned as 31/12/2017 and the appellant has applied for extension of the project before RERA authority.

5.10 Parking place in the project is paid and if respondent wanted the parking place then she has to deposit Rs.1,50,000/- for covered parking and Rs.75,000/- for open parking, which was informed to respondent and the same is well within her knowledge.

5.11 The project was proposed to be completed in 24 months. The period was proposed and not final. The project could not be completed due to unforeseen circumstances and due to the interim order granted by Hon'ble High Court.

5.12 The appellant has remained duty bound and sincere to take all necessary steps for completion of the project within the stipulated time in the interest of the allottees without causing any unreasonable delay. However, on account of circumstances beyond the control of the appellant, the construction of project was delayed to some extent.

5.13 The appellant being a statutorily constituted entity, undertakes the execution of project on end-to-end basis i.e. commencing from the acquisition of land for building till delivery of project for habitation to the general allottees. The interregnum work period includes payment and disbursement of compensation to the farmers and development of peripheral services around the project for its successful execution and implementation.

5.14 Being aggrieved from the non-delivery of possession of the flat, the Respondent preferred the Complaint before the Authority. The Regulatory Authority, vide impugned order dated 06.02.2019 decided the said complaint with the following directions:--

(i) The promoter is directed to ensure delivery of possession along with OC/CC after taking balance amount, if any.

(ii) The promoter is directed to ensure payment of interest @ MCLR+1% on the amount deposited by the complainant from promised date till the date of delivery of possession along with OC/CC. The amount of interest will be adjusted towards the amount of final payment and if the amount of interest exceeds the payable amount, then the excess amount shall be returned as per rules.

(iii) The complainants are directed to ensure execution of the registry by paying due stamp fee and the promoter shall ensure delivery of possession to the complainant after completing the remaining works within 30 days from the date of registry.

6. The appellant/Promoter has challenged the impugned order dated 06.02.2019 passed by the Regulatory Authority, on the following grounds:-

A. Because the learned Authority failed to indicate any reason for passing the order relating to payment of compensation to the Respondent. Moreover, no reason was indicated as to award exorbitant interest at the rate of MCLR+1% per annum to the Respondent against the amount of compensation to be paid by the Appellant from the date of delivery of possession till the actual date of [4:57 PM, 4/15/2024] Vikrant: delivery. It is further stated that in the absence of any cogent reasons being present in the impugned order, the said finding and consequent direction is completely unsustainable.

B. Because in order to grant compensation under Section 18 of the Act 2016, the learned Authority/Adjudicating officer was required to record and the demand evidence in view of provision contained in Sections 71(3) of the Act 2016, however, neither any direction in this regard was passed nor such power was exercised and the impugned order was passed in a hurried and cryptic manner.

C. Because the Act, 2016 stipulates that while awarding compensation under section 71, the factors mentioned under Section 72 of the Act, 2016 are required to be considered, however, apparently, no such factors have been considered while passing the impugned order.

D. Because a perusal of the Complaint would itself indicate that the Respondent-Complainant had claimed vague reliefs which could not have been granted in the absence of any supporting evidence.

E. Because the learned Authority failed to consider that the Appellant could not complete the project due to Force Majeure conditions and circumstances beyond the control of the Appellant, the possession of the flat could not be handed over to the respondent within proposed time.

F. Because the learned Authority committed material illegality in awarding the interest on the entire deposited amount without considering the mitigating circumstances. It is stated that grant of compensation for delay is not an automatic order and the circumstances which had prevailed at the relevant time were not only relevant but also material. An order for granting interest on delayed delivery of flat can only be passed when despite having control of the circumstances, the developer could not complete the project.

G. Because the order dated 06.02.2019 passed by the learned Authority is illegal, arbitrary and bereft of reasons.

H. Because the impugned order is based on conjectures and surmises and as such, is liable to be set aside.

In Appeal No. 215/2022 and 219/2022 Sri N.N. Pandey, learned counsel for the appellant only ground 'I', which is as under:--

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

7. The appellant has prayed that the judgment and order dated 06/02/2019 passed by Real Estate Regulatory Authority, Bench No. 1, Gautam Buddh Nagar, in Complaint No. 6201812606 (Archana Gautam Vs. U.P. Awas Evam Vikas Parishad) may be set aside and Appeal be allowed in favour of the Appellant, in the interest of justice.

8. The respondent/allottee in his objections to the grounds of appeal has submitted that:

8.1 The U.P. Real Estate Regulatory Authority, Lucknow vide its order dated 06.02.2019 clearly directed to the appellant to complete entire development and to pay the interest @ MCLR+1% on deposited amount from the date of agreement upto the date of handing over the possession.

8.2 According to precedent para, direction/order was given to handover possession to the allottee complainant in 30 days after completion entire legal formalities, but by not complying with aforementioned order of the learned Authority, appellant has committed contempt of court and he is liable for initiating contempt proceeding. Therefore, this appeal is liable to be dismissed on this ground alone.

8.3 The learned Authority has passed the reasoned and speaking order after going through entire facts and circumstances of the case. Rate of interest awarded by the learned Authority is in accordance with law and has been awarded after taking into consideration all aspects of the matter and ordeal suffered by the respondent.

8.4 There is no illegally and arbitrariness in passing this order by the learned Authority. Appellant being a State should have been more cautious towards public. Appellant is duty bound to handover the possession within stipulated period after extracting such a huge money from the respondent (public) and accountability for delay should be fixed.

8.5 The respondent has deposited money with the appellant as and when any demand is raised and no default whatsoever has been made in making payment.

8.6 Hon'ble High Court has not passed any stay order against the subject property and it is also not a fresh contract. Withdrawal of writ petition was a tactic of the appellant with ulterior motive in which he had succeeded by way of withdrawal of the writ petition before the Hon'ble High Court.

8.7 Permission for cutting trees is a lame excuse to mislead this Hon'ble Tribunal. At the beginning the appellant was aware of the fact as to what work is to be executed in fulfilling its commitment towards respondent.

8.8 The respondents complied with the directions issued by the appellant from time to time. As per knowledge of the answering respondent till date the completion certificate has not been obtained by the appellant.

8.9 The Regulatory Authority has passed its order on the basis of merits of the case and question of clause 2.1 of the Brochure is not subject matter.

8.10 Till date the project of the appellant has not been completed and appellant has adopted unfair trade practices and made false statement before the learned Authority.

8.11 The appellant has to count the interest @ MCLR+1% on deposited amount from the date of agreement upto the date of handing over the possession and remaining amount if any, respondent is ready to pay. This issue/point has appropriately been discussed and concluded by the learned Authority, therefore, this point has no relevancy at this stage.

8.12 The appellant itself has admitted the fact that project was proposed to be completed within 24 months. Due to negligence and dillydally tactics, deliberately and intentionally this project was not completed even after a considerable long time after expiry of prescribed period by the appellant. The appellant has misled this Hon'ble Tribunal by stating that apartments are complete. Nothing has been completed. Had the appellant completed apartments, then it would have handed over possession of the complainant and others.

8.13 It is responsibility of the appellant to obtain completion certificate from the competent authority and the same has not been obtained/annexed by the appellant.

8.14 The appeal of the appellant is devoid of merits, therefore, the same may kindly be dismissed with exemplary cost and respondents be awarded allotment of their apartment alongwith interest as directed by the learned Authority.

9. The appellant/promoter has filed a rejoinder affidavit in reply to the objections filed by the respondent/allottee, denying the averments made by the respondent and reiterating the averments made by the appellant in the memo of appeal. The appellant further submitted that:

9.1 The respondent has himself not completed the formalities to take over the possession. The respondent has not yet completed the formalities for execution of sale deed, as such possession cannot be handed over to the respondent in absence of sale deed. The construction work of the flats has been completed and the flats are ready for possession. The completion certificate has been issued by the competent authority and demand letter has been sent to the respondent.

9.2 The project could not be completed due to unforeseen circumstances and the interim order granted by Hon'ble High Court.

10. Heard Sri Akhand Pratap Singh, learned counsel for the appellant and Sri Dilip Singh, learned counsel for the respondent in Appeal No. 163/2020, Sri N. N. Pandey, learned counsel for the appellant in Appeal Nos. 215/2022 and 219/2022.

11. In order to examine the grounds taken by the appellant and the averments made by both the parties, we deem it fit to frame the following questions based on the grounds pressed by the learned counsel for the appellant:-

(i) Whether under the scheme of Act 2016 and Rules 2016 any mechanism has been provided for determination of the interest for delay in handing over possession of the apartment/plot to the allottee, if the allottee does not intend to withdraw from the project and/or refund with interest and compensation, if the allottee withdraws on account of not providing possession within the period prescribed in the agreement?

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

(iii) Whether the complaint of the allottee was to be examined only on the basis of agreed terms and conditions mentioned in the Brochure read with demand Letter of the Parishad or ought to be examined in pursuance of the provisions of Act & Rules 2016?

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

(v) Whether the appellant can claim force majeure on account of pendency of litigation before Hon'ble High Court vide Writ Petition No. 54818/2013, wherein interim order dated 08.10.2013 was in operation till 21.01.2016, or not?

12. Before we proceed to examine the issues framed by us it would be appropriate to mention here that the question as to whether the provisions of the Act and its applicability is retroactive or retrospective in operation and its legal consequences was examined by the Hon'ble Supreme Court vide **Civil Appeal No(s). 6745-6749 of 2021** ***M/s Newtech Promoters and Developers Pvt. Ltd. Vs. State of U.P. and others etc.,*** by framing a question ***"Whether the Act 2016 is retrospective or retroactive in its operation and what will be its legal consequence if tested on the anvil of the Constitution of India?"*** and vide paras 53 and 54 of the judgment the Hon'ble Supreme Court observed that from the scheme of the Act 2016, its application is retroactive in character and it can safely be observed that the projects already completed or to which completion certificate has been granted are not under its fold and therefore, vested or accrued rights, if any, in no manner are affected. At the same time it will apply after getting the on-going projects and future projects registered under Section 3 to prospectively follow the mandate of the Act 2016. Paras 53 and 54 of the said judgment are reproduced as follows:-

"53. That even the terms of the agreement to sale or home buyers agreement invariably indicates the intention of the developer that any subsequent legislation, rules and regulations etc. issued by competent authorities will be binding on the parties. The clauses have imposed the applicability of subsequent legislations to be applicable and binding on the flat buyer/allottee and either of the parties,

promoters/home buyers or allottees, cannot shirk from their responsibilities/liabilities under the Act and implies their challenge to the violation of the provisions of the Act and it negates the contention advanced by the appellants regarding contractual terms having an overriding effect to the retrospective applicability of the Authority under the provisions of the Act which is completely misplaced and deserves rejection.

54. From the scheme of the Act 2016, its application is retroactive in character and it can safely be observed that the projects already completed or to which the completion certificate has been granted are not under its fold and therefore, vested or accrued rights, if any, in no manner are affected. At the same time, it will apply after getting the on-going projects and future projects registered under Section 3 toprospectively follow the mandate of the Act 2016."

12.1 The project of the appellant being on-going and registered with the UPRERA, is fully covered under the provisions of the Act 2016.

13. **Question no. (i)** is, whether under the scheme of Act 2016 and Rules 2016 any mechanism has been provided for determination of the interest for delay in handing over possession of the apartment/plot to the allottee, if the allottee does not intend to withdraw from the project and/or refund with interest and compensation, if the allottee withdraws on account of not providing possession within the period prescribed in the agreement.

13.1 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.

13.2 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.

13.3 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 theevent 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 bythe 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 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.

(iii) 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.

13.4 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 amountswould be independent of the compensation payable to an allottee either interms 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.

13.5 The provisions of Section 18(1) acclaimed two rights of the Allottee in cases where there is a delay in handing over of the possession by the promoter of the allotted unit in accordance with the terms of agreement forsale:–

A. When an Allottee wishes to withdraw from the project due to delay in handing over of the possession, on demand the Allottee shall be refunded the entire deposited amount along with the *interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act.* Hence when an Allottee withdrew from the project he has the right to receive his deposited amount with interest at such rateas may be prescribed in the rules including compensation in the manner prescribed in the Act. Thus an Allottee can Receive"interest" and "COMPENSATION" both from the promoter alongwith the deposited amount.

B. When the Allottee decides to stay in the project even due to delay in handing over of the possession, 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. In this case an Allottee is entitled for interest for every month of delay till the handing over of the possession, at such rate as may be prescribed only.

13.6 If we closely examine the above two provisions, it comes out that in a case where the Allottee exits the projects, the Act expressly provides INTEREST AND COMPENSATION both, but in cases where the Allottee tends to stay in the project the Allottee is only entitled for interest of every month till the handing over of the possession. Thus the intention of the legislature was to provide Compensation only to those Allottees who exit the project and not to those who tends to stay in the project.

13.7 Now if we study the section 18 as a whole, the following are the expressprovisions for providing compensation to an Allottee under section 18:-

A. Where the Allottee wishes to withdraw from the project, without prejudice to any other remedy available, on demand he shall be liable 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.

B. The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under the Act.

C. If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made there under or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

13.8 As per the provisions of Section 18, compensation can be sought by an Allottee in case of defective title of the land, and also if the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made there under or in accordance with the terms and conditions of the agreement for sale.

13.9 The word “Any Other” signifies beside these, meaning thereby that apart from the delay in possession, any other breach of the terms & conditions of the Agreement to sell or breach of the obligations imposed on him by the provisions of the Act or Rules shall also be liable to compensate the Allottee.

13.10 If we critically analyze the section, we will find that the word ‘compensation’ has been used in every sub-section covering almost all the scenario except the word compensation has not been used in the case where Allottee decides to stay in the project even due to delay in handing over of the possession and 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 only.

13.11 The intention of the legislature was to provide Compensation only to those Allottees who exit the project and also regarding defective title and breach of agreement to sale and obligations imposed on, by the Act and Rules, but not to those who wishes to stay in the project, for them beside the other provision of compensation in term of defective title and breach of agreement to sale as well as obligations imposed on by the Act and Rules is applicable, but in case of delay in handing over of possession ,the Allottee is entitled for only INTEREST at a prescribed rate and not “compensation“ as the Suffix “including compensation” has not been provided by the Act.

13.12 Thus the intention of the legislature was clear in providing the compensation of delay to only those who exit the project and not to those who wishes to stay in the project.

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.

13.13 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.

13.14 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 provisionsof 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."

13.15 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 issituated.

13.16 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.

13.17 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 alsomakes it plain that the Regulatory Authority will have the same powers as a Civil Court. The legislative intent is, therefore, not to diminish the adjudicatory functions of the Regulatory Authority, but rather to provide it with all the trappings of a quasi-judicial/judicial authority while inquiring into the complaints and issuing directions, by directing the Adjudicating Officer to adjudicate the compensation or interest. The legislation in its own wisdom has used the word “Authority” as well as “Adjudicating Officer” wherever it is required. Furthermore, the legislation has clearly, intentionally and suitably used the word “penalty” or “interest at such rate as may be prescribed” in case of Authority and “compensation” or “interest as he thinks fit” in case of Adjudicating Officer.

13.18 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 thepossession. 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 useof money".*

13.19 The Hon'ble Supreme court in the case of **M/s. NEWTECH PROMOTERS AND DEVELOPERS PVT. LTD Vs STATE OF U.P. and Others [2021(11) ADJ 280], [2022 (1) R.C.R.(Civil) 357]** while dealing with the jurisdiction of the Authority and the Adjudicating Officer under the provision of the Real Estate (Regulation and Development) Act, 2016 has framed a question as follows:-

"1. Whether the authority has jurisdiction to direct return/refund of the amount to the allottee under Sections 12,14, 18 and 19 of the Act or the jurisdiction exclusively lies withthe adjudicating officer under Section 71 of the Act?"

After elaborate discussion, the Hon'ble Apex court at paragraph 86 held that:

> *" 86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, **or directing payment of interest for delayed delivery of possession**, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. If the adjudication under Sections 12, 14, 18 and 19 other than*

compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016".

13.20 On examination of the above finding of the Hon'ble Apex Court with the provision of the section 18 of the Act 2016, it is clear that when the Allottee decides to stay in the project even due to delay in handing overof the possession, 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**,** meaning thereby in this situation the Allottee is entitled for interest for every month of delay till the handing over of the possession, at such rate as may be prescribed, and not "compensation" as the suffix "including compensation" in case of seeking refund due to delay beyond the period prescribed in the agreement.

13.21 The scheme of the provisions of Section 18 of the Act 2016 clearly provides that in cases where the Allottee intends to stay in the project, the Allottee is entitled only for interest as per the rate prescribed and its jurisdiction of determination lies in the regulatory authority and not with Adjudicating Officer, and hence the Adjudicating Officer cannot grant interest as compensation, because the Statute does not provide any scope of compensation in such situation.

13.22 It is to be noted that **<u>discretionary powers also vest with the Adjudicating officer</u>** as he can direct to grant compensation as "HE THINKS FIT" after the enquiry, in conformity with the provisions of Section 72, meaning thereby that he has the power to "ACCEPT OR REJECT" the claim of the Allottee after an enquiry, but no such powers lie with the Authority in granting interest for delayed period.

13.23 From the aforementioned discussion, it is clear that the Act of 2016 provides a mechanism for determination of interest as per the rate prescribed only by the Regulatory Authority 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 and compensation, if allottee wished to withdraw from the project. **Question no. (i)** is answered accordingly.

14. **Question no. (ii)** requires us to examine as to whether the project of the appellant/promoter is delayed.

14.1 The appellant in pursuance to the application of the respondent allotted type-2 (3 BHK) flat in the Project, Shikhar Enclave, Ghaziabad, of the appellant/promoter, vide allotment letter dated 05.07.2011. As per Clause 2.1 of the Registration Booklet the proposed period of construction was 24 months from the date of issue of demand letter dated 05.07.2011 i.e. by July 2013. The delivery of possession was to be given only after full payment of the cost of the flat, after final costing.

14.2 Although the period specified as 24 months is only an estimated time andthere will always be some variation in the actual time, but an allottee cannot be made to wait indefinitely for handing over of the possession merely on the ground that the time specified is an estimated period. We are of the view that the possession ought to have been given within 24 months + a month or so required for final finishing.

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

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

a reasonable time has to be taken into consideration……"

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

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

14.5 We are of the considered view that appellant/promoter failed to give possession of the booked unit within the time prescribed in the Registration Booklet. There was delay of about 11 years on the part of the appellant in handing over possession of the flat in question to the respondent. Thus, we hold that the project of the appellant/promoter was delayed. **The question no. (ii)** is decided accordingly.

15. **Question no. (iii)** is whether the complaint of the allottee was to be examined only on the basis of agreed terms and conditions mentioned in the Brochure read with demand Letter of the Parishad or ought to be examined in pursuance of the provisions of Act & Rules 2016?

15.1 We now examine the relevant Clauses of the Registration Booklet and the conditions of the demand letter dated 05.07.2011.

Approximate English version of Clauses 2.1, 4.6 & 4.7 are as follows:-

Clause 2.1 The above mentioned price is tentative. The proposed construction is to be completed within 24 months. On completion of the project, the actual price will be determined and the final price will be payable, therefore, the amount of the prescribed installments may be increased or decreased. There is a possibility of change in the estimated cost due to inalienable reasons like increase in the market rate of construction material or increase in the charges of the labourers. Oncompletion of the project, the actual costing will be done and the balance amount after adjustment of the deposited amount will be payable.

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

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

15.2 The demand letter dated 05.07.2011, states as follows:-

Terms and condition – In any case, on payment of the amount after the due date, additional penal interest of 13.5 percent per annum will be payable for the full month. In case of late deposit of service tax, interest etc. penal interest will be payable under the provisions of service tax and the Rules. Location charges have been included in the construction cost. In case of any dispute, the decision of Housing Commissioner will be final.

15.3 Having examined the terms and conditions of the Registration Booklet/Allotment letter, we would like to examine the laws on contracts. In this connection, it is useful to note what Chitty has to say about the oldideas 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 unlessit 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".*

15.4 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)5 SSC 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 applywhere 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 ".*

15.5 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 onthe 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."

15.6 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 notreflect 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 forahad the jurisdiction to award just and reasonable compensation as an incident of the power to direct removal of deficiency in service.

15.7 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.

15.8 The expression "public policy" or "opposed to public policy" has not been defined in the Contract Act. In ***Writ Petition Nos. 6851,6886,6874 & 6978 (MB) of 2002,R.B. Singh Vs. State of U.P.,*** *reported in 2003 SCC OnLine All 400,* **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."*

15.9 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.*"

15.10 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."*

15.11 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".*

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

15.12 Now again the question is that under which head an unconscionable bargain would fall? If it falls under the head of undue influence, it wouldbe 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".*

15.13 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."

15.14 The appellant/promoter has submitted that the interest awarded by the Regulatory Authority to the complainant at the rate of MCLR+ 1 percent is bad in law in the circumstances of the present case. The appellant/promoter has further submitted that as per Clause 4.6 of the Registration Booklet, the respondent could have opted to get refund of the deposited amount with interest upon failure of the appellant/promoter to provide the flat even after six months from the deposition of the last installment. As such the complainant has given the implied consent in this regard, and therefore he is not entitled for any interest/compensation. The respondent has submitted that he paid all the installments raised by the appellant/promoter on time, and therefore the delay penalty should be at the rate of 13.5% p.a. i.e. the same as was to be charged from the respondent as per the provisions of demand letter dated 25.06.2011.

15.15 On scrutiny of demand letter dated 05.07.2011 we find that the amount payable by the buyer/allottee to the promoter in case of default in payment is at the rate of 13.5% p.a, as mentioned in Condition para of the said letter, which is much higher than the interest or delayed penalty payable by the promoter to the buyer/allottee in case of default/delayed possession as provided in the Registration Booklet, wherein it is provided that the promoter will refund the money to the allottee with the interest rate payable on the savings account interest of a Nationalized Bank as laid down in Clauses 4.6 of the Registration Booklet. Similarly, Clause 4.7 provides that in case the Parishad decides not to operate this scheme, then the deposited amount will be refunded as per the Rules and the interest will be paid only if the amount remains deposited in the account of the Parishad for more than one year, and the interest rate payable on the same will be as given on the savings account by the Nationalized Bank. It is evident from these terms and conditions of the Demand Letter and the Clauses of Registration Booklet that they do not provide a level playing field between the appellant/promoter and the allottee/respondent. We feel that this imbalance is on account of the fact that the buyer/allottee has much less bargaining power as compared to the promoter, and since the buyer/allottee had no choice but to accept such "dotted line, one sided, unjust and unreasonable" terms and conditions of the Registration Booklet, and of the Demand Letter as framed by the appellant/promoter. Such terms and conditions which are one-sided, unjust and unreasonable cannot be made binding on the allottee/respondent.

15.16 The Hon'ble Supreme Court in Civil Appeal Nos. 1232 and 1443-1444 of2019 ***(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."

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

16. **Question no. (iv),** is regarding respondent's entitlement for interest and/or compensation on account of delayed possession and whether

the rate of interest granted by the Regulatory Authority is in accordance with law.

16.1 A perusal of the complaint dated 22.06.2018 (placed at P. No. 15/16 of the Appeal) made by the respondent before the Regulatory Authority indicates that the respondent had asked for possession alongwith delay penalty.

16.2 An examination of the Regulatory Authority's order passed on 06.02.2019 reveals that the Regulatory Authority has directed the promoter to take the balance amount and stamp fee as per Rules from the complainant and handover the possession after getting the sale deed registered. Further, interest for the delay period at the rate of MCLR+1% was directed to be paid by the promoter from the promised date ofpossession till the date of actual possession.

16.3 Section 18(1) of the Act clearly specifies that if a promoter fails to give possession of a flat duly completed by the date specified, and if an allottee does not intend to withdraw from the project, then he shall be paid interest by the promoter for every month of delay till handing over of the possession at such rate as may be prescribed. We, therefore, hold that an allottee (respondent) is entitled for getting interest and/or compensation on account of delayed possession under the scheme of the Act of 2016.

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

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

16.5 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 forahad the jurisdiction to award just and reasonable compensation as an incident of the power to direct removal of deficiency in service.

16.6 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).

16.7 U.P. Government framed "Uttar Pradesh Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018" (hereinafter referred to as Rules, 2018), wherein under Rule 9.2(ii) and 9.3(i), the rate of interest payable by the promoter or by the allottee respectively are defined in case of default by either of the party. These Rules are extracted 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, alongwith interest at the rate equal to MCLR (Marginal Cost of Lending Rate) on home loan of State Bank of India + 1% unless provided otherwise under the Rules, within forty-five days of receiving the termination notice:

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

Rule 9.3

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

Rule 9.3(i)

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

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

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

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

16.10 The **Hon'ble Supreme Court** in ***Civil Appeal Nos. 4910-4941/2019 DLF Homes Panchkula Pvt. Ltd. Vs. D. S. Dhanda etc.etc. with Civil Appeal Nos. 4942-4945/2019 DLF Homes Panchkula Pvt. Ltd. Vs. Sudesh Goel etc. decided on 10.05.2019*** held in para 3 of the judgment as under:-

> *"…… We feel it appropriate that, considering that the subject units in question are dwelling units, in a residential housing project, the rate of interest for house building loan for the corresponding period in a scheduled nationalized bank (take, State Bank of India) would be appropriate and logical, and, if floating/varying/different rates of interest were/are prescribed, the higher rate of interest should be taken for this instant computation."*

16.11 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.

16.12 In view of the aforementioned, we are of the view that the rate of interest i.e. MCLR+1% granted by the Regulatory Authority for delayed possession is fair, just and reasonable – as it balances the equities between the parties and the Regulatory Authority's action is in accordance with the provisions of the Act. **Question no. (iv)** is answered accordingly.

17. Vide **question no. (v)** we are required to examine as to whether the appellant can claim force majeure on account of pendency of litigation before Hon'ble High Court vide Writ Petition No. 54818/2013, wherein interim order dated 08.10.2013 was in operation till 21.01.2016, or not.

17.1 Learned counsel for the appellant submitted that the delay was caused because of the pendency of litigation before the Hon'ble High Court in Writ Petition No. 54818/2013, wherein an interim order dated 08.10.2013 was in operation till 21.10.2016 when the said writ petition was dismissed as withdrawn.

17.2 Learned counsel for the respondent vehemently opposed the ground of force majeure taken by the appellant and submitted that no benefit of the pending litigation before the Hon'ble High Court can be given and the claim of the appellant for treating the said period as force majeure is not sustainable. The learned counsel for the respondent relied upon the observations made by Hon'ble Supreme Court in Civil Appeal No(s).6745-6749 of 2021 ***M/s Newtech Promoters and Developers Pvt. Ltd. Vs. State of U.P. & Ors.***

17.3 We have examined the submissions of learned counsel for the parties on the aspect of force majeure due to pendency of litigation before the Hon'ble High Court. The issue was thoroughly examined by the Hon'ble Supreme Court in the case of ***M/s Newtech Promoters and Developers Pvt. Ltd. Vs. State of U.P. & Ors.(supra)*** wherein the Hon'ble Supreme Court in para 25 has been pleased to observe as under:--

> *"25. The unqualified right of the allottee to seek refund referred under Section 18(1)(a) and Section 19(4) of the Act is not dependent on any contingencies or stipulations thereof. It appears that the legislature has consciously provided this right of refund on demand as an*

> *unconditional absolute right to the allottee, if the promoter fails to give possession of the apartment, plot or building within the time stipulated under the terms of the agreement regardless of unforeseen events or stay orders of the Court/Tribunal, which is in either way not attributable to the allottee/home buyer, the promoter is under an obligation to refund the amount on demand with interest at the rate prescribed by the State Government including compensation in the manner provided under the Act with the proviso that if the allottee does not wish to withdraw from the project, he shall be entitled for interest for the period of delay till handing over possession at the rate prescribed."*

17.4 In view of the aforesaid analysis the claim of the appellant with respect to force majeure on account of pendency of litigation before the Hon'ble High Court falls. **Question no. (v)** is answered accordingly.

18. In view of the preceding observations, after examining the material on record, as well as the grounds of appeal, we do not find any force in the grounds of appeal pressed by the learned counsel for the appellant/promoter. There is no illegality, infirmity or perversity in the order passed by the Regulatory Authority, and it does not warrant any interference by the Tribunal. Accordingly, while upholding the orders dated 06.02.2019 and 01.12.2021 passed by the Regulatory Authority., **we dismiss the Appeal No. 163/2020 (U.P. Avas Evam Vikas Parishad Vs. Archana Gautam), Appeal No. 215/2022 (U.P. Avas Evam Vikas Parishad Vs. Arun Kumar Dixit) and Appeal No. 219/2022 (U.P. Avas Evam Vikas Parishad Vs. Gaurav Dixit).**

19. Now the issue to be decided is as to what should be done of the pre-deposit made by the appellant/promoter in compliance of the provisions of Section 43(5) of the Act.

19.1 The aims and objects of the Act provide for regulation and promotion of the real estate sector in an efficient and transparent manner and to protect the interests of the consumers in real estate sector. Proviso to Section 43(5) of the Act specifically provides that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained without the promoter first having deposited with the Appellate Tribunal at least 30% of the penalty, or such higher percentage as determined by the Appellate Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him before the said appeal is heard. The intent of the legislature is quite clear from the wording of proviso to Section 43(5) of the Act that the interest of the consumers i.e. allottees/buyers be protected.

19.2 The intent of the legislature in laying down the provision of pre-depositof the amount of penalty or any other amount payable to the allottee by the promoter before the appeal can be heard in the Appellate Tribunal, has been elucidated by the **Hon'ble Apex Court in paragraph 127** of its judgment in the **Civil Appeal Numbers 6745-6749 of 2021 M/s Newtech Promoters and Developers Pvt. Ltd. Vs. State of UP** and others, the same reads as under:-

> *"127. It may further be noticed that under the present real estate sector which is now being regulated under theprovisions of the Act 2016, the complaint for refund of the amount of payment which the allottee/consumer has deposited with the promoter and at a later stage, when the promoter is unable to hand over possession in breach of the conditions of the agreement between the parties, are being instituted at the instance of the consumer/allottee demanding for refund of the amount deposited by them and after the scrutiny of facts being made based on the contemporaneous documentary evidence on record made available by the respective parties, the legislature in its wisdom has intended to ensure that the moneywhich has been computed by the authority at least must be safeguarded if the promoter intends to prefer an appeal before the tribunal and in case, the appeal fails at a later stage, it becomes difficult for the consumer/allottee to get the amount*

> *recovered which has been determined by the authority and to avoid the consumer/allottee to go from pillar to post for recovery of the amount that has been determined by the authority in fact, belongs to the allottee at a later stage could be saved from all the miseries which come forward against him."*

19.3 The Hon'ble Apex Court has clearly held that the legislature in its wisdom intended to ensure that the money which has been computed by the Authority at least must be safeguarded if the promoter intends to prefer an appeal before the Tribunal and in case, the appeal fails at a later stage, it should not be difficult for the consumer/allottee to get the amount recovered which has been determined by the Authority. It is in order to avoid the consumer/allottee to go from pillar to post for recovery of the amount that has been determined by the Authority, that the legislature has in its wisdom laid the condition of pre-deposit by the promoter under Section 43(5) of the Act.

19.4 Section 40(1) of the Act of 2016 provides for a mechanism for recovery of interest or penalty or compensation and enforcement of orders etc. of the A.O. or the Regulatory Authority, or the Appellate Tribunal and the same shall be recoverable in such manner as may be prescribed as an arrears of land revenue. The **Hon'ble Apex Court** vide **paragraph 140** in **M/s Newtech Promoters and Developers Pvt. Ltd. Vs. State of UP** (supra) was pleased to observe that:-

> *"140. It is settled principle of law that if the plain interpretation does not fulfill the mandate and object of the Act,this Court has to interpret the law in consonance with the spirit and purpose of the statute. There is indeed a visible inconsistency in the powers of the authority regarding refund ofthe amount received by the promoter and the provision of lawin Section 18 and the text of the provision by which such refund can be referred under Section 40(1). While harmonizing the construction of the scheme of the Act with the right of recovery as mandated in Section 40(1) of the Act keeping in mind the intention of the legislature to provide for a speedy recovery of the amount invested by the allottee along with the interest incurred thereon*

> *is self explanatory. However, if Section 40(1) is strictly construed and it is understood to mean that only penalty and interest on the principal amount are recoverable as arrears of land revenue, it would defeat the basic purpose of the Act."*

As can be seen from the above observations, Hon'ble Supreme Court has held that even the principal amount invested by the allottee can be recovered as arrears of land revenue under Section 40(1) of the Act. It is further clarified by Hon'ble Supreme Court that the intention of the legislature is to provide a mechanism for early recovery of the amount invested by the allottee along with the interest incurred thereon.

19.5 Rule 23 of the U.P. Real Estate (Regulation and Development) Rules, 2016 provides that subject to the provisions of Section 40(1), the recovery of the amounts due as arrears of land revenue shall be carried out in the manner provided in the local laws. As Rule 23 has been framed under the provisions of Section 40(1) of the Act, the observations of Hon'ble Supreme Court on Section 40(1) shall equally apply to Rule 23 of the Rules 2016.

Although Section 40(1) of the Act of 2016 gives powers to the Appellate Tribunal to enforce its decisions, but the Tribunal does not have adequate infrastructure and the required sufficient human resource to determine and certify the amount due from the appellant/promoter to be paid to the respondent/allottee.

19.6 It is our considered view that as per provisions of the Act and as per the observations made by the Hon'ble Apex Court, it is the duty of the Tribunal to arrange to transfer the pre-deposited money to the concerned allottee/consumer in case the promoter's appeal is dismissed. However, since the promoter might not have paid the full payable amount or there being a prospect of some amount having already been recovered from the promoter under execution proceedings at the level of the Authority or AO, it is just and lawful that the Tribunal transfers the amount to the Authority for transferring the same to the allottee/consumer after due diligence at its end and to recover any additional amount which could be due to be paid by the promoter; or return to the promoter any amount that could be in excess of the entitlement of the allottee/consumer.

19.7 The calculation of the exact amount due to be paid to the respondent/allottee normally is to be determined upto the date of actual payment. As the facts and figures are available with the Regulatory Authority, which is executing its or A.O.'s original order, therefore, due diligence is required while calculating the amount payable, interest thereon, as well as verification of the payments made by the allottee fromtime to time, etc.

19.8 The functioning of the Tribunal became paperless from January 2022, but the system for depositing payment through online mode by the litigants under different heads could not be made operational and the same was to be deposited by the litigants in the shape of Bank Draft, but subsequently NIC and State Bank of India succeeded in providing solution for making payment under all the heads through online mode and the State Bank of India also agreed to convert the amount deposited by the promoter under Section 43(5) of the Act into fixed deposit indicating complaint number, appeal number etc. within 24 hours for a period of 60 days with auto renewal thereafter, so that after decision in the appeal the amount be released as per direction of the Hon'ble Tribunal along with accrued interest on the said fixed deposit.

19.9 Discussion was made with the officials of the State Bank of India regarding providing benefit of interest on the deposited amount in the pending appeals. SBI also agreed to convert the amount deposited in different appeals, on the details provided by the Tribunal, into Fixed Deposits for a period of 60 days with auto renewal thereafter in the pending appeals. Accordingly, in all the pending appeals of the promoters, the amount deposited in pursuance to the provisions of Section 43(5) of the Act has been converted into fixed deposit in the month of June, 2023.

19.10 Registry is directed to take steps for redemption of the amount of fixed deposit in the instant appeal and send the same to the Regulatory Authority to be taken care as per the directions hereinabove.

19.11 It will be the liability of the beneficiary to pay the income tax on the interest earned on the deposited amount, if any.

19.12 In the instant case, this Tribunal while upholding the orders of Regulatory Authority dated 06.02.2019 and 01.12.2021, dismissed the appeals of the promoter, accordingly, we direct the Registry to transfer the entire amount deposited by the promoter under the provisions of Section 43(5) of the Act to the concerned account of the U.P. Real Estate Regulatory Authority (U.P. RERA). Further, we direct the Regulatory Authority/Adjudicating Officer to dispose of this amount during the execution proceedings in accordance with its orders dated 06.02.2019 and 01.12.2021 passed in Complaint no. 6201812606(Archana Gautam Vs. U.P. Avas Evam Vikas Parishad), Complaint no. LKO162/07/77494(Arun Kumar Dixit Vs. U.P. Avas Evam Vikas Parishad) and Complaint no.LKO162/07/77694(Gaurav Dixit Vs. U.P. Avas Evam Vikas Parishad).

20. No order as to costs.

Dated: 07th May 2024. **(Sanjai Khare)** **(D.K. Arora)**
Shakir