Appeal No.357 of 2019
Date of Decision:17.12.2019

Magic Eye Developers Pvt. Ltd. GF-09, Plaza M-6, Jasola District Centre, Jasola, New Delhi-110025.

....Appellant

Versus

1. Varsha Jain
2. Kirti Pradeep Jain
   Both residents of Block-H, Flat No.701, Lagoon apartments, Ambience Island, Gurgaon-122002, Haryana.

..... Respondent

Coram: Justice Darshan Singh(Retd), Chairman
Sh Inderjeet Mehta, Member(Judicial)
Sh Anil Kumar Gupta, Member(Technical)

Argued by: Shri Tarun Singla, Advocate, Ld counsel for the appellant.

Shri Kirti Pardeep Jain & Mrs. Varsha Jain, respondents in person.

ORDER:

JUSTICE DARSHAN SINGH (RETD), CHAIRMAN:

The present appeal has been preferred under section 44(1) of the Real Estate (Regulation & Development) Act, 2016 (hereinafter called the Act) read with rule 22 of the Real Estate (Regulation & Development) Rules, 2017 (hereinafter called the Rules) against the order dated 19.03.2019 passed by the Haryana Real Estate Regulatory Authority, Gurugram (hereinafter referred as the Authority) whereby the complaint filed by the respondent has been disposed of by issuing the following directions by the Ld Authority :-

i. The respondent is directed to pay delayed possession charges at prescribed rate of interest

i.e. 10.75% per annum w.e.f. 25.08.2016 as per the provisions of section 18(1) of the Real Estate (Regulation and Development) Act, 2016 till 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 every subsequent month.*

iii. *The respondent is also entitled to get interest at prescribed rate of 10.75% per annum on account of not receiving timely payment from the complainants.*

2. The respondent/allottee has filed the complaint regarding Flat no.0304 (1000 square feet) in The Plaza at 106 at 3rd floor, Tower No. A2, Block No.04. The builder buyer's agreement was executed on 25.02.2013 for the basic sale price of Rs.47,50,000/- (excluding EDC, IDC, one covered car parking, club membership charges and preferential charges). The respondent/complainant made a total payment of Rs.50,68,084/- (As per the receipts annexed with the complaint) out of the total sale price. As per the terms and conditions of the agreement, the possession of the unit was to be delivered to the respondent within a period of 36 months + 2 grace period of 6 months each. However, the appellant/promoter failed to deliver the possession of unit on time. Hence, the complaint wherein the respondent/allottee

sought the refund the money paid by the allottee alongwith prescribed rate of interest from the date of payment till the actual realization of the amount.

3. The said complaint was contested by the appellant/promoter on the grounds inter alia that the date of the completion of this project as per section 4(2)(1)(c) of the Act is 31st December 2021. The works at the project site is going at full swing as per schedule of the construction declared by the appellant/promoter at the time of taking registration under the Act. The appellant further pleaded that it will be able to offer the possession of respondent unit much before the above mentioned date of completion declared by it. It is further pleaded that the respondent is himself at default and had failed to make the payment as per the schedule. The appellant/promoter also raised certain legal and preliminary objections with respect to the jurisdiction of the Learned Authority to entertain the complaint, maintainability of the complaint in law and facts and the non-applicability of the provisions of the Act as the buyer's agreement was executed on 25.02.2013 before the Act came into operation. It was also pleaded that there is no provision in the Act to make it retrospective in operation. With these pleas, the appellant/promoter pleaded for dismissal of the complaint.

4. After hearing Learned counsel for the parties the Learned Authority vide impugned order dated 19.03.2019

issued the directions as mentioned in para No. 1 of the judgement.

5. Aggrieved with the aforesaid order dated 19.03.2019 passed by the Ld Authority, the present appeal has been preferred.

6. We have heard Shri Tarun Singal, Advocate, Ld. counsel for the appellant and Shri Kirti Pradeep Jain, respondent No.2 and have carefully gone through the record of the case. Learned counsel for the parties have also filed the written arguments.

7. Shri Tarun Singal, Advocate, Ld counsel for the appellant contended that the Ld. Authority has wrongly awarded the interest for delayed possession at the rate of 10.75% per annum, as no rate of interest has been prescribed in the Act or the rules framed thereunder for delayed possession. Rule 15 of the rules is only applicable in case of refund and not in cases of delay in offer of possession.

8. He further contended that the Act came into operation on 01.05.2016. The project in question was ongoing on the date of commencement of the Act. The appellant got the project registered as required under section 3 of the Act and gave the declaration under section 4(2)(1)(c) of the Act declaring the date of completion of project as 31.12.2021. The said date has not yet arrived.

9. He further contended that it is clear from section 13 (2) of the Act that the provisions of the Act will apply to the prospective agreements which have been executed after coming into force the Act. The present agreement was executed before the Act came in force. The same cannot be considered to be the agreement for sale referred in the provisions of the Act. He has also drawn our attention to rule 8(1) of the rules, which provides for the draft agreement for sale as per Annexure-A. Thus, he contended that the provisions of the Act are not applicable to the buyer's agreement in this case.

10. He further contended that the Hon'ble Minister of Housing and Urban Property made speech at the time of moving the Bill before both the houses of parliament and clarified that the provisions of the Act will apply to the future projects and whatever conditions have been stipulated in the pre RERA agreements, the parties have to implement those in toto. He contended that the debate in the Parliament can be taken into consideration in order to see the background of the statutory provisions. To support his contentions he relied upon the case **Kalpna Mehta Vs. Union of India 2018 (7) SCC 1.**

11. He further contended that section 19(3) of the Act does not refer to the agreement for sale, it has been designed in such a way that it can cover not only the post RERA agreements but also pre RERA agreements. This provision makes clear that the allottee shall be entitled to seek possession not on the basis

of agreement but on the basis of declaration given by the promoter under section 4(2)(1)(c) of the Act. He further contended that the allottees entitlement to claim possession and interest at RERA rates for delay in possession in cases of ongoing projects will be governed not by section 18(1), 18(3) and 19(4) but by section 19(3) of the Act.

12. He further contended that the Learned Authority gets the jurisdiction only from the registration of the project. Thereafter, the Learned Authority cannot jump the particulars of the registration to look at the pre RERA agreements to find the due date of offer of possession. He further contended that the jurisdiction to adjudicate unfair advantage vests with the Adjudicating Officer and not with the Learned Authority.

13. He further contended that the pre RERA agreements have to be read and interpreted *"as it is"* without any addition and subtraction and without any aid of any subsequent enactment. He contended that therefore, the respondent/allottee will be entitled for compensation for delay in the offer of possession at the rate of Rs. 5 per square feet per month in view of the clause 10.4 of the buyer's agreement. The said agreement executed between the parties is neither illegitimate nor contrary to public policy and is binding between the parties as per legislative intent reflected in declaration made by Hon'ble Minister to the Parliament. To support his

contention, he relied upon the case **DLF Homes Panchkula Private Limited Vs. D.S. Dhanda 2019 (7) SCALE 670.**

14. He further contended that the Learned Authority has also not awarded the remedy of set off/adjustment and has also not held the appellant/promoter to be entitled to recover the amount due along with future instalments. The appellant should be allowed to recover the payments/adjustments at the time of offer of possession while settling the accounts.

15. Sh. Kirti Pradeep Jain, respondent no.2 has pleaded that the respondent/allottee has made the payment of Rs.50,68,084/- till 15.10.2015. After that there was 3 years of silence and there was no progress in work at site. The respondent/allottee wrote to the developer regarding the tardy progress in construction. On not receiving any satisfactory response he approached the Ld Authority. He contended that the Ld Authority vide impugned order dated 19.03.2019 has directed the appellant to pay the delayed possession charges w.e.f. 25.08.2016 till the offer of possession before 10th of every subsequent month as per the provisions of the Act.

16. He has further pleaded that the provisions of the Act is fully applicable to the agreement between the parties the rights of the respondent/allottee could not be defeated by taking shelter of technicalities of law. The project of the appellant was ongoing when the Act became applicable and was got registered with the Ld Authority. So, it cannot be stated that

the Ld Authority was not competent to grant interest on delayed possession as per the provisions of the Act and the Rules framed thereunder. With these pleas he pleaded for dismissal of the present appeal.

17. We have duly considered the aforesaid contentions. The foremost question for consideration, which arises in this case is as to whether the provisions of the Act and the rules made thereunder shall be applicable to the builder buyer's agreement executed between the parties prior to the Act came into operation.

18. As per preamble the enactment of the Act was required to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building or the sale of the real estate project in an efficient and transparent manner and to protect the interest of the consumers in the real estate sector and to establish an adjudicating mechanism for the speedy dispute redressal between the promoters/developers and the home buyers. The basic purpose for enactment of the Act was to provide the special platform to the consumers for redressal of their grievances against the defaults and malpractices of the promoters/builders. It was felt that several promoters had defaulted and the consumers who had spent their hard earned money had no specialized forum to approach to get the speedy remedy. Thus, in a way the Act is a beneficial legislation to the

consumers but at the same time it also provides certain remedies to the promoters for the recovery of the dues and other matters.

19. Some of the provisions of the Act came into force on 1st May 2016 and the remaining provisions came into force w.e.f. 1st May 2017. It is not disputed that the builder buyer's agreement in this case was executed on 25.02.2013. As per the terms and conditions of the agreement the due date for the delivery of the possession was 25.08.2016.

20. Ld counsel for the appellant by referring section 13(2) of the Act has pleaded that the provisions of the Act would only be applicable to the agreement for sale drafted and executed as per annexure-A as provided in rule 8(1) of the Rules. **Section 13 of the Act reads as under:-**

> ***"13. No deposit or advance to be taken by promoter without first entering into agreement for sale.*** —
>
> *(1) A promoter shall not accept a sum more than ten per cent. of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.*
>
> *(2) The agreement for sale referred to in sub-section (1) shall be in such form as may be*

> *prescribed and shall specify the particulars of development of the project including the construction of building and apartments, along with specifications and internal development works and external development works, the dates and the manner by which payments towards the cost of the apartment, plot, or building, as the case may be, are to be made by the allottees and the date on which the possession of the apartment, plot or building is to be handed over, the rates of interest payable by the promoter to the allottee and the allottee to the promoter in case of default, and such other particulars, as may be prescribed."*

Section 13(2) no doubt refers to the agreements which are to be executed after the Act and the Rules framed thereunder came into force. Those agreements are required to contain all the particulars as prescribed. Section 13(1) primarily deals with the payment of earnest money or the application fees required to be paid before the execution of the written agreement. Section 13(2) provides the form of the agreements referred to in Section 13(1) of the Act which relates to the advance payment.

21. Agreement for sale has been defined in Section 2 clause (c) as under: -

> *"agreement for sale" means an agreement entered into between the promoter and the allottee;"*

As per the above definition agreement for sale means an agreement entered into between the promoter and allottee. This

definition does not exclude the agreements entered into between the promoter and the allottee prior to the Act came into force. The definition of the agreement for sale as mentioned above will cover both the pre-RERA as well as the post-RERA agreements. The claim of the appellant is based on the remedies provided under section 18 of the Act. Section 18(1)(a) also mentions "the agreement for sale". In this provision of law it is no where mentioned that it will only cover the agreements as provided in section 13(2) of the Act read with rule 8(1) of the Rules. Meaning thereby the operation of the provisions of the Act cannot be restricted only to the post-RERA agreements.

22. With respect to the rule of construction of a statutory provision the Hon'ble Apex Court in case **M/s Hiralal Ratanlal vs. STO, AIR 1973 SC 1034** has laid down as under:-

> *"In construing a statutory provision the first and foremost rule of construction is the literally construction. All that the Court has to see at the very outset is what does the provision 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. The other rules of construction are called into aid only when the legislative intent is not clear. (emphasis supplied)"*

Thus, in view of the aforesaid ratio of law the first and foremost principle of interpretation of a statute in every system of

interpretation is the literal rule of interpretation. The aid of the preamble and the objects and reasons is only sought where there is any kind of ambiguity in the literal meaning of the words of the provisions. In Kalpana Mehta's case (supra) relied upon by Ld counsel for the appellant it has been laid down that Court can take aid of report of parliamentary committee for the purpose of appreciating historical background of the statutory provisions and it can also refer to a committee report or speech of the Minister on the floor of the parliament if there is any kind of ambiguity and incongruity in a provision of an enactment. Thus, the speech made by the Hon'ble Minister of Housing and Urban in both the houses of the parliament shall only be relevant if the Court finds any ambiguity and incongruity in the provisions of the Act. But in our opinion the legislative intent is clear even from the plain/literal meaning of the provisions of the Act and there is no need to go into the historical background of debate in the parliament in order to interpret the provisions of the Act.

23. The constitutional validity of the Act has also stood the judicial scrutiny in Neelkamal's case (supra). The division bench of **Hon'ble Bombay High Court**, after examining every aspect in detail has upheld the constitutional validity of the Act.

24. The question regarding applicability of the Act and the Rules made thereunder to the pre-RERA agreements was

also taken note of by the **Hon'ble Bombay High Court** in **Neelkamal's** case (supra). It was laid down as under:-

> *"121. The thrust of the argument of the learned counsel for the petitioners was that provisions of Sections 3(1), 6, 8, 18 are **retrospective/retroactive** in its application. In the case of **State Bank's Staff Union V. Union of India and ors., [(2005) 7 SCC 584],** the Apex Court observed in paras 20 and 21 as under:-*
>
> > *20. Judicial Dictionary (13th Edn.) K.J. Aiyar, Butterworth, p. 857, state that the word "**retrospective**" when used with reference to an enactment may mean (i) affecting an existing contract; or (ii) reopening up of past, closed and completed transaction; or (iii) affecting accrued rights and remedies; or (iv) affecting procedure. Words and Phrases, Permanent Edn., Vol. 37-A, pp. 224-25, defines a "**retrospective** or **retroactive law**" as one which takes away or impairs vested or accrued rights acquired under existing laws. A **retroactive law** takes away or impairs vested rights acquired under existing laws, or create a new obligation, imposes a new duty, or attaches a new disability, in respect to transaction or considerations already past.*
> >
> > *21. 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)."*
>
> *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."*

25. 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 or 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. In the case in hand also though the agreement for sale between the parties was executed prior to the Act came into force but the transactions was still in the process of completion when the Act became applicable. It is evident from the facts that even on the date of filing of the complaint the possession of the unit was not delivered to the respondent/allottee and conveyance deed was yet to be executed. Thus, the concept of quasi-retroactivity will make the provisions of the Act and the Rules applicable to the agreement for sale entered into between the parties.

26. In a recent case titled as **M/s Shanti Conductors (P) Ltd. Vs. Assam State Electricity Board 2019(1) Scale 747** the question arose for consideration before the Hon'ble Apex Court as to whether the provisions of the Interest on Delayed Payment to Small Scale and Ancillary Industrial Undertakings Act, 1993 will not be applicable when the contract for supply was entered into between the parties prior to the enforcement of the aforesaid Act. In that case appellant M/s Shanti Conductors (P) Ltd. received the orders on

31.03.1992 and 13.05.1992 for supply of the material. The supply of the material was to be made between June and December 1992 for the first order and between January and February 1993 for the second order. In the meanwhile the aforesaid Act of 1993 became applicable. The appellants sought the payment of interest on delay payment as per provisions of the said Act. The Hon'ble Apex Court laid down as under:-

> *"Factor for liability to make payment under Section 3 being the supplier supplies any goods or renders services to the buyer, the liability of buyer cannot be denied on the ground that agreement entered between the parties for supply was prior to Act, 1993. To hold that liability of buyer for payment shall arise only when agreement for supply was entered subsequent to enforcement of the Act, it shall be adding words to Section 3 which is not permissible under principles of statutory construction.* ***We, thus, are of the view that judgements in Purbanchal Cables and Conductors (supra), Assam Small Scale Industries and Shakti Tubes which held that Act, 1993 shall be applicable only when the agreement to sale/contact was entered prior/subsequent to the enforcement of the Act, does not lay down the correct law. We accept the submission of learned counsel for the appellants that even if agreement of sale is entered prior to enforcement of the Act, liability to make payment under Section 3 and liability to make payment of interest under Section 4 shall arise if supplies are made subsequent to the enforcement of the Act****."*

The Hon'ble Apex Court in the aforesaid judgment has observed that the Act, 1993 being beneficial legislation enacted to protect small scale industries and statutorily ensure by mandatory provisions for payment of interest on the outstanding money, accepting the interpretation as put by learned counsel for the Board that the day of agreement has to be subsequent to the enforcement of the Act, the entire beneficial protection of the Act shall be defeated. The aforesaid ratio of law laid down by the Hon'ble Apex Court will be squarely applicable to the case in hand.

27. In case M/s Harkaran Dass Vedpal Vs. Union of India and Ors. (Writ Petition No.10889 of 2015 decided on 22.07.2019) the show cause notices under the provisions of the Customs Act 1962 were issued on 19.03.2009. The said show cause notices were challenged in the aforesaid writ petition. In the meanwhile the provisions of the section 28 of the Customs Act were amended w.e.f. 29.03.2018 and a new sub-section 9(A) alongwith explanation 4 was inserted, which stipulated if the amount of duty or interest is not determined with a stipulated period the proceedings on the show cause notices shall be deemed to be concluded. The division bench of our Hon'ble High Court laid down as under:-

> *"The afore-stated Amendment of Section 28 came into force w.e.f. 29.03.2018 and in the case of present Petitioners till date no order has been passed. Applying the principles of retroactive*

> *amendment, the Respondent was bound to pass order by 28.03.2019 which Respondent has failed. The Respondent has failed to pass order within one year from the date of Show Cause Notice, assuming the date to be 29.03.2018 on the principle of retroactive operation; still further there is nothing on record / to a pointed query to even suggest that the said period was ever extended by one year by any senior officer in terms of the first proviso to Sub Section (9) of amended Section 28. No notice under Sub-section (9A) has been served upon Petitioners by the proper officer seeking the deferment of the commencement of the initial one year notice period for the reasons stated in sub-section (9A). By Amendment of 2018, the legislature has made it clear that no Show Cause Notice shall be kept pending beyond a period of 1 year by the proper officer unless and until requirement of Sub-section (9A) are complied with or beyond the extended period of another one year by an order passed by any officer senior in rank to the proper officer detailing the circumstances which prevented the proper officer from passing the order within the initial period of one year."*

Thus, by applying the principle of retroactive operation the amendment of section 28 of the Customs Act, made subsequently to the show cause notice, was applied in the aforesaid case and benefit thereof was given to the petitioners. There is no reason not to apply the principles of law laid down in the cases referred above to the case in hand particularly

when no judicial precedent to the contrary could be cited by ld. Counsel for the appellant. Thus even though the agreement for sale was entered into between the parties prior to the Act came into force but the transactions between the parties 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. However, the terms and conditions of the agreement will still 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 in-consistent to the provisions of the Act or the Rules.

28. We do not find any substance in the plea raised by Ld counsel for the appellant that the respondent/allottee shall be entitled to claim possession as per the date declared by the appellant/promoter in the declaration under section 4(2)(1)(c) of the Act at the time of getting the project registered. This declaration is given unilaterally by the promoter/developer to the Authority at the time of getting 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 agreement for sale entered into by the parties. The **Hon'ble Bombay High Court in Neelkamal's** case (supra) has laid down as under :-

> *"Section 4(2)(I)(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)(I)(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)(I)(C) he is not absolved of the liability under the agreement for sale."***

The hon'ble bombay high court by taking note of the provisions of section 4(2)(1)(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, 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.

29. We also do not find any substance in the plea raised by Ld counsel for the appellant that the respondent/allottee was entitled to the delayed possession charges/interest only at the rate of Rs.5 per square feet per month in view of clause 10.4 of the buyer's agreement. The function of the authority establish under the Act is to safeguard the interest of the aggrieved person may be allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take any undue advantage of his dominant position and to exploit the needs of the home buyer. This Tribunal is duty bound to take into consideration the legislative intent i.e. to protect the interest of consumers/allottee in real estate sector. As per clause 10.4 of the agreement in case of failure of the developer to give the possession within the stipulated period the respondent/allottee was only entitled to receive the compensation at the rate of Rs.5 per square feet of the super area per month for the period of delay. This will come to only 1.18% p.a. However, as per clause 7 of the agreement the appellant/promoter was entitled to charge the interest at the rate of 18% per annum on the delayed payment for the period of delay. The appellant/promoter as per clause 11 of the agreement has been given the vast powers even to cancel the allotments if the default is not cured within 30 days of the date of issue of the notice and to forfeit the entire earnest money paid by the allottee. As per clause 10.4 in case

the developer abandon the project for any reason whatsoever the developer will be entitled to terminate the agreement and the allottee shall be refunded the amount paid by him only with 9% per annum simple interest for the period such amount was lying with the developer and **to pay no other compensation whatsoever**. Thus, the aforesaid terms of the agreement dated 20.03.2013 are ex-facie one sided, unfair and unreasonable, which constitute the unfair trade practice on the part of the appellant/promoter. There is no denial to the fact that appellant/promoter was in dominant position; the respondent/allottee was in the need of the house. He has already parted with his hard earned money, so he had no option but to sign the agreement on the dotted lines. The discriminatory terms and conditions of such agreement will not be final and binding.

30. To support this view reference can be made to case Pioneer Urban Land's case (supra) wherein the Hon'ble Apex Court 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."

In the aforesaid judgments, the Hon'ble Apex Court finding the terms and conditions of the agreement to be one sided unfair and unreasonable has 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 in the contractual rate.

31. In DLF Homes Panchkula's case (supra) replied upon by Ld counsel for the appellant is quite distinguishable on facts. In that case the earlier cases i.e. Civil Appeal No.11097/2018 with Civil Appeal No.s 11098-11138 of 2018 and Civil Appeal No. 2285-2330 of 2019 were decided by consent on agreed terms of settlement whereby the refund was allowed with

interest at the rate of 9% per annum. In DLF Homes Panchkula's case (supra) also Hon'ble Apex Court has awarded the same rate of interest as awarded in the previous cases. It was also observed by the Hon'ble Apex Court that the causes of delay in delivery of the possession were beyond the control of the appellant. But in the instant case there is no such material to show that 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 has been awarded, which was more than the contractual rate of compensation for delay. So, this case is of no help to the appellant.

32. 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 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 in order to maintain the uniformity in the orders 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 prohibition to award the same rate of interest in case of delayed possession/delayed possession charges.

33. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. 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 on 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.

34. In the instant case also the Ld Authority has awarded the interest for delayed possession at the prescribed rate i.e. 10.75% for every month as provided in Rule 15 of the rules from the due date of possession till the actual date of handing over the possession. We do not find any illegality in the said award of interest by the Ld Authority.

35. Learned counsel for the appellant has also pleaded that as per the agreement, there were two grace periods for six months each, in addition to three years for delivery of the

possession. But the learned Authority has arbitrarily and wrongly taken only one grace period of six months and has wrongly substituted the deemed date of possession.

36. We have duly considered the aforesaid contention. As per Clause 9(1) of the Builder Buyer's Agreement, the construction of the building was contemplated to be completed within a period of three years from the date of execution of the agreement with two grace periods for six months each. There is no justification to have two grace periods of six months each and to further extend the period for completion of the construction by one year. Prescribing the two grace periods without any justification and sufficient cause again shows the terms and conditions of the agreement to be unfair and unreasonable. So, we do not find any illegality in the deemed date of possession as determined by the learned Authority.

37. Finally, Ld counsel for the appellant has pleaded that the Ld Authority has not ordered for adjustment of the amount recoverable by the appellant/promoter from the respondent/allottee against the delayed possession charges/interest. He has requested that the Ld Authority should have ordered for the set off/adjustment of the said amount. We found substance in this plea raised by the Ld. counsel for the appellant. The appellant/promoter shall be entitled for adjustment of the amount which became due or

recoverable from the respondent/allottee as per the agreement for sale/payment schedule against the amount payable by the appellant/promoter to the allottee towards the interest/delayed possession charges imposed by the Ld Authority. With this clarification there is no merit in the present appeal and the same is hereby dismissed. Copy of this order be communicated to the Ld. Authority and the parties. The amount deposited by the appellant/promoter be remitted to the Ld Real Estate Regulatory Authority, Gurugram for disbursement to the respondent/allottee as per rules.

38. File be consigned to record.

Justice Darshan Singh (Retd.)
Chairman,
Haryana Real Estate Appellate Tribunal,
Chandigarh
17.12.2019

Inderjeet Mehta
Member (Judicial)
17.12.2019

Anil Kumar Gupta
Member (Technical)
17.12.2019

Magic Eye Developers Pvt. Ltd.
Vs.
Varsha Jain and anr.

Appeal No.357 of 2019

Present: None.

Judgment pronounced.

The present appeal stands dismissed vide separate detailed judgment of the even date with clarification. The amount deposited by the appellant/promoter be transferred to the learned Authority for disbursement to the respondent/allottee as per law.

Copy of the detailed judgment be communicated to both the parties and the learned Authority.

File be consigned to the records.

Justice Darshan Singh (Retd.)
Chairman,
Haryana Real Estate Appellate Tribunal,
Chandigarh
17.12.2019

Inderjeet Mehta
Member (Judicial)
17.12.2019

Anil Kumar Gupta
Member (Technical)
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