BEFORE THE HARYANA REAL ESTATE APPELLATE TRIBUNAL

Appeal No.182 of 2019
Date of Decision:19.12.2019

M/s Omaxe Limited, Registered Office at 7, LSC, Kalkaji, New Delhi-110019.

Appellant

Versus

Mrs. Arun Prabha w/o Shri Subhash Chandra, 903, Millenia Emerald Heights, Ramprastha Greens, Vaishali, Sector 7, Ghaziabad.

Respondent/Complainant

CORAM:

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

Argued by: Shri Sanjeev Sharma, Advocate, counsel for the appellant.
Shri R.P. Arora, Advocate, counsel for the respondent.

ORDER:

JUSTICE DARSHAN SINGH (Retd.) CHAIRMAN:

The present appeal has been preferred by the appellant/promoter under Section 44 sub section 2 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter called 'the Act') against the order dated 20.11.2018 passed by the learned Haryana Real Estate Regulatory Authority, Panchkula (hereinafter called 'the Authority'), whereby the complaint filed by the respondent/allottee was disposed of by

awarding compensation for delay in handing over possession at the prescribed rate of interest provided in Rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter called 'the Rules') for the period w.e.f. from April, 2013 to November, 2014.

2. As per averments in the complaint filed by the respondent/allottee, she booked a unit No.705 measuring 1164 sq. ft. in the project 'Omaxe Heights', Sonipat being developed by the appellant/promoter. The Buyer's Agreement was executed on 07.04.2010. As per the terms and conditions of the agreement, the possession of the unit was to be offered within a period of 30 months. The appellant/promoter offered possession of the apartment on 12.06.2013 without obtaining the Occupation Certificate and without actually completing the construction work. Ultimately, the physical possession of the unit was delivered to the respondent/allottee in November, 2014. It is further pleaded that the respondent/allotted had to spent Rs.1.00 lac for rectification of defects in the building.

3. The respondent/complainant sought the relief of compensation for delay, reimbursement of the expenditure of Rs.1.00 lac and compensation for mental harassment etc.

4. The appellant/promoter contested the complaint by raising preliminary objections that the complaint is not maintainable in the present form; that the appellant is not

registered with the learned Authority as the project was not required to be registered. So, the Authority had no jurisdiction to entertain and try the complaint; that the issues/claims sought in the complaint are beyond the realm of the jurisdiction of the Authority.

5. It was further pleaded that the respondent/allottee has levelled false allegations of defects in the flat as well as the amount spent by her on rectification of the alleged defects without any corroborative evidence. The possession of the flat has already been delivered to the respondent/allottee; that the claim for compensation for mental harassment is wrong as the respondent/allottee has already obtained the possession of the unit in pursuance of the Indemnity-bond signed by her. The respondent/allottee has concealed the fact that she has obtained the possession of the unit for fit outs and had executed the Indemnity-bond. The respondent/allottee is bound by the Indemnity-bond signed and executed by her.

6. It was further pleaded that no such agreement as provided under the provisions of the Act has been executed between the parties. Rather, the agreement which has been referred to for the purpose of getting the adjudication of the complaint by the learned Authority, is the Buyer's Agreement, executed much prior to coming into force of the Act. So, no relief can be granted to the respondent/allottee. It was further

pleaded that as per Clause 48 of the Buyer's Agreement, in the event of any dispute, it was to be referred to the arbitration. Thus, the complaint filed by the respondent/allottee is not sustainable.

7. It was further pleaded that only the Adjudicating Officer was competent to entertain the complaint and award the reliefs claimed therein; the complaint filed by the respondent/allottee was not maintainable before the learned Authority in view of Section 71 of the Act. It was further pleaded that the question of awarding compensation only arises if the possession is not delivered as per declaration given by the promoter under Section 4(2)(l)(c) of the Act. It was further pleaded that the Occupation Certificate of the project was already obtained in the year 2015; as such the project was not required to be registered with the Authority and the complaint against unregistered project is not maintainable before the Authority. It was further pleaded that the provisions of the Act are not retrospective in operation. The agreement which has been relied upon, was executed much prior to coming into operation of the Act. All other pleas raised in the complaint were controverted. With these pleas, the appellant/promoter pleaded for dismissal of the complaint.

8. After hearing learned counsel for both the parties and appreciating the material on record, the learned Authority

disposed of the complaint filed by the respondent/allottee by giving the directions as mentioned in upper part of this judgment.

9. Aggrieved with the aforesaid order dated 20.11.2018, the present appeal has been preferred.

10. We have heard Shri Sanjeev Sharma, Advocate, learned counsel for the appellant; Shri R.P. Arora, Advocate, learned counsel for the respondent and have carefully perused the record of the case. The respondent has also filed the written arguments.

11. Initiating the arguments, learned counsel for the appellant contended that the learned Authority has wrongly granted the interest for a period of one year seven months. In fact, there was delay of only four months in offering the possession. He has referred to the affidavit-cum-undertaking dated 06.08.2013 executed by the respondent/allottee which shows the delivery of possession.

12. He further contended that the respondent/allottee is herself at fault. The appellant has repeatedly written to the respondent/allottee for registration of the conveyance-deed but the respondent/complainant never came forward to get the conveyance-deed executed till date though the possession has already been delivered. Even the Occupation Certificate was

obtained on 26.10.2015. It shows the conduct of the respondent/allottee and makes her dis-entitle for any relief.

13. He further contended that the respondent/allottee has filed the complaint for grant of compensation. As per Section 71 of the Act, such complaint could only be entertained by the Adjudicating Officer and the Authority had no jurisdiction to deal with the complaint for grant of compensation. So, the complaint filed by the respondent was not maintainable from the very beginning. The statement made by learned counsel for the respondent at the appellate stage cannot remove the defect of jurisdiction.

14. He further contended that the project in dispute was not registered with the learned Authority. As the possession of the unit was already delivered, Occupation Certificate was also obtained on 26.10.2015 i.e. much prior to the implementation of the Act, so the provisions of the Act were not applicable and the learned Authority had no jurisdiction to entertain the complaint.

15. He further contended that the provisions of the Act are not retrospective in operation. The agreement in this case was executed on 07.04.2010. The possession was also delivered much prior to the Act came into operation. Even the Occupation Certificate was delivered in October, 2015. So, the learned Authority has wrongly granted the interest as per Rule

15 of the Rules. The respondent/allottee at the most could claim the compensation as per Clause 26 (e) of the Agreement.

16. On the other hand, Shri R.P. Arora, Advocate, learned counsel for the respondent/allottee contended that possession of the unit was to be delivered within 30 months as per Clause 26 (e) of the Agreement. So, the possession was to be delivered on or before 07.10.2012, but the project was not complete by that date. Even no completion/Occupation Certificate was obtained by the appellant. He further pleaded that in order to avoid the penalty under the law and the agreement, the appellant made the respondent/complainant to sign the letter of acceptance and stamped affidavit provided by it for handing over the temporary possession to carry out the interior works. This affidavit was obtained under threat to levy the holding charges. In fact, no possession was handed over to the respondent/allottee at that time. The appellant had falsely claimed to have obtained the completion/Occupancy Certificate. In fact, the occupancy certificate was obtained on 26.10.2015 i.e. after about three years of the due date for delivery of possession. He further contended that the physical possession was actually delivered to the respondent/allottee in November, 2014 with a considerable delay.

17. Learned counsel for the respondent/complainant further contended that the Act nowhere mentions that it is

applicable only to the registered projects. Any aggrieved person can file complaint under Section 31 of the Act in respect of any Real Estate Project, as defined in Section 2(zn) of the Act, if he is aggrieved of any violation and contravention of the provisions of the Act; rules, regulations, terms and conditions of the Agreement. The language of Section 31 of the Act is un-ambiguous and unequivocal and does not put any restriction on the right of any aggrieved person in respect of unregistered project. He contended that the law is well settled that effect must be given to the plain meaning of the statute. To support his plea, he relied upon cases **B. Premanand and others Versus Mohan Koikal and others, 2011(4) SCC 266** and **Delhi Fin. Corpn. & Anr. Versus Rajiv Anand & Ors. 2004(11) SCC 625**.

18. He further contended that certain categories of the projects mentioned in Section 3(2) of the Act do not require registration. Those projects have been taken out of the purview of the registration alone and not from the operation of the Act. He contended that Section 31 of the Act has been enacted in the widest possible term in order to resolve the grievance of the allottees and also the promoters/Real Estates agents, which is evident from the preamble of the Act.

19. He further contended that even the projects which were completed and handed over during the last five years, are

covered for the liability of workmanship and structural defects. He contended that if it is presumed that the Act is not applicable to the unregistered projects, the provisions of the Act will be rendered nugatory to the large extent. The consumer will have no forum to go for redressal of their grievances and the promoter can happily deny the possession of the unit or rectification of the defects.

20. He further contended that the provisions of the Act should be liberally interpreted in tune with the object of the Act. He referred to case **Lucknow Development Authority vs.M.K. Gupta (1994) 1 SCC 243**. He contended that **The Real Estate Appellate Tribunal, Punjab in Appeal No.49 of 2018 decided on July 24, 2019 titled M/s Silver City Construction Limited vs. State of Punjab and others**, has laid down that the complaint even against the promoters of unregistered projects are legally maintainable.

21. He further contended that the respondent/allottee has already given up the claim of compensation. The complaint for grant of interest for delayed possession is perfectly within the jurisdiction of the learned Authority.

22. He further contended that the compensation for delayed possession mentioned in the agreement is one sided, unfair and amounts to unfair trade practice. Such terms and conditions are not binding on the rights of the allottee. To

support his contentions, he relied upon cases **Pioneer Urban Land & Infrastructure Limited vs. Govindan Raghavan, 2019(2) R.C.R. (Civil) 738** and **Ghaziabad Development Authority vs. Balbir Singh, (2004) 5 SCC 65**. He contended that the interest for delayed possession has been rightly awarded by the learned Authority at the prescribed rate.

23. He further contended that the provisions of the Act will be applicable even though the agreement was executed prior to coming into operation of the Act, as the transaction has not yet been completed and no conveyance-deed was executed. Thus, he contended that there is no illegality in the impugned order passed by the learned Authority.

24. We have duly considered the aforesaid contentions.

25. It is pertinent to mention that we refrain from expressing any opinion as to whether the project in dispute will fall in the definition of ongoing project or not requiring registration under Section 3 of the Act as the learned Authority has not initiated any proceedings against the appellant/promoter for not getting the project registered.

26. Firstly, we take up the issue as to whether the provisions of the Act will be applicable to the present project or not. This fact is not disputed that the possession of the unit was delivered to the respondent allottee in November, 2014. Even the Occupation Certificate was issued on 26.11.2015. It

is also an admitted fact that the disputed project is not registered with the learned Authority as required under Section 3 of the Act.

27. The necessity to enact the present Act was felt as there was no special statute to provide effective and simplicitor remedy for redressal of the grievances of the home buyers. Keeping in view the background of the Act, it has to be looked from the perspective harmony with the aim and objects for which it was enacted. The Act came into force w.e.f. 01.05.2016. The preamble of the Act reads as under: -

> "An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto."

28. It is well settled that the preamble of the statute has a guide light to ascertain the legislative intent. The preamble of the Act reproduced above shows that the Real Estate Regulatory Authority has been established for regulation and

promotion of the real estate sector and to protect the interest of the consumers in real estate sector.

29. The project has been defined in Section 2(zj) as under:

> *"(zj) "Project" means the real estate project as defined in clause (zn);"*

Section 2(zn) defines the real estate project as under:-

> *"(zn) "real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or [apartments], as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto;"*

30. The definitions reproduced above will cover all the projects where the development of a building or the land into plots is carried out for the purpose of sale of the said apartment or the plot or the building. There is no classification of registered or unregistered projects in the definition of the real estate projects.

31. Section 11 of the Act provides for the functions and duties of the promoters. Sub Section 4 of Section 11 reads as under: -

> ***"11. Functions and duties of promoter***. —
>
> *(1) xxx*
> *(2) xxx*
> *(3) xxx*
>
> *(4) The promoter shall—*
>
> *(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be:*
>
> *Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.*
>
> *(b) be responsible to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees, as the case may be;*

(c) be responsible to obtain the lease certificate, where the real estate project is developed on a leasehold land, specifying the period of lease, and certifying that all dues and charges in regard to the leasehold land has been paid, and to make the lease certificate available to the association of allottees;

(d) be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees;

(e) enable the formation of an association or society or co-operative society, as the case may be, of the allottees, or a federation of the same, under the laws applicable:

Provided that in the absence of local laws, the association of allottees, by whatever name called, shall be formed within a period of three months of the majority of allottees having booked their plot or apartment or building, as the case may be, in the project;

(f) execute a registered conveyance deed of the apartment, plot or building, as the case may be, in favour of the allottee along with the undivided proportionate title in the common areas to the association of allottees or competent authority, as the case may be, as provided under section 17 of this Act;

(g) pay all outgoings until he transfers the physical possession of the real estate project to the allottee or the associations of allottees, as the case may be,

which he has collected from the allottees, for the payment of outgoings (including land cost, ground rent, municipal or other local taxes, charges for water or electricity, maintenance charges, including mortgage loan and interest on mortgages or other encumbrances and such other liabilities payable to competent authorities, banks and financial institutions, which are related to the project):

Provided that where any promoter fails to pay all or any of the outgoings collected by him from the allottees or any liability, mortgage loan and interest thereon before transferring the real estate project to such allottees, or the association of the allottees, as the case may be, the promoter shall continue to be liable, even after the transfer of the property, to pay such outgoings and penal charges, if any, to the authority or person to whom they are payable and be liable for the cost of any legal proceedings which may be taken therefor by such authority or person;

(h) after he executes an agreement for sale for any apartment, plot or building, as the case may be, not mortgage or create a charge on such apartment, plot or building, as the case may be, and if any such mortgage or charge is made or created then notwithstanding anything contained in any other law for the time being in force, it shall not affect the right and interest of the allottee who has taken or agreed to take such apartment, plot or building, as the case may be;"

32. In the aforesaid provision various responsibilities, obligations and functions have been described which are to be

fulfilled by the promoter. In this provision also there is no distinction of registered or unregistered projects.

33. Section 17 of the Act deals with the transfer of the title. It requires the promoter to execute the registered conveyance-deed in favour of the allottee. Again, there is no reference in this provision that it will apply only to the registered projects.

34. Section 18 of the Act reads as under: -

> ***"18. Return of amount and compensation***.
>
> *(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building, —*
>
> *(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
>
> *(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including*

compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

(2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this subsection shall not be barred by limitation provided under any law for the time being in force.

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

35. The aforesaid provision grants the remedy to the allottee for return of the amount, compensation and interest for delayed possession in case the promoter fails to complete or is unable to deliver possession of an apartment, plot or building in terms of the agreement for sale. This provision also

nowhere states that the remedies provided therein will be applicable only to the allottees of the registered projects.

36. Section 31 of the Act reads as under: -

> ***"31. Filing of complaints with the Authority or the adjudicating officer****.—(1) Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of this Act or the rules and regulations made thereunder, against any promoter, allottee or real estate agent, as the case may be.*
>
> *Explanation. —For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.*
>
> *(2) The form, manner and fees for filing complaint under sub-section (1) shall be such as may be prescribed."*

The aforesaid provision entitles any aggrieved person to file a complaint with the Authority or the Adjudicating Officer, as the case may be, for any violation or contravention of the provisions of this Act or the rules and regulations made thereunder, against any promoter, allottee or real estate agent, as the case may be. In this provision also, there is no classification that the aggrieved person must be of the registered project. So, even if the allottee of an un-registered project has any grievance, he can avail the remedy provided under Section 31 of the Act.

37. The Rules came into force w.e.f. July 28, 2017. Rule 28 sub rule (1) and Rule 29 sub rule 1) provide for filing of complaints with the Authority, which read as under: -

Rule 28 sub rule (1): -

> *"**28. Filing of complaint with the Authority**. Section 31.- (1) Any aggrieved person may file a complaint with the Authority for any violation of the provisions of the Act or the rules and regulations made thereunder, save as those provided to be adjudicated by the adjudicating officer, in Form 'CRA', in triplicate, which shall be accompanied by a fees as prescribed in Schedule III in the form of a demand draft or a bankers cheque drawn on a Scheduled bank in favour of "Haryana Real Estate Regulatory Authority".*

Rule 29 sub rule (1): -

> *"29. **Filing of complaint and inquiry by adjudicating officer. Section 12, 14, 18 and 19** – (1) Any aggrieved person may file a complaint with the adjudicating officer for interest and compensation as provided under sections 12,14,18 and 19 in Form 'CAO', in triplicate, which shall be accompanied by a fee as mentioned in Schedule III in the form of a demand draft or a bankers cheque drawn on a Scheduled bank in favour of "Haryana Real Estate Regulatory Authority" and payable at the branch of that bank at the station where the seat of the said Authority is situated."*

38. As per rule 28 sub rule (1) reproduced above, any aggrieved person may file complaint with the Authority for any violation of the provisions of the Act or the rules and regulations made thereunder, save as those provided to be adjudicated by the Adjudicating Officer. This complaint is to be filed in the prescribed form. Similarly, as per Rule 29 Sub rule (1) of the Rules any aggrieved person may file the complaint with the Adjudicating Officer for interest and compensation. Again, in these provisions and rules, it is nowhere mentioned that the aggrieved person must be the allottee or the promoter of the project which is registered with the Authority. Thus, even the allottee or the promoter of the un-registered projects can file complaint as per Rule 28 and Rule 29 of the Rules.

39. The reference of the aforesaid provisions of the Act and the Rules shows the scheme of the Act and legislative intent. The Regulatory Authority has been burdened with the responsibilities to regulate the real estate projects within its territorial jurisdiction. To conclude that the Regulatory Authority shall only have control over the projects which have been registered with it and not over the projects which have not been deliberately or otherwise got registered with it, would be an interpretation nugatory to the objects sought to be achieved by the Act in its letter and spirit. As already mentioned, there is no distinction in the Act or the Rules made

thereunder between the registered and unregistered projects. Moreover, such type of artificial classification to bring out the unregistered projects from the purview of the Act may violate the legislative intent and will not stand the touchstone of equality as provided under Article 14 of the Constitution of India qua the consumers in the registered and unregistered projects.

40. If the plea raised by learned counsel for the appellant that the learned Authority has no jurisdiction over the unregistered projects is accepted, the very purpose of the Act would be frustrated. The consumers of such projects will be deprived of the remedies provided under the provisions of the Act, even though they are also the consumers of the real estate projects. Such an absurd interpretation would defeat the very purpose, policy, aim and object of the Act. It was felt that the consumers/home buyers were being exploited by the promoters/developers and they were helpless to get their grievances redressed effectively and expeditiously which necessitated the enactment of the Act. Thus, the plea raised by learned counsel for the appellant that the learned Authority had no jurisdiction as the project of the appellant was not registered with it, is without any substance.

41. Similar view has been taken by the **Hon'ble Real Estate Appellate Tribunal Jaipur, Rajasthan in Appeal**

No.RAJ-RERA-C-2018-2370 titled as **Jain Realtors (P) Ltd. Vs. The Registrar of Real Estate Regulatory Authority, Jaipur, Rajasthan and others,** decided on 09.10.2018 and by the **Hon'ble Real Estate Appellate Tribunal, Punjab, SAS Nagar (Mohali) in M/s Silver City Construction Ltd. versus State of Punjab and others** (Supra).

42. The Division Bench of the Hon'ble Bombay High Court in case **Mohammed Zain Khan Vs. Maharashtra Real Estate Regulatory Authority and others, Writ Petition (Lodging) No.908 of 2018 decided on July 31st, 2018** has given direction in the complaint tendered online by the Petitioner and other similarly situated complaints, in respect of unregistered projects would be entertained and same will be dealt with in accordance with the procedure being adopted by the Maharashtra Real Estate Regulatory Authority in respect of disposal of complaints in relation to registered projects. This direction issued by the Division Bench of Hon'ble Bombay High Court clinches the matter and makes it clear that the Authority is competent to deal with the complaints filed by the aggrieved persons/consumers irrespective of the project being registered or unregistered.

43. As already mentioned, it is not disputed that the possession of the unit was already delivered to the respondent/allottee in November, 2014. The Occupation

Certificate was also obtained by the appellant/promoter on 26.10.2015. But that will not absolve the appellant/promoter from fulfilling the responsibilities and obligations provided in the Act nor it will render the home buyers remediless. We have already referred the functions and duties of the promoter as provided in sub section 4 of Section 11 of the Act. There are various responsibilities and obligations which are required to be fulfilled even after the issuance of the occupancy certificate. Section 11(4)(d) imposes responsibilities on the promoter for maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees. Section 11(4)(f) read with section 17 of the Act requires the promoter to execute the registered conveyance-deed in favour of the allottee.

44. Section 14(3) of the Act is reproduced as under: -

> *"**14. Adherence to sanctioned plans and project specifications by the promoter**.*
>
> *(1) xxx*
>
> *(2) xxx*
>
> *(3) In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter*

> *to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act."*

45. As per the aforesaid provisions of law it shall be the duty of the promoter to rectify any structural defect or any other defect in the workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale, which is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over of the possession. So, the responsibilities and obligations of the promoter do not come to an end just with the issuance of the occupancy certificate and handing over the possession. In the instant case, it is an admitted case that the conveyance-deed has not been executed so far in favour of the respondent/allottee. So, the plea raised by learned counsel for the appellant that the complaint was not maintainable under the provisions of the Act due to issuance of the occupation certificate before the Act came into force, is also without any substance.

46. Learned counsel for the appellant has also vehemently contended that as the agreement between the parties was executed on 07.04.2010 i.e. before the date of the

Act, so the respondent/allottee at the most can claim the delayed compensation as per Clause 26 (e) of the Buyer's Agreement and the learned Authority has wrongly awarded the interest for delayed possession as per rule 15 of the Rules. As already mentioned, the aim and object of the Act, as per preamble of the Act, was to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal.

47. With respect to the interpretation of the statutory provisions, the Hon'ble Apex Court in case **M/s Hiralal Ratanlal Vs. STO AIR 1973 SC 1034** 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."*

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

system of interpretation is the literal rule of interpretation. The other rules of interpretation i.e. the mischief rule, purposive interpretation etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or would nullify the very object of the statute.

49. The Hon'ble Apex Court in case **Prakash Nath Khanna vs. C.I.T. (2004)9 SCC 686** has laid down that the language implies in a statute is the determinative factor of the legislative intent. We are of the view that it cannot be concluded from the plain meaning of the provisions of the Act that it has no application to the agreement executed prior to the date of its commencement. The agreement for sale has been defined in Section 2 (c) of the Act which reads as under: -

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

50. As per the above definition, the agreement for sale means an agreement entered into between the promoter and the allottee. This definition does not exclude the agreements entered into between the parties and the allottees prior to the Act came into force. This definition will cover the pre-RERA and post-RERA agreements. The claim of the appellant is based on the remedies provided under Section 18 of the Act. Section 18(1) (a) of the Act also mentions the agreement for sale. In this provision of law, it is nowhere mentioned that it

will only cover the agreements which are post-RERA and have been executed as provided in Section 13(2) of the Act read with rule 8(1) of the Rules. Thus, the operation of the provisions of the Act cannot be restricted only to the post-RERA agreement for sale.

51. 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 Realtors Suburban Pvt. Ltd. And anr. Vs. Union of India and others 2018(1) RCR (Civil) 298 (DB)**. 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 term 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."

52. 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 as the conveyance-deed is 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.

53. 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.

54. In case **M/s Harkaran Dass Vedpal Vs. Union of India and Ors, Writ Petition No.10889 of 2015 (O&M) 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.

55. We also do not find any substance in the plea raised by learned 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 26(e) 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. Court is duty bound to take into consideration the legislative intent i.e. to protect the interest of consumers/allottee in real estate sector. The clauses of the Buyer's Agreement entered into between the parties are one sided, unfair and unreasonable with respect to the grant of interest for delayed possession. As per Clause 20 of the Buyer's Agreement, the appellant/promoter was entitled to charge the penal interest @ 18% per annum for one month and thereafter @ 24% per annum up to next two months on the outstanding amount. Whereas, as per Clause 26(e), in case of delay in construction, the promoter was liable to pay compensation only at the rate of Rs.5/- per sq. ft. of the super area per month for the period of delay, which comes to approximately 3.2% per annum. Clause 18 of the agreement gives vast powers to the promoter to cancel the allotment without any reminder in case of non-payment of the dues as

per the terms of the payment schedule. 20% of the amount of the sale consideration had been provided to be considered as earnest money as per Clause 19 which is also on higher side. Thus, the aforesaid terms of the agreement dated 07.04.2010 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. She has already parted with her hard-earned money; so, she 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.

56. To support this view reference can be made to case **Pioneer Urban Land & Infrastructure Ltd. Vs. Govindan Raghavan** case (supra) that the Hon'ble Apex Court has laid down as under:

> *"6. 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.

57. Learned counsel for the appellant has relied upon case **Rasheed Ahmad Usmani and others v. DLF Ltd., 2019(3) C.P.R. 309** to contend that the compensation should be awarded on the contractual rate. This authority is based on the judgment of the Hon'ble Apex Court in case **DLF Homes, Panchkula Pvt. Ltd. v. D.S. Dhanda, 2019(7) SCALE 670**. But in that case the earlier cases i.e. Civil Appeal

No.11097/2018 with Civil Appeal Nos. 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 Pvt. Ltd. Vs. D.S. Dhanda, Etc.Etc.'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, Dhanda's case (Supra) is quite distinguishable on facts and is of no help to the appellant.

58. Hon'ble National Consumer Disputes Redressal Commission has given precedence to Dhanda's case (Supra) wrongly assuming that the said judgment had been rendered by three Judges Bench of the Hon'ble Supreme Court, whereas in fact this judgment has also been rendered by two Hon'ble Judges of the Hon'ble Apex Court (Hon'ble Justice Dr.

Dhananjaya Y. Chandrachud and Hon'ble Justice Hemant Gupta).

59. Thus, there is no escape from the conclusion 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 of 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.

60. Learned counsel for the appellant has also challenged the jurisdiction of the Authority to entertain the complaint filed by the respondent/allottee on the ground that the respondent/allottee has claimed the relief of compensation and as such complaint can only be entertained and tried by the Adjudicating Officer in view of Section 71 of the Act. But, this plea raised by learned counsel for the appellant is devoid of merits.

61. During the pendency of the present appeal, learned counsel for the respondent/allottee has made the following statement on 03.07.2019: -

> "That the respondent/allottee does not claim the relief of compensation and the said relief mentioned in the complaint may be deemed to have been given up. The respondent/allottee is satisfied with the impugned order passed by the ld. Real Estate Regulatory Authority, Panchkula for regarding interest on delayed possession."

62. As per the aforesaid statement, the respondent/allottee has given up the relief of the compensation from the complaint. It is settled principle of law that the appeal is the continuation of the suit. The statement made by learned counsel for the respondent/allottee giving up the relief of compensation will relates back to the very institution of the complaint and the relief of compensation shall be deemed to have been deleted from the complaint from the very beginning. Thus, it cannot be stated that the learned Authority had no jurisdiction to entertain the complaint.

63. It is an admitted fact that the conveyance-deed has not been so far executed in favour of the respondent/allottee. The appellant/promoter has written some letters to the respondent/allottee for getting the conveyance-deed registered but from the letter dated 16.01.2019 available at page no.300

of the paper-book, it is clear that there was some dispute between the parties with respect to the compensation for delay in delivery of possession. That can be a cause for delay in the execution of the conveyance-deed.

64. Learned counsel for the appellant has pleaded that there was delay of only four months in delivery of possession. But this plea raised by learned counsel for the appellant is belied from the documents available on record. Learned counsel for the appellant has drawn our attention to Annexure-G, the affidavit-cum-undertaking executed by the respondent-allottee on 06.08.2013. It shows that this affidavit was executed only with respect to the offer of temporary possession in order to carry out interior fit outs/furnishing work. That was not the valid and legal physical possession. The respondent/allottee sent the email dated 03.04.2014 Annexure-H to the appellant/promoter for delivery of possession of Flat No.705. In reply to the said email it has been mentioned that the unit was ready and the respondent may collect the keys of the flat on any working day from one Ajit at the site. Thus, it is evident that up to April 4, 2014 the physical possession of the flat was not delivered to the respondent/allottee. Once the stand taken by the appellant that the possession was delivered on 06.08.2013, stands falsified, there is no reason to disbelieve the date of delivery of

the physical possession mentioned by the respondent/allottee in the complaint. Thus, in this way, the physical possession of the flat has been delivered to the respondent/allottee in the month of November, 2014 with a delay of one year and seven days from the deemed date of possession i.e. 07.04.2013 as per the terms and conditions of the agreement for sale and the learned Authority has rightly determined the period of delay.

65. Thus, keeping in view our aforesaid discussions, the provisions of the Act and the rules made thereunder shall be applicable to the project of the appellant, even though it is not registered with the learned Authority. The provisions of the Act are retroactive to some extent and will be applicable to the agreement of sale entered into between the parties as the transaction was still in the process of completion as the conveyance-deed was not yet executed. We also do not find any illegality qua the interest for delayed possession awarded by the learned Authority as per Rule 15 of the Rules. The learned Authority has also rightly determined the period of delay in delivery of possession.

66. Consequently, the present appeal has no merit and the same is hereby dismissed. However, no order as to costs.

67. The amount deposited by the appellant with this Tribunal be transferred to the learned Authority being the

executing authority of the impugned order, for disbursement to the respondent/allottee as per law.

68. File be consigned to the records.

Announced:
December 19, 2019

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

Inderjeet Mehta
Member (Judicial)

Anil Kumar Gupta
Member (Technical)