**BEFORE THE HARYANA REAL ESTATE APPELLATE TRIBUNAL**

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**Appeal No.240 of 2019**
**Date of Decision: 09.02.2021**

M/s Apex Buildwell Pvt. Ltd. Plot No.25B, Sector 32, Gurugram, Haryana.

Appellant

Versus

Sachin Kumar, Mohalla Khojwara, near Badadorwaja, Mahendergarh, Haryana.

Respondent

**CORAM:**

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| Justice Darshan Singh (Retd.) | Chairman |
| Shri Inderjeet Mehta | Member (Judicial) |
| Shri Anil Kumar Gupta | Member (Technical) |

**Argued by:** Shri Rohan Gupta, Advocate, ld. counsel for the appellant.
Shri Ishaan Mukherjee, Advocate, ld. counsel for the respondent.

**ORDER:**

**JUSTICE DARSHAN SINGH (Retd.) CHAIRMAN:**

The present appeal has been preferred by the appellant/promoter under Section 44(2) of the Real Estate (Regulation and Development) Act, 2016 (hereinafter called 'the Act') against the order dated 08.02.2019 passed by the learned Haryana Real Estate Regulatory Authority, Gurugram (hereinafter called 'the Authority'), in complaint bearing No.654 of 2018.

2. The respondent/allottee has filed complaint under Section 31 of the Act read with rule 28 of The Haryana Real

Estate (Regulation and Development) Rules, 2017 (hereinafter called 'the Rules') alleging therein that he applied for a flat in affordable housing project under Government of Haryana affordable housing scheme and was allotted apartment no.343, 3rd floor, tower-Orchid, in Group Housing namely "Our Home" Sector 37-C, Gurugram having carpet area of 48 sq. mtrs. The total sale price of the flat was Rs.16,00,000/-. The respondent/allottee has paid Rs.15,20,000/- to the appellant/promoter as per the payment plan. The 'Apartment Buyer's Agreement (hereinafter called 'the Agreement') was executed between the parties on 12.07.2013. As per the said agreement, the actual physical possession of the apartment was to be delivered to the respondent/allottee within a period of 36 months with grace period of six months. However, the appellant/promoter failed to complete the project and to deliver the possession of the apartment to the respondent/allottee as per the time schedule stipulated in the agreement. Hence, he filed the complaint seeking interest @ 18% per annum for delay in delivery of possession and immediate delivery of possession of the apartment.

3. In spite of notices, the appellant/promoter did not appear to contest the complaint and was ultimately proceeded against ex-parte.

4. After hearing learned counsel for the respondent/allottee and perusal of the material available on

record, the learned Authority vide impugned order dated 08.02.2019 disposed of the complaint filed by the respondent/allottee with the following directions: -

> *"i. The respondent is directed to pay interest at the prescribed rate of 10.75% per annum on the amount deposited by the complainant with the respondent from the due date of possession i.e. 02.06.2017 up to the date of offer of possession.*
>
> *ii. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till offer of possession shall be paid before 10th of subsequent month."*

5. Aggrieved with the aforesaid order dated 08.02.2019, the present appeal has been preferred.

6. We have heard Shri Rohan Gupta, Advocate, learned counsel for the appellant, Shri Ishaan Mukherjee, Advocate, ld. counsel for the respondent and have meticulously examined the record of the case.

7. Initiating the arguments, Shri Rohan Gupta, learned counsel for the appellant contended that the appellant/promoter was not at all responsible for the delay in handing over the possession to the respondent/allottee. He contended that the licence granted to the appellant had expired on 21.02.2016. The appellant had applied for renewal of the licence vide application dated 11.02.2016. As per the Affordable Housing Policy, 2009, extension only for one year

could have been granted on expiry of three years from the date of licence. He contended that there was no provision for extension of the validity of the licence beyond the period of four years.

8. He further contended that in this case, the consent to establish was granted on 02.12.2013. There were only 27 months with the appellant to complete the construction and development works of the project as the licence was going to expire on 21.02.2016. Ultimately, the licence of the appellant was renewed on 25.04.2019. The learned Authority also did not extend the registration of the project due to non-renewal of the licence which was ultimately registered on 08.07.2019. He contended that due to non-registration of the project, the finances of the appellant were got blocked and were not accessible to the appellant which adversely affected the pace of the construction. All these circumstances were beyond the control of the appellant/promoter. The delay in granting the renewal of the licence and RERA registration further resulted in delay of all the subsequent approvals like occupancy certificate etc. He contended that even then the appellant was able to complete the construction and moved the application for issuance of part occupation certificate for ten towers on 18.03.2019 which was granted on 29.11.2019 and for 16 towers on 03.10.2019 which was granted on 24.02.2020. In

this way the appellant has obtained the occupation certificate for 26 towers within 11 months of the renewal of the licence.

9. He further contended that as per clause 3(b)(i) of the agreement executed between the parties, the said agreement stand extended for a period of three years two months due to non-renewal of licence. Thus, a period of 42 months should be excluded while calculating the due date of completion of the construction. Accordingly, the appellant was entitled for extension of period of 15 months from 29.04.2019 i.e. the date of renewal of the licence. Thus, there was no delay in handing over the physical possession of the unit to the respondent/allottee.

10. He further contended that if this Tribunal comes to the conclusion that there was delay in delivery of possession, in that eventuality the respondent/allottee shall only be entitled to the delayed compensation at the rate of Rs.10/- per sq. ft. per month as per clause 3(c)(iv) of the agreement, the learned Authority was not justified to grant the delayed interest @ SBI MCLR+2%, the prescribed rate of interest as per rule 15 of the Rules. He contended that the prescribed rate of interest as per rule 15 is only permissible in case of refund of the amount and not on account of delay in completion of the project. Thus, he contended that rule 15 of the Rules cannot be applied as a rule of thumb in every case. To support his contentions, he relied upon cases ***Wg. Cdr. Arifur Rahman***

***Khan and Ors. Vs. DLF Southern Homes Pvt. Ltd. and Ors. 2020(3) RCR (Civil) 544***; ***DLF Homes Panchkula Pvt. Ltd. and Ors. Vs. D.S. Dhanda_and Ors. AIR 2019 SC 3218*** and ***Ghaziabad Development Authority Vs. Balbir Singh, AIR 2004 SC 2141***.

11. It is further contended that as per the RERA registration, the appellant was allowed to hand over the possession on or before 01.12.2019. So, the learned Authority cannot go beyond the terms of the registration. He further contended that the provisions of the Act and Rules made thereunder shall not be made applicable to the pre-RERA agreements. The said provisions can only be applicable to the post-RERA agreements governing the un-sold stock of the promoters. He has drawn our attention to the clauses of the RERA Registration Certificate in order to stress his contention. He contended that the Legislature never intended to apply or made applicable the provisions of the Act and the Rules made thereunder to the apartments already sold by the promoter which is evident from conjoint reading of the provisions of the Act and the terms and conditions of the registration certificate. He contended that the terms and conditions of the agreement cannot be amended or supplemented. The learned Authority had no jurisdiction to hold clause 3(a) and 3(b)(i) of the agreement as unreasonable. Even no reasons have been specified in the impugned order for this conclusion. The

learned Authority has failed to take note that the respondent/allottee has committed default in timely payments of the instalments as per the terms of the agreement. He contended that it is settled law that the time is not the essence of contract in sale of the immovable property. In support of his contentions, he relied upon case ***Gomathinayagam Pillai Vs. Palaniswami Nadar AIR 1967 SC 868***. He contended that the learned Authority was wholly erroneous to award the interest for delayed possession.

12. He further contended that the respondent/allottee has failed to show any loss suffered by him as a result of delay in delivery of possession. He further contended that as per Section 74 of the Indian Contract Act, in the event of breach of contract, the party complaining for the breach is entitled to the reasonable compensation not exceeding the amount so named in the contract. These principles of law have not been taken into consideration by the learned Authority by awarding the interest.

13. He further contended that the provisions of the Act and the Rules made thereunder are not applicable to the 'ongoing projects' registered under the Act and the Rules made thereunder. He contended that as per Section 3(1) of the Act, the intention of the Legislature was only to get registered the real estate projects within the planning area which are intended to be sold or marketed or advertised. The intention of

the Legislature was to provide information to the prospective allottees by getting the real estate project registered with the authority. Term 'ongoing project' has not been defined in the Act and has to be considered in simple language. He contended that the first proviso of Section 3 sub section (1) of the Act provides for registration of the 'ongoing projects' within three months from the date of commencement of the Act. Second proviso to section 3 sub section (1) of the Act is applicable to a project which is developed beyond the planning area from the stage of registration. Thus, he contended that the Legislature in its legislative conscience and wisdom had abstained itself from mentioning that the Act and the Rules/Regulations made thereunder shall be applicable to the 'ongoing projects' from the stage of registration of the project.

14. He further contended that the first proviso to section 3(1) of the Act does not indicate that the provisions of the Act or the Rules with regulations made thereunder shall apply to such 'ongoing projects' which are getting registered under the Act including the units already sold. He contended that the first proviso to Section 3(1) of the Act is an exception to the main enactment. If there would have been no first proviso, then all the real estate projects whether ongoing or future or completed, would have required compulsory registration under the Act. By providing the first proviso, the Legislature has only prescribed the condition of compulsory registration for

'ongoing projects' for which completion certificate is not granted by the authority. Thus, he contended that the provisions of the Act will not be applicable to all the real estate projects including already sold units within the planning area. To support his contentions, he has relied upon cases ***S. Sundaram Pillai and Ors. Vs. R. Pattabiraman*** **and** ***Ors. AIR 1985 SC 582*** *and* ***Ali M.K. and Ors. Vs. State of Kerala and Ors. 2003 (II) SCC 632***.

15. He further contended that the registration of the project and applicability of the provisions of the Act are two different and distinct aspects. Mere registration of the project will not make the provisions of the Act automatically applicable to the entire project. He contended that the provisions of the Act will only be applicable to the unsold units of the registered projects and not to the units already sold as the prime objective of the enactment of the Act as specified in the objects is to ensure the sale of real estate projects in an efficient, transparent manner and to further secure the interest of the consumers in the real estate sector. He further contended that the existing agreements for sale between the parties of an 'ongoing project' cannot be invalidated or amended/supplemented in any manner by the provisions of the Act or registration of the project thereunder. He contended that even in the model agreement provided in the Rules, the validity of the existing agreement has been upheld. Thus, he

contended that the award of the interest at SBI MCLR+2% in case of pre-RERA period is not warranted by the correct interpretation of law. The harsher penalties cannot be made applicable to the acts committed prior to the enactment of the Act. The Legislature has never intended to apply the provisions of the Act retrospectively as it has not been so specifically mentioned in the Act. Thus, he contended that the Act has no retrospective/retroactive application to units already sold. To support his contentions, he relied upon case ***District Collector, Vellore District Vs. K. Govindaraj, 2016(4) SCC 763*** and ***Mukund Dewangan vs. Oriental Insurance Company Limited, AIR 2017 Supreme Court 3668***.

16. In the alternate, he contended that if this Tribunal comes to the conclusion that the provisions of the Act are applicable, then the dispute between the parties has to be adjudicated upon in terms of the RERA registration and the appellant was allowed to complete the project by 01.12.2019, hence there was no delay in completion of the project.

17. By inviting our attention to Section 2 (c), 4(2)(g), 11(4), 11(4)(h), 11(5), Section 13, 14(3), 15(2), 16(1), 16(3), 18(3), 19(4) and Section 19(6) of the Act, he contended that there is no distinction between agreement for sale executed prior to or after the date of enactment of the Act and are at the equal footing. Further, he contended that the agreements for

sale of the 'ongoing projects' are to be implemented without being amended, supplemented or re-written by the provisions of the Act.

18. He further contended that the learned Authority had no jurisdiction to grant the compensation or the interest in the shape of compensation. To stress his contentions, he has referred to Section 71 and 72 of the Act which provide that the compensation is to be adjudged by the Adjudicating Officer.

19. He further contended that the learned Authority has limited jurisdiction to facilitate the conciliation between the promoter and allottees as specified under Section 32(g) of the Act. The Authority does not have the powers to adjudicate upon the disputes between the promoter and allottees. These functions can only be carried out by the Adjudicating Officer. He further contended that the obligations provided in Section 18 sub-clause (3) and Section 11 sub-section (4) of the Act are the contractual obligations. The learned Authority had no jurisdiction to award compensation or interest for breach of any obligation of the agreement for sale. These disputes are to be adjudicated upon by the Adjudicating Officer.

20. He further contended that the award of compensation does not fall within the purview of Section 38 of the Act. Under Section 38 of the Act, the Authority can only impose penalty or interest in regard to contravention of obligation cast upon the promoters, the allottees and the real

estate agents under the Act or the rules and regulations made thereunder. Word compensation does not figure at all in Section 38 of the Act. He further contended that Section 37 of the Act only empowers the authority to issue some direction and not to award the interest at the prescribed rate. He further contended that Section 37 of the Act being a general section cannot override the specific provisions of Section 71 of the Act. He further contended that the interest granted by the learned Authority is in the form of compensation only and the same cannot be granted by the learned Authority taking the aid of Section 38 of the Act. To support his contentions, he relied upon case ***Ankur Goel vs. Unitech Reliable Projects Pvt. Ltd., Complaint Case No.709 of 2015, decided on 27.07.2016*** by the Hon'ble National Consumer Disputes Redressal Commission.

21. He further contended that Section 38 of the Act has no application with respect to the violation of the terms and conditions of the agreement. The learned Authority has granted the compensation in the form of interest for contravention of the obligations of the agreement to sell. Thus, the grant of interest by way of compensation for such violation is wholly beyond the purview of Section 38 of the Act. He further contended that if the learned Authority will start deciding the dispute arising out of the contractual obligations, then the functions of the Adjudicating Officer shall be rendered

redundant and superfluous. He has also drawn our attention to clause 33 of the model agreement to sell which provides that the respective rights and obligations of the parties shall be settled amicably by mutual discussions failure to which the same shall be settled through Adjudicating Officer appointed. Thus, he contended that the Adjudicating Officer alone was entitled to adjudicate the claim raised by the respondent/allottee.

22. To conclude his contentions, learned counsel for the appellant contended that the learned Authority has exceeded its jurisdiction while granting compensation in accordance with rule 15 of the Rules and only the Adjudicating Officer was entitled to adjudicate upon the present dispute and determine the amount of the compensation. He further contended that the respondent/allottee never challenged the terms and conditions of the agreement. So, if this Tribunal comes to the conclusion that there was any delay on the part of the appellant/promoter, then the respondent/allottee can only be awarded compensation at the rate of Rs.10/- per sq. ft. per month for the delay in delivering the possession beyond the agreed period. With these submissions, learned counsel for the appellant pleaded that the impugned order passed by the learned Authority is without jurisdiction, illegal, violative of the provisions of the Act and cannot be sustained in the eyes of law.

23. Per contra, learned counsel for the respondent/allottee contended that the provisions of the Act are retrospective/retroactive which affects the past transactions entered into between the promoter and allottee prior to the registration of the project under the Act. He contended that the Act is a retroactive statute, though it does not operate backwards and does not take away the already vested rights. Though it operates forward, it will be applicable in respect of payment of interest even with respect to the past transactions entered into between the promoter and the allottees.

24. Learned counsel for the respondent/allottee further contended that Section 18 of the Act is not at all penal in nature. It is only compensatory in nature. He further contended that the appellant has got its project registered under the Act. It indicates that the appellant was well aware that the project was for sale of apartments and the provisions of the Act shall be applicable. He further contended that there is no question of applying the logic that if the project is not registered, the provisions of the Act will not be applicable.

25. He contended that the intention of the Legislature has to be considered by interpreting the provisions of the Act as a whole. Every clause of a statue has to be construed with reference to the context of the other clauses of the Act. An isolated consideration of the definitions may not give justice to

the objects and reasons of the Act and the intention of the Legislature. He contended that the normal rule to interpret the words of a statute is in its ordinary sense. In case of any ambiguity, rational meaning has to be given and in case of apparent conflict, harmonious meaning to advance the object and intention of legislature has to be given. To support his contentions, he relied upon case ***Parkash & others versus Phoolwati & others, (2016)2 SCC 36***.

26. He further contended that it is an admitted fact that the appellant has applied for RERA registration as an 'ongoing project' according to the provisions of the Act, so the provisions of the Act are applicable. He further contended that the appellant/promoter cannot bind the respondent/allottee with one sided contractual terms in the agreement and such conditions are liable to be ignored. He contended that the Law Commission of India in its 199th report has categorically mentioned that the term of contract is substantively unfair if such contract or the term thereof is in itself harsh, oppressive or unconscionable to one of the parties. He also relied upon case ***Pioneer Urban Land & Infrastructure Ltd. vs. Govindan Raghvan and Ors. (2019) 5 SCC 725***.

27. He further contended that the grace period can only be granted if there is any justification. He contended that there is inordinate delay of more than three years in completion of the project. He contended that the appellant

was well aware that the licence was going to expire in February, 2016. The application for renewal could have been moved in advance. Moreover, there were deficiencies in the application which caused delay in renewal of the licence. He contended that the burden to prove that the delay was attributable to the department of Town and Country Planning was on the appellant but the appellant has not led any evidence to show that the office of Director Town and Country Planning had caused the unreasonable delay in renewal of the licence. Thus, the appellant is not entitled for any benefit for delay in renewal of the licence. Moreover, the construction had not stopped due to non-renewal of the licence. Even as per the case of the appellant the construction continued even during that period. He contended that clause 3(b)(i) and (ii) of the Act are not applicable and the appellant cannot derive any benefit thereof. The respondent/allottee has already made the payment of the substantial amount of the sale price even before the due date of possession i.e. 02.06.2017 and a very small part of the sale price was remained to be paid which was to be paid at the time of delivery of the possession. He contended that the rate of interest awarded by the learned authority is reasonable and justified. The respondent/allottee is a poor person. He has purchased the affordable house by spending his hard-earned money. The appellant/promoter though had received the substantial amount of the sale price

but failed to deliver the possession within the stipulated period. So, the interest awarded by the learned Authority vide impugned order is fully justified and reasonable. The interest so awarded by the learned Authority cannot be stated to be the compensation. The learned Authority had complete jurisdiction to deal with and adjudicate the complaint filed by the respondent/allottee and to award the interest for delayed possession.

28. We have duly considered the aforesaid contentions.

29. Before touching the issue that the delay in the completion of the project was beyond the control of the appellant/promoter, we deem it necessary to consider the other issues raised by learned counsel for the parties. It is the admitted case of the appellant/promoter that the project in question was an 'ongoing project' as the development work was not still completed. Neither the Occupation Certificate nor the Completion Certificate was issued on the date when the Act came into force. It is also an admitted fact that the appellant/promoter has itself applied for the registration of the project under the provisions of the Act.

30. Learned counsel for the appellant has contended that as per the correct interpretation of Section 3 of the Act and the legislation intent for enactment, the provisions of the Act cannot be made applicable to the 'ongoing project'. The provisions of the Act will only be applicable if there is sale of

the project. Even in case of an 'ongoing project' the provisions of the Act will not apply to the pre-RERA agreements with respect to the units already sold. The interpretation of Section 3 of the Act so put forward by learned counsel for the appellant is totally absurd. The law is well settled that in construing a statutory provision, the first and foremost rule of construction is the literal construction. The court has to see at the very outset as to what does the provisions say. If the provision is unambiguous and if from the provision the legislative intent is clear, the Court need not call into aid the other rules of construction of statutes. Reference can be made to cases ***M/s Hiralal Ratanlal Vs. STO AIR 1973 SC 1034*** and ***Union of India and anr. Versus National Federation of the Blind and Ors. 2013(10) SCC 772.*** Even in case ***Mukund Dewangan Vs. Oriental Insurance Company Limited*** (Supra) relied upon by learned counsel for the appellant, the Hon'ble Apex Court has also laid down that the first and primary rule of construction is that the intention of the legislature must be found in the words used by legislature itself. Each word, phrase or sentence is to be construed in the light of the general purpose of the Act itself. The interpretation of the provisions of law depends upon the text and context. The text is the texture and the context is what gives colour and neither of them can be ignored. That interpretation is best which makes the textual matching contextual.

31. The crux of the ratio of law laid down in cases referred above is that the first and foremost rule of construction is the literal construction where language is plain and simple and does not warrant two possible interpretations, then the plain and grammatical meaning would necessarily have to be given effect to. Further any interpretation which renders the provision of a statute redundant, otiose or surplusage has to be avoided. The court should strive to avoid a construction which will tend to make the statute unjust, oppressive, unreasonable, absurd or contrary to public interest. That construction should be accepted which will make the statute effective and productive, as it is presumed that these results were intended by the legislature. A statute must be given a fair, pragmatic, and common-sense interpretation so as to fulfil the objects sought to be achieved by the legislature.

32. The plea raised by learned counsel for the appellant that the provisions of the Act will only be appliable to the unsold/unallotted units in a real estate ongoing project, is totally misconceived and mis-interpretation of the provisions of the Act.

33. This fact is not disputed that the project in question is a registered project with the Haryana Real Estate Regulatory

Authority, Gurugram under the provisions of the Act and the rules made thereunder.

34. Section 3(1) of the Act reads as under: -

> ***"3. Prior registration of real estate project with Real Estate Regulatory Authority****. — (1) No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act:*
>
> *Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act:*
>
> *Provided further that if the Authority thinks necessary, in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority, and the provisions of this Act or the rules and regulations made thereunder, shall apply to such projects from that stage of registration."*

35. Section 3(1) of the Act prohibits the advertisement, marketing, booking, sale or offer for sale or inviting the persons to purchase in any manner any plot, apartment or building without registering the real estate project with the Real Estate Regulatory Authority established under the Act. The legislature was well aware of the fact that various projects at the time of enactment of the Act were ongoing. So, as per

the first proviso to Section 3(1) of the Act three months' time was given from the date of commencement of the Act, to such ongoing projects for which the completion certificate has not been issued, to move the application to the Authority for registration of the project. In the second proviso, it has been clarified that the real estate projects which are beyond the planning area can also be directed to be registered with the Authority with the requisite permission of the local authority in the interest of the allottees and the provisions of the Act shall apply to such projects from the stage of registration.

36. From the aforesaid plain wording of the provisions, it cannot be concluded that the ongoing project is on better footing and provisions of the Act will not be applicable to it. The contentions raised by the learned counsel for the appellant are itself contradictory. At some places he has mentioned that the provisions of the Act will not be applicable to the ongoing projects and at some places he has mentioned that the provisions of the Act will only be applicable to the un-allotted/unsold units of the ongoing projects. If the interpretation of the provisions of the Act as put forward by the learned counsel for the appellant is accepted, the provisions of the Act shall virtually be rendered redundant and the very purpose of the enactment of the Act shall be defeated. Such interpretation will render the Act ineffective,

unproductive and thwart the results intended to be achieved by the Parliament. As per the ratio of law laid down in cases ***Sudhaben B. Tamboli Versus Ahmedabad Education Society and anr. Law Finder Doc Id # 787730*** and ***Nathi Devi v. Radha Devi Gupta, AIR 2005 SC 648***, such interpretation is always to be avoided and cannot be accepted. Learned counsel for the appellant could not show us any compelling reason for taking such a view.

37. Once the project is registered with the learned Authority, it does not lie in the mouth of the appellant to contend that the provisions of the Act shall be applicable only to one part of the project and the other part of the project shall be immune from the application of the Act. Any such view shall be ridiculous and anomalous that same project shall be governed by two set of laws/rules. There is also no escape from the conclusion that relevant provisions of the Act are clear and unambiguous so far as the applicability of the Act to the real estate project is concerned. The literal and plain meaning of Section 3, 11(4)(a), 12, 14(3), 15, 17, 18 and 19 etc. clearly indicate that provisions of the Act are applicable to the entire real estate project and not in parts irrespective of the fact whether the agreement for sale is pre or post-RERA.

38. As already mentioned, it is an admitted fact that the project in dispute was an 'ongoing project' on the date of

enforcement of the Act, various obligations and responsibilities to be performed by the appellant/promoter like completion of the project, delivery of possession and execution of the conveyance-deed etc. were yet to be performed, which are to be enforced in accordance with the provisions of the Act and the rules made thereunder. There is no distinction qua the rights of the allottees in respect of the units sold/allotted prior to enforcement of the Act and post enforcement of the Act, as provided in Section 11(4)(a), 12, 14(3) and 18 of the Act.

39. The 'agreement for sale' has been defined in Section 2(c) of the Act which reads as under: -

> *"2. Definitions. —In this Act, unless the context otherwise requires, —*
>
> *(c) "agreement for sale" means an agreement entered into between the promoter and the allottee"*

40. Learned counsel for the appellant has himself vehemently contended that the Act does not create any distinction between the agreement for sale executed prior to or after the commencement of the Act and that the Act never intended to re-write or amend or supplement or suspend the terms of the agreement executed between the parties prior to the enforcement of the Act and rights of the parties are to be determined in terms thereof.

41. This plea raised by learned counsel for the appellant is totally destructive to the plea raised by him that the provisions of the Act and Rules made thereunder shall not be applicable to the pre-RERA agreements and the said provisions can only be made applicable to the post-RERA agreements governing the unsold stock of the promoter. We have failed to reconcile this self-contradictory plea raised by learned counsel for the appellant.

42. It is evident from the definition of the 'agreement for sale' reproduced above that there is no distinction between the agreement for sale executed prior to or after the enforcement of the Act. At the same time, it cannot be disputed that enforcement of the Act will not invalidate the agreement for sale executed between the parties prior to the enforcement of the Act. The applicability of the provisions of the Act and the Rules made thereunder to the pre-RERA agreements shall depend upon the determination of the question as to whether the provisions of the Act are retrospective or prospective or retroactive. The Hon'ble Apex Court in case ***State Bank's Staff Union (Madras Circle) Versus Union of India & Ors, AIR 2005 SC 3446*** had laid down as under: -

> *"23. In Advanced Law Lexicon by P. Ramanath Aiyar (3rd Edition, 2005) the expressions "**retroactive" and "retrospective**" have been defined as follows at page 4124 Vol.4 :*

*"**Retroactive-Acting** backward; affecting what is past. (Of a statute, ruling, etc.) extending in scope or effect to matters that have occurred in the past. Also termed **retrospective.** (Blacks Law Discretionary, 7th Edn. 1999)*

*'**Retroactivity'** is a terms often used by lawyers but rarely defined. On analysis it soon becomes apparent, moreover, that it is used to cover at least two distinct concepts. The first, which may be called '**true retroactivity'**, consists in the application of a new rule of law to an act or transaction which was completed before the rule was promulgated. **The second concept, which will be referred to as 'quasi-retroactivity', occurs when a new rule of law is applied to an act or transaction in the process of completion.....** The foundation of these concepts is the distinction between completed and pending transaction...." (T.C. Hartley, The Foundation of European Community Law 129 (1981).*

*'**Retrospective**-Looking back; contemplating what is past. Having operation from a past time.*

*'**Retrospective'** is somewhat ambiguous and that good deal of confusion has been caused by the fact that it is used in more senses than one. In general however the Courts regard as **retrospective** any statute which operates on cases of facts coming into existence before its commencement in the sense that it affects even if for the future only the character or*

*consequences of transactions previously entered into or of other past conduct. Thus, a statute is not **retrospective** merely because it affects existing rights; nor is it **retrospective** merely because a part of the requisite for its action is drawn from a time and antecedents to its passing. (Vol.44 Halsbury's Laws of England, Fourth Edition, Page 8 of 10 pages 570 para 921)."*

43. The Division Bench of the Hon'ble Bombay High Court in ***Neel Kamal Realtors Suburban Pvt. Ltd. & anr. Vs. Union of India and others 2018(1) RCR (Civil) 298 (DB)*** has also reiterated the same ratio of law and laid down as under: -

*"122. We have already discussed that above stated provisions of the RERA are not **retrospective** in nature. **They may to some extent be having a retroactive or quasi retroactive effect** but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having **retrospective** or **retroactive** effect. A law can be even framed to affect subsisting/existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports. As regards Article 19(1)(g) it is settled principles that the right conferred*

*by sub-clause (g) of Article 19 is expressed in general language and if there had been no qualifying provisions like clause (6) the right so conferred would have been an absolute one."*

44. As per the aforesaid ratio of law the provisions of the Act are retroactive or quasi retroactive to some extent. The second concept of quasi-retroactivity occurs when a new rule of law is applied to an act or transaction in the process of completion. Thus, the rule of quasi retroactivity will make the provisions of the Act and the Rules applicable to the acts or transactions, which were in the process of the completion though the contract/agreement might have taken place before the Act and the Rules became applicable. Hence, it cannot be stated that the provisions of the Act and the Rules made thereunder will not be applicable to the agreement for sale executed between the parties prior to the commencement of the Act. It is also not the correct interpretation of the provisions of the Act that the said provisions will only be applicable to the unsold stock/units, rather these provisions shall be applicable to the project as a whole including the units already sold.

45. In the instant case, though the agreement for sale between the parties was executed prior to the Act came into force but the transaction was still incomplete and the contract had not concluded. It is an admitted fact that the present

project was an ongoing project. The possession of the unit was not delivered on the date of enforcement of the Act and even on the date of filing the complaint. Some payments were also due against the respondent/allottee and the conveyance-deed has also not been executed so far. Thus, the concept of quasi retroactivity will make the provisions of the Act and the Rules applicable to the agreements for sale entered into between the parties. The aforesaid view is also supported by the law laid down by the Hon'ble Apex Court in case ***M/s Shanti Conductors (P) Ltd. Vs. Assam State Electricity Board 2019(1) Scale 747*** and by the Division Bench of our Hon'ble High Court in case ***M/s Harkaran Dass Vedpal Vs. Union of India and Ors.*** (Writ Petition No.10889 of 2015 decided on 22.07.2019).

46. Thus, even though the agreement for sale was entered into between the parties prior to the Act came into force but the transaction was still in the process of completion when the Act and the Rules became applicable. So, in our view the rights of the parties will be governed by the provisions of the Act and the rules made thereunder. Mere this fact that the unit was allotted to the respondent prior to the commencement of the Act, will not take out the dispute from the purview of the Act and the dispute between the parties with respect to fulfilment of the obligations and responsibilities

by the promoter shall be governed by the provisions of the Act and the rules made thereunder. However, the terms and conditions of the agreements still will be taken into consideration with respect to the matters for which there is no specific provision in the Act or the Rules and the same are not inconsistent to the provisions of the Act or the Rules.

47. Likely or actual date of completion of the project has been mentioned to be February, 2019 in the Certificate of Registration granted by the learned Authority. This date might have been mentioned in the Registration Certificate on the basis of declaration submitted by the promoter under Section 4(2)(*l*)(C) of the Act at the time of getting the project registered. This declaration is given unilaterally by the promoter to the Authority at the time of getting the real estate project registered. The allottee had no opportunity to raise any objection at that stage, so this unilateral Act of mentioning the date of completion of project by the builder will not abrogate the rights of the allottee under the agreements for sale entered into between the parties. The Division Bench of the Hon'ble Bombay High Court in case ***Neel Kamal Realtors Suburban Pvt. Ltd. & anr. Vs. Union of India and others*** (Supra) has laid down as under: -

> *"Section 4(2)(l)(C) enables the promoter to revise the date of completion of project and hand over possession.* ***The provisions of RERA, however, do***

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

Recently, in case ***M/s Imperia Structures Ltd. and others Versus Anil Patni and others***, ***Law Finder DocId#1758728***, the Hon'ble Apex Court has laid down as under:-

*"33. We may now consider the effect of the registration of the Project under the RERA Act. In the present case the apartments were booked by the Complainants in 2011-2012 and the Builder Buyer Agreements were entered into in November, 2013. As promised, the construction should have been completed in 42 months. The period had expired well before the Project was registered under the provisions of the RERA Act. Merely because the registration under the RERA Act is valid till 31.12.2020 does not mean that the entitlement of the concerned allottees to maintain an action stands deferred.* ***It is relevant to note that even for the purposes of Section 18, the period has to be reckoned in terms of the agreement and not the registration. Condition no.(x) of the***

> ***letter dated 17.11.2017 also entitles an allottee in same fashion. Therefore, the entitlement of the Complainants must be considered in the light of the terms of the Builder Buyer Agreements and was rightly dealt with by the Commission.”***

In case ***Neel Kamal Realtors Suburban Pvt. Ltd. & anr. Vs. Union of India and others*** (Supra), the Hon’ble Bombay High Court by taking note of the provisions of section 4(2)(l)(c) of the Act has categorically laid down that the provisions of the Act will not re-write the clause of completion or handing over of the possession mentioned in the agreement for sale. The fresh time line independent of the time stipulated in the agreement is given in order to save the developer from the penal consequences but he is not absolved of the liability under the agreement for sale. Thus, in view of the ratio of law laid down in the cases referred to above, the appellant/builder was required to offer the possession of the unit to the respondent/allottee as per the terms and conditions of the agreements, failing which the respondent/allottee will be entitled to claim the remedies as provided under section 18 of the Act. The date of completion unilaterally mentioned in the declaration under Section 4(2)(l)(c) of the Act will not extend the time to hand over the possession of the unit to the allottee.

48. The plea raised by learned counsel for the appellant that the learned Authority has no adjudicatory functions is

also devoid of merits. There is no dispute that as per the scheme of the Act, the main role of the learned Authority is regulatory for the development of the real estate project. But at the same time, the learned Authority is invested with various adjudicatory functions. Chapter-VIII of the Act provides the offences, penalties and adjudication. As per sections 59 to 63, the Authority is empowered to impose the penalties for violation of the provision of the Act and the rules made thereunder. Section 31 of the Act authorise the Authority to entertain the complaint filed by the aggrieved person for any violation or contravention of the provisions of the Act, rules and regulations made thereunder against any promoter/allottee or real estate agent as the case may be. Section 34(f) of the Act provides that it is the function of the Authority to ensure the compliance of the obligations casted upon the promoter, allottee and the real estate agent under the Act, rules and regulations made thereunder. Section 37 of the Act authorised the Authority to issue certain directions for the purpose of discharging its functions. Section 38 of the Act authorise the Authority to impose penalty or interest. Rule 28 of the Rules provides the complete procedure for the imposition of penalties after due inquiry and adjudication. So, it cannot be stated that the Authority had no adjudicatory role.

49. Section 71 of the Act provides for appointment of Adjudicating Officer for adjudging the compensation. The

Adjudicating Officer is competent to award the compensation or the interest as the case may be. The interest mentioned in Section 71(3) of the Act is an alternative to the lump sum compensation whereas the interest payable under proviso to Section 18(1) of the Act is the interest simplicitor on the prescribed rate for delay in delivery of possession where the allottee does not intend to withdraw from the project. Said interest automatically flows from the failure of the promoter to complete the project and offer the possession in terms of agreement and does not involve intricate adjudication. The interest mentioned in Section 71 is not at the prescribed rate, rather is to be determined keeping in view the factors mentioned in Section 72 of the Act. So, the interest simplicitor is not covered under section 71 of the Act or rule 29 of the Rules. Consequently, there is no bar to the Authority to deal with the cases seeking direction for delivery of possession and interest simplicitor for delayed possession. The position has further become clear with the amendment of rule 28 of the rules by the Government of Haryana vide notification dated 12.09.2019.

50. It is settled principle of law that in order to determine the relief sought by the respondent/allottee, the pleadings as a whole have to be taken into consideration. In the instant case, the real claim raised by the respondent/allottee is for grant of interest for delay in delivery

of possession. It cannot be equated with compensation or penalty.

51. The interest for delayed possession may appears to be compensatory in nature but there is a marked distinction between compensation as such and the interest simplicitor. The dictionary meaning of word 'compensation' is as under: -

| | |
|---|---|
| Black's Law dictionary | -Money given to compensate loss or injury. |
| Webster's Third New International Dictionary | -The act or action of making up, making good or counter balancing, rendering equal. |
| Law Lexicon by P. Ramanatha Aiyer | -something given or obtained as an equivalent, an equivalent given for property taken or for any injury done to another. |

52. As is evident from the above meaning of the word 'compensation' it is in fact the indemnification, that is, the payment of the damages which is necessary to restore an injured party to his former position. The courts are granting the compensation to be paid by a person whose acts or omission has caused, loss or injury to another, in order that thereby the person indemnified may receive equal value for the loss or in respect of injury suffered by him.

53. On the other hand, the interest is a premium paid for the use of money. Ordinarily a person who is deprived of his money to which he is legitimately entitled as of right is

entitled to interest for the period his money is used by the other person. In general terms the interest is the return for the use or retention by one person of a sum or money belonging to or owned by other. Thus, there is a clear distinction between compensation and interest simplicitor. So, the interest provided in proviso to section 18(1) of the Act is an interest simplicitor which is available to an allottee who does not intent to withdraw from the project as a return for his money used by the promoter, who caused delay in the delivery of the possession. Thus, the interest for delayed possession cannot be construed to be the compensation in strict sense to fall within the purview of Sections 71 and 72 of the Act read with rule 29 of the Rules.

54. Section 11(4)(a) of the Act provides that the promoter shall be responsible to fulfil the obligation towards the allottee as per the terms and conditions of the agreement for sale. Once this obligation has been incorporated in the substantive provision of the Act, its non-compliance may invite the violation of the provision of the Act. As per section 34(f) the Authority is competent to ensure the compliance of the obligations casted upon the promoter under this Act and the Rules and Regulations made thereunder. As per Section 11(4)(a) it is the statutory obligation of the promoter to fulfil his obligations and responsibilities towards allottee as per agreement for sale. So, the learned Authority can enforce the

compliance of said obligations under section 34(f) and by issuing necessary directions by exercising the powers vested in it under Section 37 of the Act.

55. Section 38 of the Act also empowers the Authority to impose penalty or interest in respect of any contravention of obligations casted upon the promoter, allottee and real estate agent under this Act and Rules and Regulation made thereunder. As already discussed, the obligations/ responsibilities of the promoter towards the allottee as per the terms and conditions of the agreement are also the statutory obligation in view of section 11(4)(a) of the Act. Thus, for awarding the interest under Section 18(1) of the Act due to non-fulfilment of the obligations/responsibilities as per the terms and conditions of the agreement by the promoter, the Authority will be competent to award interest simplicitor by taking the aid of the provision of section 11(4)(a), 34(f), 37 and 38 of the Act and amended rule 28 of the rules. So, we are of the considered opinion that the learned Authority had jurisdiction to adjudicate upon the dispute raised by the respondent/allottee in the present complaint and also to award the interest for delay in delivery of possession within the time stipulated in the agreement for sale.

56. We do not find any substance in the contentions raised by learned counsel for the appellant that in order to claim the compensation for delay in delivery of possession, the

respondent/allottee was required to establish the loss suffered by him as provided in Section 74 of the Indian Contract Act, 1872. The provisions for grant of damage on account of the breach of contract provided in Section 74 of the Indian Contract Act are the general provisions. Whereas Section 18 of the Act is a special provision dealing with consequences on account of the failure of the promoter to complete the project by the date specified in the agreement for sale. The proviso to Section 18(1) of the Act categorically provides that where an allotee does not intend to withdraw from the project, he shall be paid by the promoter the interest for every month of delay till handing over of the possession at such rate as may be prescribed. Thus, the proviso to Section 18(1) of the Act stipulates that the allottee shall be entitled to interest at the prescribed rate for the delay in delivery of possession beyond the date stipulated in the agreement for sale. It is nowhere mentioned in Section 18 of the Act that in order to claim the interest for delayed delivery, the allottee has to prove the loss. Simple failure of the promoter to deliver the possession by the date specified in the agreement for sale, will make the allottee entitled for the interest provided in the proviso to Section 18(1) of the Act. It is settled rule of interpretation that the provisions of the special Act always override the provisions of the general law. So, the provisions of the Act will override Section 74 of the Indian Contract Act which is the general law.

57. We also do not find any substance in the contention raised by learned counsel for the appellant that the respondent/allottee will only be entitled to the compensation at the rate of Rs.10/- per sq. ft. per month of delay as provided in the Agreement and cannot be granted the interest @ SBI MCLR+2% as prescribed in rule 15 of the Rules.

58. As already discussed above, the provisions of the Act are retroactive or quasi retroactive to some extent. It is an admitted fact that the transaction between the parties was still in the process of completion. The possession of the unit was yet to be delivered and the conveyance-deed was yet to be executed when the Act came into force. Thus, the provisions of the Act and the Rules have become applicable to the present transaction i.e. the agreement for sale entered into between the parties. The function of the learned Authority is to safeguard the interest of the aggrieved person whether he is the allottee or the promoter. The rights of the parties are required to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his/its dominant position and to exploit the needs of the home buyers. The learned Authority as well as this Tribunal is duty bound to take into consideration the legislative intent i.e. to protect the interest of the consumers in the real estate sector.

59. The Hon'ble Apex Court in case ***Pioneer Urban Land & Infrastructure Limited vs. Govindan Raghavan, 2019(2) R.C.R. (Civil) 738*** has laid down as under:

> *"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.*
>
> *8. We also reject the submission made by the Appellant-Builder that the National Commission was not justified in awarding interest @ 10.7% S.I. p.a. for the period commencing from the date of payment of each instalment, till the date on which the amount was paid, excluding only the period during which the stay of cancellation of the allotment was in operation."*

Even in case ***Wg. Cdr. Arifur Rahman Khan and Ors. Vs. DLF Southern Homes Pvt. Ltd. and Ors.*** (supra) relied upon by learned counsel for the appellant, the Hon'ble Apex Court has reiterated the aforesaid legal position. Further, in the

latest judgment of the Hon'ble Apex Court, titled as ***IREO GRACE REAL TECH PVT. LTD. Versus ABHISHEK KHANNA & OTHERS***, ***Civil Appeal No.5785 of 2019 decided on January 11, 2021***, the same legal position has been again re-affirmed.

60. Mere this fact that the respondent/allottee has not assailed the terms and conditions of the agreement, is of no consequences as the strict principles of pleadings are not applicable to the proceedings under the Act since the proceedings before the learned Authority are summary in nature. The learned Authority can also take suo motu action in case of any disparity or injustice as the prime object is to safeguard the interest of the consumers of the real estate sector. In the instant case also, there are various clauses in the agreement dated 12.07.2013 which are ex facie one sided unfair and unreasonable. As per clause 2(c) of the agreement, the appellant/promoter has been invested with the powers to cancel the allotment and forfeit the earnest money alongwith interest on delayed payments, interest on instalments, brokerage etc. in the event of default by the allottee. Events of defaults has been detailed in Clause 7 of the agreement dated 12.07.2013. Some of the indicative events of default are failure to make payments within the time as stipulated in the schedule of payments, failure to perform and observe the obligations set forth in the agreement, failure to take

possession and to pay the Holding Charges, failure to execute the conveyance deed, failure to execute Maintenance Agreement or to pay on or before its due date the maintenance charges, maintenance security or any increases in respect thereof, failure to become a member of the association of apartment owners, assignment of the agreement or any interest without prior written consent of the promoter, dishonour of any cheque, any other acts, deeds or things which the allottee may commit or omit or fail to perform in breach of terms of the agreement, any breach of any of the obligations and duties under maintenance agreement. Thus, the appellant/promoter has invested itself with vast powers to cancel the allotment, to forfeit the earnest money alongwith the interest on delayed payments, interest on instalments and brokerage etc.

61. As per clause 7(ii)(a) of the agreement, the allottee was liable to pay interest @ 18% per annum on the delayed payments for the first 60 days of default. Whereas, as per Clause 3(c)(iv) of the agreement, the allottee was entitled to receive compensation @ Rs.10/- per Sq. ft. per month on the carpet area of the apartment for the delay in delivery of possession which comes to approximately 0.37% per annum. Thus, the aforesaid terms of the agreement are ex-facie one sided unfair and unreasonable which constitute the unfair practice on the part of the appellant/promoter who was in

dominant position as the respondent/allottee was in the need of house. He had already parted with his hard-earned money, so he had no other option but to sign the agreement on dotted lines. These type of dominant terms and conditions of the agreement will not be final and are liable to be ignored. In ***Pioneer Urban Land & Infrastructure Limited vs. Govindan Raghavan*** case (Supra), the Hon'ble Apex Court finding the terms and conditions of the agreement to be one sided unfair and unreasonable had upheld the award of the National Commission awarding the interest as per rule 15 of the Rules at the rate of 10.7 % per annum and not on the contractual rate.

62. Even the ratio of law laid down in ***Wg. Cdr. Arifur Rahman Khan and Ors. Vs. DLF Southern Homes Pvt. Ltd. and Ors.*** (supra) is of no help to the appellant wherein the Hon'ble Apex Court has laid down that the judgment in Dhanda's case (Supra) does not prescribe an absolute embargo on the award of compensation beyond the rate stipulated in the flat buyers' agreement where handing over of the possession of a flat has been delayed. It is further mentioned that Dhanda's case was preceded by consented terms which were presented before the Hon'ble Apex Court in two earlier civil appeals under which interest at the rate of 9 per cent had been granted. In Dhanda's case (Supra) it was observed by the

Hon'ble Apex Court that the causes of delay in delivery of the possession were beyond the control of the appellant. Moreover, in that case also the agreed rate of interest for delay i.e. Rs.10 per square feet per month was not awarded rather the interest at the rate of 9% p.a. was awarded, which was more than the contractual rate of compensation for delay. So, this case is of no help to the appellant.

63. The plea raised by the ld. counsel for the appellant that Rule 15 of the rules is only applicable in case of refund and the rate of interest mentioned therein cannot be awarded in case of delayed possession is also devoid of merits. Though in the unamended Rule 15 of the rules the interest for delayed possession is not specifically mentioned but in order to determine the reasonable rate of interest the aid of Rule 15 of the rules can be taken even in case of the grant of interest for delayed possession or delayed possession charges. This will also help to maintain the uniformity in the orders to be passed by the Authority/ Tribunal. Rule 15 of the rules provides for grant of rate of interest at the rate of State Bank of India highest marginal cost of lending rate +2%. This rate of interest has been provided by the appropriate Government in the rules being the reasonable and justified. So, there is no legal impediment to award the same rate of interest in case of delayed possession/delayed possession charges. Hence in

case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges at the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored. Moreover, as per the amended rule 15 the prescribed rate of interest is also available in case of delayed possession. Thus, we do not find any illegality in the rate of interest awarded by the learned Authority.

64. Learned counsel for the appellant has vehemently contended that the delay in completion of the project was beyond the control of the appellant/promoter as the office of Director General, Town and Country Planning Haryana has caused the delay of about 38 months in the renewal of the licence due to some policy issue. By raising this plea, the appellant is in fact invoking the principle of fore majeure. With advantage we can refer to the relevant clauses of the Apartment Buyer's Agreement which read as under: -

*"3. POSSESSION*

*a) Offer of possession:*

*That subject t terms of this Clause3, and subject to the APARTMENT ALLOTTEE(S) having complied with all the terms and conditions of this Agreement and no being in*

*default under any of the provisions of this Agreement and further subject to compliance with all provisions, formalities, registration of sale deed, documentation, payment of all amount due and payable to the DEVELOPER by the APARTMENT ALLOTTEE(S) under this agreement etc., as prescribed by the DEVELOPER, the DEVELOPER proposes to hand over the possession of the APARTMENT within a period of thirty (36) months, with a grace period of 6 months from the date of commencement of construction of the Complex upon the receipt of all project related approvals including sanction of building plan/revised plan and approval of all concerned authorities including the Fire Service Department, Civil Aviation Department, Traffic Department, Pollution Control Department etc., as may be required for commencing, carrying on and completing the said Complex subject to force majeure, restraints or restriction from any court/authorities. It is however understood between the parties that the possession of various Blocks/Towers comprised in the*

*Complex as also the various common facilities planned therein shall be ready & completed in phases and will be handed over to the allottees of different Block/Towers as and when completed and in a phased manner*

b) *Notwithstanding anything to the contrary contained herein, in the following circumstances, the date of possession shall get extended accordingly:*

i) *The completion of the said LOW COST/AFFORDABLE GROUP HOUSING PROJECT including the APARTMENT is delayed by reason of non-availability of steel and/or cement or other building materials, or water supply or electric power or slow down, strike or, lock-out or civil commotion or by reason of war or enemy action or terrorist action or earthquake or any act of God or due to circumstances beyond the power and control of the DEVELOPER or due to any Act, Notice, Order, Rule or Notification of the Government and/or any other Public or Competent Authority or due to delay in sanction of any revised building/zoning plans/grant of occupation certificate or for any other reasons beyond the control of the DEVELOPER, then the APARTMENT ALLOTTEE(S) agrees that the*

*DEVELOPER shall be entitled to the extension of time for offering the possession o the said APARTMENT. The DEVELOPER as a result of such a contingency arising reserves the right to alter or vary the terms and conditions of this Agreement or if the circumstances beyond the control of the DEVELOPER so warrant, the DEVELOPER may suspend the construction of the LOW COST/AFFORDABLE GROUP HOUSING PROJECT and this Agreement for such period as it may consider expedient and the APARTMENT ALLOTTEE(S) agrees not to claim compensation of any nature whatsoever for the period of suspension of the construction of the LOW COST/AFFORDABLE GROUP HOUSING PROJECT and this Agreement.*

*ii) If as a result of any law that may be passed by any legislature or Rule, Regulation or Order on notification that may be made an/or issued by the Government or any other Authority including a Municipal Authority or on account of delay in sanctioning of plans or any other sanctions or approval for development or issuance of occupation certificate by appropriate Authorities, the DEVELOPER is not in a position to hand over the possession of the APARTMENT, then the DEVELOPER may, if so advised, though not bound to*

*do so, at its sole discretion challenge the validity, applicability and/or efficacy of such Legislation, Rule, Order or notification by moving the appropriate Courts, Tribunal(s) and/or Authority. In such a situation, the money(ies) paid by the APARTMENT ALLOTTEE(S) in pursuance of this Agreement, shall continue to remain with the DEVELOPER and the AARTMENT ALLOTTEE(S) agrees not to move for or to obtain specific performance of the terms of this Agreement, it being specifically agreed that this Agreement shall remain in abeyance till final determination by the Court(s)/Tribunal(s)/Authority(ies).”*

65. As per clause 3(a) of the Agreement, the possession of the apartment was to handed over within a period of 36 months with a grace period of six months from the date of commencement of construction of the complex upon receipt of necessary approvals of the project. It is an admitted fact that the consent to establish the project was granted on 02.12.2013. If we compute the period for completion of the project as provided in clause 3(a) of the Agreement, the deemed date of possession will come to 02.06.2017.

66. As per clause 3(b)(i) of the Agreement, certain circumstances have been provided which will extend the date of possession. The appellant in the instant case is primarily

relying upon the delay caused by the office of Director Town and Country Planning in renewal of the licence. It is alleged that the delay in renewal of the licence was beyond the control of the appellant/promoter and intricate question of the policy issued by the Government was involved.

67. As already said, by raising this plea, the appellant in fact is raising the applicability of the principle of fore majeure. The term force majeure has been defined in Black's Law Dictionary as an event of effect that can neither be anticipated nor controlled. The force majeure can be invoked if the performance of the contract becomes impossible or impracticable especially as a result of the events that the parties could not have anticipated or controlled. The force majeure clause to become applicable the occurrence of such events should be beyond the control of the parties and the parties will be required to demonstrate that they have made attempts to mitigate the impact of such force majeure events.

68. The present project was being developed by the appellant/promoter under the policy for Low Cost/Affordable Group Housing Project, issued by the Government of Haryana vide memo dated 29.05.2009 (for short "2009 policy"). The appellant/promoter was issued licence no.13 of 2012 under the provisions of Haryana Development and Regulation of Urban Areas Act, 1975 (for short 'the Act, 1975') on 22.02.2012 and this licence was valid up to 21.02.2016. The

appellant/promoter has alleged that it applied on February 11, 2016 for renewal of the licence and ultimately the same was renewed on 25.04.2019. More than 38 months were spent for renewal of the licence. The appellant has placed on file Annexure-8 in the additional documents, the covering letter for filing the application for renewal of the licence. Annexure-11 is the letter dated 26.04.2019 vide which the renewal of the licence was communicated to the promoter by Directorate of Town & Country Planning, Haryana.

69. In order to clarify the whole issue, this Tribunal has summoned the record of Directorate of Town & Country Planning, Haryana with respect to the renewal of licence no.13 of 2012. Annexure C-1 is the copy of the covering letter dated 11.02.2016 moved for renewal of the licence. This application was received in the office of the Director General, Town & Country Planning, Haryana, Chandigarh on 14.03.2016 when the licence had already expired on 21.02.2016. Letter dated 29.08.2016, Annexure C-2, shows that the appellant/promoter had sought permission for transfer of the school site to M/s Namo Educational Society. Copy of the letter dated 21.11.2016, Annexure C-3, shows that the said request of transfer of school site was examined and it was pointed out that the licence had already expired and even the EDC had not been paid which had become due and the bank guarantee was also not got renewed. Due to these shortcomings, the request

was rejected. Ultimately on 29.12.2016 the request for transfer of school site was approved on certain conditions, vide letter Annexure C-4. Thus, about nine months were spent in this process, which had started on the request of the appellant.

70. In the meanwhile, the licensee of the project moved a complaint against the appellant/promoter with respect to some illegalities committed by it vide letter dated 30.03.2017, copy Annexure C-5. Vide letter dated 20.06.2017, Annexure C-6, various deficiencies in the application for renewal of licence were pointed out and the appellant/promoter was directed to remove those shortcomings within 15 days. Due to non-compliance of the directions given in the letter dated 20.06.2017 (Annexure C-6), a show cause notice dated 14.07.2017 (Annexure C-7) was issued to the appellant/promoter. It was pointed out in the said show-cause notice that an amount of Rs.1951.28 lacs on account of EDC was outstanding as on 30.04.2017. The shortcomings point out were required to be removed within 15 days from the date of issuance of the notice. On account of failure of the promoter, again the show-cause notice dated 24.08.2017 (Annexure C-8) was issued. The appellant submitted reply dated 28.08.2017 (Annexure C-9) to the show-cause notice. Some documents were supplied and request for renewal of the licence till 21.02.2019 was made. Annexure C-10 is the copy of the application dated 27.09.2017, whereby the appellant

had sought two months' time for approval of the application under consideration. Annexure C-13 is the copy of the show-cause notice dated 04.10.2018 whereby the appellant was granted an opportunity to show cause as to why the licence may not be treated as lapsed. Reply to this notice was sought within a period of 30 days from the date of receipt of the notice. Another notice was issued on 22.10.2018 (Annexure C-14) intimating the adjourned date for appearance. Annexure C-15 is further notice dated 30.11.2018 affording the opportunity of personal hearing to the appellant on 04.01.2019. Annexure C-17 is the copy of the letter dated 28.12.2018 written by the appellant/promoter to the Director General, Town and Country Planning, Haryana, Chandigarh which shows that the renewal fee of Rs.2,00,00,000/- was deposited through RTGS on 28.12.2018 and it was prayed that the request for renewal be considered on early basis.

71. Thereafter, letter was written by the Directorate of Town & Country Planning, Haryana to the appellant on 18.01.2019 (copy Annexure C-18) pointing out seven deficiencies in the application submitted by the appellant for renewal of the licence. Copy of the letter dated 05.02.2019 (Annexure C-19) shows that the appellant was afforded an opportunity of personal hearing on 08.02.2019 and it was also directed to remove the deficiencies pointed out in the letter Annexure C-18. Ultimately, the Director Town and Country

Planning, Haryana, Chandigarh passed the order for renewal of the licence on 01.04.2019. The order dated 01.04.2019 (copy Annexure C-20) is in detail and has narrated all the circumstances therein. The issue regarding policy with respect to the Low Cost/Affordable Group Housing Project was resolved way back in January, 2018.

72. Thus, from the documents discussed above it comes out that there were various deficiencies in the application submitted by the appellant/promoter for renewal of the licence. The huge amount of EDC which had become due, was not deposited. Even the less renewal fee was deposited and deficiency was made good only on December 28th, 2018 with the deposits of Rs.2,00,00,000/-. In between the appellant had also started the correspondence for transfer of the school site which also remained under consideration of the department. The appellant/promoter was well aware that the licence granted to it was going to expire on 21.02.2016. Even then, the application for renewal of the licence was filed in the office of Director, Town and Country Planning on 14.03.2016 when the licence had already expired.

73. Thus, from the documents brought on record it cannot be concluded that there was any hurdle in the renewal of the licence due to the policy issue. The matter was clarified with the opinion of the Advocate General on 01.01.2018 that the renewal of the licence granted under the Affordable

Housing Policy, 2009 may be considered for four years from the date of consent of environment permission and with the renewal fee as applicable vide notification dated 30.05.2014. As already mentioned, there were as many as seven deficiencies in the application moved by the appellant/promoter for renewal of the licence which was conveyed vide letter dated 18.01.2019. So, the real cause for delay in renewal of the licence was the shortcoming in the application submitted by the appellant/promoter. Thus, it cannot be stated that the constraints in Affordable Housing Policy, 2009 was the sole reason for delay in renewal of the licence. The said issue was already resolved with the opinion of the Advocate General in January, 2018. Moreover, the appellant/promoter has not taken the necessary steps to mitigate the force majeure. The appellant could have applied for renewal of the licence well in time. The shortcomings pointed out in the application could have been removed without any delay. But, even in order to get those shortcomings removed, the Directorate of Town and Country Planning had to issue various show-cause notices as detailed above. Even the deficiency in the renewal fee was made good on December 28, 2018. Thus, the appellant itself is to be blamed for the delay in renewal of the licence. Consequently, the appellant/promoter cannot claim the applicability of the

circumstances narrated in clause 3(b)(i) and 3(b)(ii) of the Agreement as well as the principle of force majeure.

74. It is further pertinent to mention that the appellant has not brought on record any document to show that any of the circumstances mentioned in clause 3(b)(i) and 3(b)(ii) was ever communicated by the appellant/promoter to the respondent/allottee. The appellant has only written the letter **Annexure-13** dated 12.08.2019 to the respondent/allottee intimating the status of the project. By that time, the licence of the appellant was already renewed. Thus, this letter can be of no help to the appellant to claim the extension of period for completion of the project. Moreover, it is an admitted case of the appellant that even during the period when the licence of the appellant was under the process of renewal, the construction did not stop and was being carried out. A Local Commissioner was appointed by the learned Authority who had inspected the spot on 16.01.2019. Copy of the report of the Local Commissioner dated 21.01.2019 is Annexure A-9 which shows that by that date over all the physical completion of the project was 62.88%.

75. Thus, the appellant/promoter has failed to establish that the delay in the offer of possession had occurred due to the circumstances beyond its control. Consequently, we do not find any illegality in the deemed date of offer of possession

determined by the learned Authority to be 02.06.2017 and the learned Authority has righty awarded the interest @ 10.75% p.a. for delayed possession w.e.f. 02.06.2017 till the date of offer of possession.

76. Resultantly, we do not find any illegality or infirmity in the impugned order passed by the learned Authority warranting any interference by this Tribunal. Thus, the present appeal is without any merits and the same is hereby dismissed.

77. The copy of this order be communicated to learned counsel for the parties/parties and the learned Authority for compliance.

78. File be consigned to the records.

Announced:
February 9, 2021

Justice Darshan Singh (Retd.)
Chairman,
Haryana Real Estate Appellate Tribunal,
Chandigarh

Inderjeet Mehta
Member (Judicial)

Anil Kumar Gupta
Member (Technical)

*CL*

M/s Apex Buildwell Pvt. Ltd. Vs. Sachin Kumar
Appeal No.240 of 2019

Present: None.

Vide our separate detailed judgment of the even date, the appeal is dismissed.

Copy of the detailed judgment be communicated to learned counsel for the parties/parties and the learned Authority.

File be consigned to the records.

Announced:
February 9, 2021

Justice Darshan Singh (Retd.)
Chairman,
Haryana Real Estate Appellate Tribunal,
Chandigarh

Inderjeet Mehta
Member (Judicial)

Anil Kumar Gupta
Member (Technical)

*CL*