HARYANA REAL ESTATE REGULATORY AUTHORITY, PANCHKULA.

1. Complaint No. 152/2018

Mukesh Kumar Khandelwal & another. ...Complainants
Versus
M/s Avlon Project. ...Respondent.

2. Complaint No. 154/2018

Pardeep Sharma. ...Complainant
Versus
M/s Avlon Project. ...Respondent.

3. Complaint No. 156/2018

Kusum Mishra. ...Complainant
Versus
M/s Avlon Project. ...Respondent.

4. Complaint No. 157/2018

Sunita Bhasin. ...Complainant
Versus
M/s Avlon Project. ...Respondent.

5. Complaint No. 160/2018

Tachilote Anand Kumar ...Complainant
Versus
M/s Avlon Project. ...Respondent.

6. Complaint No. 168/2018

Shahshi Bala Sachdeva ...Complainant
Versus
M/s Avlon Project. ...Respondent.

Date of hearing. On 08.08.2018.

Coram:- Shri Rajan Gupta, Chairman
Shri Anil Kumar Panwar, Member
Shri Dilbag Singh Sihag, Member.

Present:- Ms. Rupali S. Verma, Advocate for complainants.
Shri Kamal Dahiya, Advocate for respondents.

ORDER:-

1. The above captioned six complaints are being disposed of vide this order as the core issues involved in all cases are same. The Authority will cull out the facts from the lead case titled as Pardeep Versus M/s Avlon Pvt. Ltd.

2. The complainant was allotted 2 BHK flat bearing No. 304 measuring 1300 Sq. fts on 3rd floor in Tower A-3 of respondent's project named "Avalon Rangoli" situated in Sector-24, Dharuhera. The total consideration fixed was Rs. 39,07,450/- and the complainant had already paid Rs. 37,80,186/-.

3. The complainant's grievance is that no construction is progressing at site and the respondent has failed to abide by his commitment to handover the possession of flat on the agreed date, which has lapsed on 14.08.2012 in terms of the buyer's agreement. So, prayer has been made for refund of the deposited amount.

4. Respondent in his written statement has not controverted the allotment of flat and payment of Rs. 37,80,186/- out of total consideration of Rs. 39,07,450/-. His plea is that he has already completed first phase of the project

and has since been granted occupation certificate in respect of said phase on 29.02.2018. The complainants' flats fall in Phase-II for which occupation certificate has been applied on 05.06.2017. So, there was no lapse on his part and the complainant's prayer for refund deserves to be rejected.

5. In the course of hearing of these complaints on the last date, it was revealed that offer of possession was made to the complainants, in the year 2016 and the Authority, therefore, questioned the complainants for explaining the reasons as to why the possession was not taken. Thereupon, the Authority was informed that the respondent had offered flats which were having many deficiencies. To prove their assertion in this regard, the complainants had drawn the attention of the Authority to a letter dated 17.03.2018 addressed by them to the Director, Town and Country Planning Department, Haryana, wherein deficiencies were pointed out in respect of development works promised by the respondent at the time of entering buyer's agreement.

6. Learned counsel for the respondent on being confronted with said letter had assured the Authority that the respondent would remove all the deficiencies and hand over the possession to the complainants after providing all basic services in terms of the buyer's agreement. The case was accordingly adjourned for today leaving the complainant at liberty to file detail of such deficiencies as would still be left unrectified in their respective flats.

7. Today, the complainants have filed an additional affidavit for pointing out the deficiencies still persisting and not rectified by the respondents. The

deficiencies so pointed out are:- (i) non providing of sewerage treatment plant, (ii) basement parking not complete, (iii) incomplete construction of school in the project, (iv) incomplete road network, (v) electrification work incomplete as no supply of DHBVN available on the site, (vi) club facility is not yet available (vii) fire control facility yet not complete, (viii) EWS component of the project still not complete, (ix) swimming pool facility is not available.

8. The Authority after hearing the parties and on consideration of the facts and circumstances of the case, observes that the respondent shall not raise charges from the complainants for those facilities which are not yet available to them and the respondent will ensure that the sewerage from the apartments is properly discharged by making suitable arrangement in such a manner that such discharge does not create nuisance of a kind as may be injurious and creates hindrance in peaceful and comfortable living in the apartment. The respondent shall also ensure that regular electricity supply to the apartment is made available by making alternative arrangement till the availability of DHBVN's supply of electricity and the rates for such alternative facility are charged at par with the rates equivalent to DHBVN rates.

9. The only other grievance requiring determination in the complaints is regarding the amount payable to the complainants for the delay in handing over possession. The deemed date of possession as per buyer's agreement was 21.1.2015. Concededly, the deficiencies were pointed out on the last date of hearing in the development works and the respondent's counsel then sought

time to remove those deficiencies. So, the period of delay has to be reckoned from 21.11.2015 to the date on which the respondent will now offer the possession to the complainants after removing the deficiencies in development works.

10. Learned counsel for the respondent has urged the Authority to grant delay compensation for aforesaid period @ Rs. 250/- per Sq. ft. on the super area of the apartment as mentioned in the buyer's agreement. This Authority has already ruled in Complaint No. 113 of 2018 in the case titled as "Madhu Sareen Versus M/s BPTP Limited" decided on 31.08.2018 that such clause of the buyer's agreement which does not provide equal terms of penalty for the promoter and the allottees in respect of their respective defaults towards discharge of obligations to each other is void ab-initio in view of the Explanation attached to the specimen format of Agreement for Sale prescribed in Annexure A of HRERA Rules, 2017 and therefore, the allotees after coming into force of the RERA Act, 2016 are entitled to be paid amount equivalent to the State Bank of India highest marginal cost lending rate plus 2% on the amount already deposited with the promoter in terms of Rule 15 of the HRERA Rules, 2017 not only for the period after coming into force of RERA Act but also for the period prior thereto. So, the respondent at the time of offering possession to the complainants will calculate the compensation at the aforesaid rate and supply its calculations to the complainants. Such amount will be adjustable towards the liability that may become due from the complainants for

payment to the promoter at the time of handing over the possession. The respondent shall execute the sale deed in favour of the complainants within one month of deposit of the dues payable by the complainants after adjustment of the compensation amount.

11. Before parting with the orders, it is worth-while to mention that the project in question has not been yet registered with the Authority as mandatorily required under Section 3 of the RERA Act. So, the Project Section shall initiate proceedings under Section 59 of the RERA Act against the respondent with reference to this order and papers be put up before the Authority in its next meeting.

12. All the complaints are accordingly disposed of and files be consigned to the record room.

Dilbag Singh Sihag
Member

Anil Kumar Panwar
Member

Rajan Gupta
Chairman

I have perused the orders authored by my learned friends Hon'ble Members of the Authority. I concur with all the orders except the following:-

(i) My learned friends have ordered that "the respondent shall also ensure that a regular electricity supply to the apartments is made available by making alternative arrangement till the availability of DHBVN's supply of electricity and the rates for such alternative facility shall be charged at par with the rates equivalent to the DHBVN's rates.

It is a fact that supply of electricity through generating sets is much more expensive compared with the supply by the State distribution companies. It is also a fact that it takes long time for the State Electricity Companies to supply electricity after filing of application with them.

I order that if the respondent had applied to DHBVNL well in time for supplying electricity to the colony then the rates to be charged for supply of electricity through the generating sets shall be the actual cost being incurred by the respondent. In other words, the supply shall be made by the respondent at the actual cost without earning any profit out of it. However, if the respondent had not applied to DHBVN for supply of electricity then he shall be liable to supply the same at rates equivalent to the DHBVN rates.

(ii) Learned Members have ordered that deemed date of possession in the instant case works out to 21.11.2015. However, the offer of possession was made by the respondent to the complainant in the year 2016. This offer is not valid because the occupation certificate for the project was applied on 19.01.2017 and same was granted on 27.02.2018. Since possession could not have been offered without obtaining the occupation certificate, therefore, the offer of possession of the year 2016 cannot be termed valid offer of possession.

The respondent had applied for occupation certificate on 19.01.2017 and as per Haryana Building Code the occupation certificate is deemed to have been granted if it is not denied or rejected by the authorities concerned within a period of 60 days. Accordingly, the project shall be considered to have obtained the occupation certificate on 20.03.2017.

Accordingly, the delay in offering of possession works out to for the period 21.11.2015 to 20.03.2017 which is about one year and four months.

(iii) Hon'ble Members have ordered that the compensation for delay in offering possession for the period of delay should be paid at the rates provided for in Rule 15 of the RERA Rules. This is based on

an opinion expressed by the learned Members in complaint Case No.113 of 2018- Madhu Sareen Vs. BPTP Ltd. I have expressed my difference of view in this regard and have given a detailed reasoning thereof in a subsequent Complaint case No.49 of 2018- Prakash Chand Arohi Vs. Pivotal Infrastructure Pvt. Ltd. A copy of the judgement of the complaint case No. 49 of 2018 is being uploaded on the website of the Authority with this order as well. The reasoning and conclusions of my orders in this Complaint No.49 of 2018 will be fully applicable in this matter as well.

I would add that provision of Rule 15 is applicable in the situations when refund of the amount is to be allowed for the contract between the parties having been frustrated. Awarding of interest in accordance with Rule 15 for the period of delay in offering possession, as ordered by my learned friends, is therefore, not justified. Furthermore, compensation for delay in handing over possession for reasonable period of time at the rates provided for in the agreement has been repeatedly upheld by the National Consumer Redressal Commission and also the Hon'ble Supreme Court.

(iv) As per the agreement, for the period of delay the seller is liable to compensate the complainant @ Rs.2.50/- per sq.ft. per month for

the super area of apartment. Delay of 1-2 years in real estate projects is not abnormal. Real Estate Projects are complex projects to execute in which numerous financial, men and material resources have to be mobilised. It involves obtaining approvals from numerous State agencies which often get delayed. Therefore, without entering into an inquiry as to whether the delay was justified or not, simply awarding penal interest for the delayed period is not justified. Delay of 1-2 years is very normal in such projects. When possession has actually been offered, it implies that the developer has no mala fide intentions and he has deployed the finances collected from the allottees on the project itself. It is only the unreasonable delay that should attract penal interest. One year and 4 months delay is not unreasonable. Since the delay is not unreasonable, I order that the compensation for delay in offering possession shall be payable at the rates provided for in the agreement.

I order accordingly.

(Rajan Gupta)
Chairman

BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHROITY, PANCHKULA.

Complaint No. RERA-PKL-COMP. 49/2018

Date of hearing. On 04.09.2018, 8th Hearing.

Parties names. Parkash Chand Arohi. ...Complainant

Versus

M/s Pivotal Infrastructure Pvt. Ltd. ...Respondent.

Quorum:- i) Shri Rajan Gupta, Chairman.
ii) Shri Anil Kumar Panwar, Member.
iii) Dilbag Singh Sihag, Member.

Present:- Shri Parkash Chand Arohi, Complainant in person alongwith his advocate.
Shri Rohan Gupta, Advocate for respondent.

ORDER:-

1. Complainant Parkash Chand Arohi has booked an apartment with the respondent on 15.06.2010 and the respondent allotted him Flat No. 0004 in Tower 12A of his project namely "Takshila Garden" presently known as Royale Haritage, situated in Sector-70, Faridabad. The sale consideration of the apartment was fixed at Rs. 30,07,750/- besides EDC charges. The complainant has already paid a sum of Rs. 30,91,384/-. There is no dispute between the parties about these facts.

2. The Respondent sent the Statement of Account dated 09.12.2017 to the complainant, whereby a total demand of Rs. 19,14,845.50 was raised under various heads and it is this demand which the complainant is disputing and challenging for which he had filed the present complaint.

3. The Respondent has averred that the demand is legal and has been raised as per terms agreed between the parties. So, the complaint is not maintainable and liable to be dismissed.

4. Considering the nature of various demands raised in the Statement of Account dated 09.12.2017, the Authority vide its order dated 19.06.2018 has directed the respondent to hold a meeting with the complainant at site of the project and to carry out actual measurement of the apartment in his presence in order to satisfy him about the increase in the super area of the apartment. The complainant has today conceded that actual measurements were carried out in his presence and the carpet area of the apartment was found correct as per the approved plan.

5. So, the complainant without disputing the measurement of carpet area of apartment has today confined his arguments only with regard to the legality of various demands raised in the Statement of Account dated 09.12.2017. The Authority has heard the parties and perused the record. It will now discuss each grievance of the complainant one by one.

6. The complainant at the outset has argued that the respondent is not competent to offer him possession because the project is not yet complete. The

Authority does not find any merit in the contention because it is indisputable fact that the respondent has already obtained an occupation certificate from the Town and Country Planning Department, which signifies the laying of all basic essential services and he can, therefore, legitimately deliver the possession to the complainant.

7. His next contention is that he has agreed to purchase a flat having super area of 1650 Sq. fts. but the respondent has unilaterally increased the super area to 1815 Sq. fts. and therefore, he is not liable to pay the increased cost. The Authority does not find merit in this contention because the complainant vide letter dated 05.03.2012, which he has himself attached with the complaint at Page 55, had agreed to pay proportionate price for increase in super area from 1650 Sq. fts to 1815 Sq. fts. The Authority on appraisal of the building plan today produced by the respondent in pursuant to its previous order and after hearing the parties has however found that the respondent for the purpose of calculating increase in super area of complainant's apartment has divided the common area of the floor at which said apartment situates by the number of flats constructed on that floor instead of calculating the increase in the super area on pro-rata basis by dividing the entire commonly useable area of the project with the number of total apartments existing therein. The criteria adopted by the respondent is apparently wrong because the common area on the floor at which complainant's flat situates will not be used by the complainant alone and it will rather be useable even by other allottees of the project. So, the

entire common area of the project deserves to be proportionately divided by the total number of allottees in order to assess the increase in the super area of the complainant's flat. Accordingly, the respondent is directed to calculate the increase in this manner and supply its copy to the complainant so that he is assured that the increase in his super area has been calculated by dividing the overall common area of the project with the total number of apartments in the project. At this stage, the authority further observes that the respondent has added the area of water tanks installed on terrace and mumty built on staircase and machine rooms of lifts in calculating super area. The area occupied by common utility services, cannot be considered a part of super area because the rest on a space which already has been counted towards common utility area. So, the respondent is directed to exclude from adding any such structure which has been laid or raised on a space already counted in determination of the super area.

8. The complainant has then argued that the respondent's demand for GST/VAT charges is unjustified for two reasons: (i) the GST liability has accrued because of respondent's own failure to handover the possession on time and (ii) the actual VAT rate is 1.05% instead of 4% being claimed by the respondent The Authority on this point will observe that the possession of the flat in term of buyer's agreement was required to be delivered on 1.10.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability which had accrued solely due to respondent's own fault in delivering timely possession of the flat.

Regarding VAT, the Authority would advise that the respondent shall consult a service tax expert and will convey to the complainant the amount which he is liable to pay as per the actual rate of VAT fixed by the Government for the period extending upto the deemed date of offer of possession i.e. 10.10.2013.

9. Another grievance of the complainant is that the respondent is demanding exorbitant charges for the electricity meter. The Authority on this point would direct the respondent to charge actual price of the meter as indicated in its purchase bill or as per the actual charges levied for it by the electricity department, after supplying him a copy thereof.

10. Next grievance of the complainant is that the respondent has not adjusted in the Statement of Account dated 09.12.2017 the amount of compensation payable to him on account of delayed delivery of possession. The Authority on perusal of the documents has found that a buyer's agreement was initially entered between the parties on 14.02.2011 under which the respondent was liable to deliver the possession within 42 months i.e. by 13.08.2014 but before the arrival of the said date, parties had entered into a new agreement on 29.03.2013, whereby the respondent was allowed to deliver the possession latest by 28.09.2016. According to the complainant, delayed period for compensation shall be reckoned with effect from the deemed date of possession stipulated in the first buyer's agreement i.e. from 13.08.2014. Learned counsel for the respondent, on the other hand, has urged for calculating the delayed period with effect from the date of deemed possession stipulated in the second buyer's

agreement i.e. with effect from 28.09.2016. If the period of delay is reckoned from the deemed date of possession mentioned in the first agreement, the delay period comes to about 39 months while such period on reckoning from the deemed date of possession mentioned in second buyer's agreement comes to around 15 months. The respondent in the Statement of Account today filed has calculated the delayed compensation for 23 months. The Authority on considering the complainant's own conduct in extending the deemed date of possession to 28.09.2016 by signing the second buyer's agreement, deems it just and reasonable to calculate the delayed compensation for 23 months as agreed by the respondent in the Statement of Account submitted today.

11. The respondent has calculated the delayed compensation @ Rs. 5/- per sq. ft. per month on the total super area of 1815 Sq. fts. in terms of buyer's agreement. The Authority will not approve such calculations in view of its earlier decision in Complaint Case No. 113 of 2018 titled as "Madhu Sareen Versus M/s B.P.T.P. Limited" decided on 31.08.2018, wherein it was held that the allottee for the period prior to coming into force the RERA Act and also for the period after coming into force the RERA Act is entitled to delay compensation equivalent to the SBI MCLR+2%. So, the respondent is directed to calculate the delayed compensation @ SBI MCLR + 2% for the entire 23 months period of delay.

12. Another grievance of the complainant is that the respondent has raised a demand of Rs. 2,76,920/- towards enhanced EDC. Learned counsel for the

respondent has not disputed that matter concerning enhanced EDC is pending before the Hon'ble High Court and the amount of such enhanced EDC is not payable at present because of a stay granted by the Hon'ble High Court. So, the Authority will observe that the amount of EEDC will be charged from the complainant only after vacation of stay by Hon'ble High Court and in case such liability accrues, then the complainant shall pay the same to the respondent within 15 days failing which he will be liable to pay interest equivalent to the rate chargeable by the State Government on the delayed payment of EEDC, from the date it became payable till the date of its actual payment.

13. The last grievance of the complainant is regarding the amount demanded as upgradation charges. The Authority has found during argument that the respondent has not calculated the upgradation charges on the carpet area and rather calculated it on the super area of 1815 Sq. fts. Learned counsel for the respondent has argued that the complainant in view of his consent for increase in super area is liable to pay for upgradation charges not merely on carpet area but on the over all super area. The Authority regrets inability to accept the contention because the complainant's individual consent cannot be applied to cover even the common useable area of the project. Rather, the respondent before upgrading the common useable super area was required to hold a meeting with total number of allottees of the project and to obtain their consents for any upgradation to be effected in such area. Such process has not been adherered by the respondent and therefore, the upgrdation if any carried out in

the common useable area without the consent of the entire body of the allottees of the project has to be deemed at respondent's own risk and he cannot raise a separate demand thereto from the individual allottees. So, the respondent shall calculate the upgradation charges only on carpet area of complainant's apartment and raise its demand after supplying him the details of the upgrdation carried therein.

14. No other point was agitated by the complainant in respect of the other demands raised in the Statement of Account dated 09.12.2017 and has rather conceded his liability for paying the same.

15. The complaint is accordingly disposed of with the direction that the respondent shall re-convey his demands to the complainant after making calculations in terms of observations made in this order. Respondent is further directed to hand over the possession of the apartment to the complainant complete in all respects after providing all facilities in terms of buyer's agreement and the complainant is directed to make all the payments, as arrived at on the basis of calculations made in terms of this order, within one month from the date of supply of fresh demand. It is, however, made clear that nothing stated in this order shall debar the complainant from filing a complaint before the Adjudicating Officer to claim such compensations as he may be entitled under the law.

16. Complaint is disposed of and file be consigned to the record room after necessary action.

Dilbag Singh Sihag
Member

Anil Kumar Panwar
Member

Rajan Gupta
Chairman

My Separate Judgement is annexed.

RAJAN GUPTA
Chairman.

I have gone through the order passed by my learned friends Hon'ble Members of the Authority. I am in full agreement with the orders on all the issues except the issue at No.11 relating to the compensation payable to the complainant for delayed offer of possession beyond the deemed date of possession. Learned Members in para 11 have passed the following orders:-

> "The respondent has calculated the delayed compensation @ Rs. 5/- per sq. ft. per month on the total super area of 1815 Sq. fts. in terms of buyer's agreement. The Authority will not approve such calculations in view of its earlier decision in Complaint Case No. 113 of 2018 titled as "Madhu Sareen Versus M/s B.P.T.P. Limited" decided on 31.08.2018, wherein it was held that the allottee for the period prior to coming into force the RERA Act and also for the period after coming into force the RERA Act is entitled to delay compensation equivalent to the SBI MCLR+2%. So, the respondent is directed to calculate the delayed compensation @ SBI MCLR + 2% for the entire 23 months period of delay."

2. The aforesaid orders are based on the decision in complaint case No.113 of 2018 titled as Madhu Sareen Versus BPTP Ltd. decided by this Authority on 31.8.2018. In this complaint No.113 of 2018 views of the Authority on the issue of delay compensation were divided. The views of the two learned Members, which constitutes majority in the Coram, were recorded

as separate orders. Gist of the majority views in the said complaint No.113 of 2018 is as follows:-

2.1 The undersigned had awarded compensation on account of delay in handing over possession by promoter to the complainant at the rate Rs.5 per Sft. of the total super area for every month of delay in accordance with clause 3.3 of the buyers agreement upto the date of coming into the force of the HRERA Act i.e. upto 1.5.2017, and thereafter at the rate prescribed in Rule 15 of the Haryana Real Estate (Regulation & Development) Rules, 2017 that is at the rate equivalent to SBI Marginal cost lending rate (MCLR) +2%. The learned majority Members in their separate order had ruled that the rate prescribed in Rule 15 of the Rules should be applicable for the entire period of delay in handing over of possession starting from November, 2014 which was the deemed date of handing over possession upto the actual date of possession. In other words, the provisions of Rule 15 have been applicable even for the period prior to coming into force of the RERA Act. The reason cited for this conclusion is that the RERA Act requires registration of not only the new projects to be set up after 1.5.2017 i.e. the date when RERA Act came into force, but also the ongoing projects which had started prior to coming into force of RERA Act and were not complete by the time the RERA was enforced.

Ld. majority members further reasoned that the Legislature at the time of enacting RERA were not oblivious of the fact that there will be agreements for sale executed between promoter and buyer of ongoing projects therefore, the expression "agreement for sale" wherever used in RERA is applicable to new as well as ongoing projects.

Further, the buyer agreement which provides that promoters will charge 18% interest for any default on the part of buyer to pay installments of sale consideration on time, whereas the promoter for his

own default in handing over the possession of the apartment on time would compensate the buyer with an amount to be calculated @ Rs.5 per Sft. of the super area per month, is wholly discriminatory and heavily lean in favour of the promoter with regard to the payment of compensation to the promoter and the buyer for their respective defaults towards discharge of their obligations. This provision of the apartment, therefore, is not sustainable in law.

Further, the Legislature through several provisions in the Act namely Section 2 (za), Section 2(z1), Section 18, Rule 15 as strongly disapproving the disparity occurring in agreement for sale about the delay compensation payable by allottee to the promoter and the delay compensation payable by promoter to the allottee in case of their respective defaults. Section 2 (za) of RERA mandates that compensation liability for both of them shall be equal.

Learned majority Members have cited a judgement titled Ashish Oberoi Versus EMMAR FG Land Ltd. decided on 14.9.2016 by the Hon'ble National Consumer Disputes Redressal Commission (NCDRC) relating to two unequal clauses in the sale agreement, in which it has been held that such clauses amount to unfair trade practices since it provided unfair advantage of colonizer or buyer. Further, the decision of the NRDRC) was challenged in Civil Appeal No.35562 of 2015 before the Hon'ble Supreme Court but the same was dismissed by the Hon'ble court vide its orders dated 11.12.2015 with the observation that "the judgement impugned does not warrant any interference". Learned Members have ruled that in view of the affirmative nod accorded by Hon'ble Supreme Court to the above referred view taken by NCDRC the discriminatory clause is therefore, unsustainable and cannot be active upon for the purpose of granting delay compensation to the complainants.

2.2 The next reason given by the Ld. majority members is that explanation (b) appended to the model agreement for sale prescribed, Annexure-A with the Rules, provide that any clause in this agreement found contrary to or inconsistent with any provision of the Act, rules and regulations would be void ab-initio. Learned majority Members are of the view that this explanation (b) of the Annexure attached with the HRERA Rules, 2017 makes the discriminatory provision in the buyers agreement made even before coming into force of the RERA Act void ab-initio therefore, has to be treated as non-est for having been declared void ab-initio and therefore cannot be acted upon for any purpose.

2.3 The Hon'ble High Court of Bombay in the case bearing Civil Writ Petition No.2737 of 2017 titled as Neelkamal Realtors suburban Pvt. Ltd. and anr. Versus Union of India & Ors. decided on 6.12.2017 has ruled that RERA is not retrospective in nature but is retroactive in operation therefore, anything that has already been done in terms of buyers agreement prior to coming into force of RERA cannot be undone but if something in relation to such agreements needs to be done after enforcement of RERA then such action shall not be contrary to the provisions of RERA. Accordingly, the discriminatory clauses of agreement for sale entered between the promoter and the buyer are illegal, not tenable and not enforceable.

2.4 Learned majority Members have expressed a view that had there been a legislative intent for providing delay compensation to the buyers of ongoing projects only in accordance with the agreement for the sale instead of statutory provisions for the period prior coming into the force of RERA then the language of Section 18(1) and Section 19 (4) of RERA would have been provided very differently as has been proposed by the learned Members in their

3. My response to the issues raised by my Ld. friends is as follows:-

3.1 In the reasoning given at the above para no. 2.1, learned Members have stated that the decision of the Hon'ble National Consumer Disputes Redressal Commission (NCDRC) in the case titled Ashish Oberoi Versus Emaar MGF Land Limited decided on 14.09.2016 was challenged in Civil Appeal No.35562 of 2015 before the Hon'ble Supreme Court and the same was dismissed by the Hon'ble Court vide their orders dated 11.12.2015.

It is respectfully observed that above citation of the decision of NCDRC and Hon'ble Supreme Court given by Hon'ble Members is factually incorrect. Apparently full text of the judgement of the cited case could not come before the Hon'ble Members. I have before me the full judgement of Hon'ble NCDRC (Manu/CF/0434/2016) passed in case No.70 of 2015 decided on 14.09.2016 titled Ashish Obseroi Versus Emaar MFG Land Limited. The dispute in this case pertained to a property purchase by the appellant from

the respondent company in Mohali (Punjab). For the reasons given in the judgement, Hon'ble NCDRC had held that the amount deposited by the appellants should be returned to them by the respondents along with compensation in the form of interest @ 9%.

For arriving at the above decision Hon'ble NCDRC had referred to their earlier decision passed in Consumer Complaint No.347 of 2014 decided by them on 14.8.2015. It was against this decision in Complaint No.347 of 2014 that Civil Appeal No.35562 of 2015 was filed before the Hon'ble Supreme Court which was disposed of by Hon'ble Supreme Court vide their orders dated 11.12.2015 with operative part "we do not see any cogent reason to entertain the appeal".

It noted that the decision of NCDRC in Complaint No.347 of 2014, as upheld by the Hon'ble Supreme Court, is at complete variance with the conclusions arrived at by the learned Members in the referred complaint case No.113 of 2018, Madhu Sareen V/S BPTP Ltd. The judgement of Hon'ble

NCDRC and Hon'ble Supreme Court runs contrary to the decision given by the learned members. The decision of the NCDRC, as upheld by Hon'ble Supreme Court, in the said consumer complaint No.347 of 2014 decided on 14.08.2015 is reproduced as follows: (Emphasis added).

> "As regards the plea that in terms of Clause (c) of the allotment letter the opposite party is required to pay only the holding charges calculated at the rate of Rs5/- per sq.ft.per month of the super area for the period the possession is delayed, such a contention was expressly rejected by us in Puneet Malhotra (supra) holding that such clause applies only in a case where construction of the flat is delayed but despite delay the buyer accepts the possession of the flat from the seller and consequently the accounts have to be settled between the parties. We observed in this regard that the buyer would have to pay the agreed holding charges to the seller and the seller to pay the agreed compensation on account of delaying the construction of the flat. The said clause however does not apply to a case where the buyer on account of delay on the part of the seller in construction the flat is left with no option but to seek refund of the amount which he had paid to the seller. We further held that such a clause where the seller in case of default on the part of the buyer seeks to recover interest from him at the rate of 24% per annum will amount to an unfair trade practice since it gives an unfair advantage to the seller over the buyer. We also noted in this regard that enumeration of the unfair trade practices in Section 2(r) of the Act is inclusive and not exhaustive."

The above orders were challenged before the Hon'ble Supreme Court vide Civil Appeal No.35562 of 2015 in which the Hon'ble Court passed the following orders dated 11.12.2015:-

> "We have heard learned counsel for the appellant and perused the record. We do not see any cogent reason to entertain the appeal. The judgement impugned does not warrant any interference."

The above rule laid by Hon'ble Supreme Court was followed by the NCDRC in the Consumer No.70 of 2015 Ashish Oberoi Versus Emaar MGF. The orders of NCDRC are reproduced as follows:-

> "12. During the course of hearing, it was contended by the learned counsel for the opposite party that on 06.4.2016, they have already obtained post-completion certificate in respect of the villa allotted to the complainant. He also submitted that vide letter dated 06.5.2016, they have already informed the complainant about grant of the part occupancy certificate and asked him to pay an additional amount of Rs.3,01,200/- on account of revision of EDC by Government of Punjab. The learned counsel for the complainants however, maintained that considering the breach of its contractual obligation by the opposite party, the complainants is not obliged to accept the offer of possession at such a belated stage, particularly when the said offer is not accompanied by an offer to pay adequate compensation for the delay in offering

possession of the villa. I am in agreement with the learned senior counsel for the complainant that considering the default on the part of the opposite party in performing its contractual obligation, the complainant cannot be compelled to accept the offer of possession at this belated stage and therefore, is entitled to refund the entire amount paid by him along with reasonable compensation, in the form of interest.

13. For the reasons stated hereinabove, the opposite party is directed to refund the entire principal amount of Rs.1,15,78, 537/-, received from the complainant, along with compensation in the form of interest @ 9% per annum from the date of the individual deposit, till the date of payment. The opposite party shall also pay Rs.10,000/- as cost of litigation to the complainant. The payment, in terms of this order, shall be made within six weeks from today. The complaint stands disposed of accordingly".

3.2 From the above orders three distinct situations emerges relating to the obligations cast upon buyers and sellers by the agreement for sale/purchase of apartment/plot, as follows:-

(a) The first situation is when the agreement has got frustrated and refund of entire amount has been ordered to be given by the developer to the allottee. In this situation Hon'ble NCDRC as well as Hon'ble Supreme Court have held

that the amount shall be refunded along with a reasonable interest. The reasonable interest in the instant case was determined as 9% per annum.

(b) The second situation is when even though the construction of the apartment has been delayed but possession is actually being delivered. In such situation the clause in the agreement that opposite party will pay only the holding charges calculated at the rate of specified amount of money, say Rs.5 to Rs.10 per Sft. per month, of the super area for the period the possession is delayed, will continue to remain applicable. In such situation only the accounts have to be settled between the parties in accordance with the provisions of the agreement. This provision in the agreement has been upheld by the Hon'ble Supreme Court.

(c) The NCDRC have held that the recovery of interest @ 24% per annum in the case of default by the buyers will amount to an unfair trade

practice. This provision, being held an unfair trade practice, therefore, has to be read down.

HRERA, Panchkula has passed orders in numerous cases that in the event when the contract between the parties is not to be acted upon and there no likelihood of delivery of possession of plot/apartment, in that case entire money paid by the allottee to the developer shall be refunded along with interest as prescribed in rule 15 of the Rules. To this extent the judgments and orders passed by this Authority are in consonance with the order passed by the Hon'ble Supreme Court.

Further, my order passed in Complaint No.113 of 2018 titled as Madhu Sareen Versus BPTP Ltd. that up to the date when RERA Act came into force, i.e. 1.5.2017, if possession is being delivered to the allottees, the delay compensation to be paid by the sellers to the buyers shall be in accordance with the provisions of the agreement, are also fully in consonance with the orders of the Hon'ble Court.

However, I had also ordered that for the period after 1.5.2017, i.e. is the date when RERA Act came into force, upto the actual date of offer of possession the delay compensation to be paid by the sellers to the buyers for delayed delivery of the apartment shall be in accordance with rule 15 of the HRERA Rules. This part of my orders in complaint case No.113 of 2018 does not appear to be in conformity with the orders of the Hon'ble Supreme Court.

3.3 In conclusion I would state that the Hon'ble Members have based their reasoning for awarding the delay compensation to the buyers in Complaint No.113 of 2018, on incorrect interpretation of the orders passed by the NCDRC as upheld by the Hon'ble Supreme Court. The reasoning and decision of my learned friends therefore, in my considered view, is incorrect.

4.1 The second reason given by my Ld friends for allowing interest @ SBI MCLR+2%, which at present works out to about 10.5%, is that even ongoing projects are required to be registered with HRERA.

My Ld. friends in their judgement have implied that if the ongoing projects have been mandated to be registered, then even the agreements executed prior to enactment of RERA Act relating to the sale of apartments in such projects should be revised to make them in conformity with the provisions of the Act and the Rules. I am unable to agree with my learned friends.

I observe that the RERA Act is comprised of two distinct parts. First dealing with registration of new as well as ongoing projects; and second with redressal of grievances of the apartment buyers by the Authority and the adjudication of system.

4.2 The first part relating to registration of projects is intended to ensure that:

a) All vital informations relation to the new as well as ongoing projects is brought in public domain to enable the prospective buyers to make informed decision for investment of their money.

b) To ensure that 70% of the money collected is put into an escrow account for spending on the project only.

c) To see that projects are completed within the declared time schedule.

d) All future agreements between the prospective buyers and developers are made on a standardized format which in turn seeks to provide a level playing field to both the parties.

4.3. The second part of the Act, is designed to ensure that:

a) Grievances of the apartment buyers of the completed, ongoing, as well as new projects are redressed speedily by following a summary procedure.

b) In the cases of completed or an ongoing projects both the parties should fulfill their contractual obligations faithfully, and in case any party suffers a loss or damage on account of breach of contract he/ she is suitably compensated.

Above views have been expressed by this Authority also in the complaint case No.144 of 2018, Sanju Jain Vs. TDI Infrastructure Ltd. vide its order dated 13.6.2018. The relevant part of order is reproduced below:-

> "The underlying object for enacting the Act is two folds. Firstly, it is aimed at ensuring sale of plot/apartment/building in the real estate sector in an efficient and transparent manner. For serving of such purpose, the registration of the real estate project has been made compulsory before a promoter is allowed to put his project on sale. Elaborate provisions concerning the process of registration have been laid in Chapter-II of the Act; thereby, requiring the promoter to disclose and bring to the public domain all such information as is reasonably necessarily for a prospective purchaser of property, to effectively decide on the question as to whether or not he should invest his money with the promoter in his proposed project. The registration process is also aimed at ensuring that 70% of the money collected from the prospective buyers is invested in the project without its diversion for other purpose.
>
> The second purpose for enacting the Act is to establish an adjudicating mechanism for speedy redressal of the grievances of allottees and promoters. The legislature in order to achieve this purpose has laid provisions detailing out the functions and duties of the promoters in Chapter-III, rights and duties of the

allottees in Chapter IV and also by creation of Real Estate Regulatory Authority and Appellate Tribunal as per the provisions contained in Chapter-V and in Chapter-VII of the Act. There is Chapter VIII relating to the offences emerging from different kind of violations committed in respect of various provisions of the Act and vesting of powers in the Authority/Appellate Tribunal for punishing those offences."

4.4 From the above, it is abundantly clear that the aims and objective of the part dealing with registration of the projects are quite different from the part dealing with redressal of grievances. I am of the considered view that merely the fact that an on-going projects also has to be registered with the Authority, does not mean that all executed contracts between the parties of the on-going projects will have to undergo a revision or have to be re-written. There is no provision in the RERA Act to support the view of my Ld. friends that even past and executed contracts also stands amended after coming into force of RERA, Act. Such an interpretation will create chaos in the

society. Legally executed contacts between the parties cannot be ordered to be revised without an express provision of law enacted by the appropriate legislature.

5.1 Next I would deal with the reason No.2.2. Learned Members have expressed a view that discriminatory provisions in the buyers agreement made well before coming into force of RERA Act, has become void ab-initio because in the part (b) of the explanation appended with a model agreement for sale annexed with RERA Rules, which came into force on 28.07.2017, provides that "any clause in this agreement found contrary to or inconsistent with any provision of the Act, Rules and Regulations would be void ab-initio". Ld members are of the view that this explanation in the draft model agreement appended with the Rules will have the effect of turning all the past agreements lawfully entered between the parties, to which

the jurisdiction of RERA extends, declared ab-initio to that extent with retrospective effect.

5.2 With due respect to the learned members I am of the considered view that this reasoning is incorrect, unsustainable in law and not supported by any statutory provision or any ruling of the higher courts. I will further substantiate my views with following reasons:-

(a) The concept of void and voidable agreement is contained in the Indian Contract Act, 1872. Section 20 to Section 30 of the Act contains various provisions relating to the void agreements. As per these provisions only those agreement are void which are made (i) on account of both parties being under-mistake as to the matter of fact; (ii) where the consideration is forbidden by law, it would defeat the provisions of any law or implies injury to the property of another person or the Court regards it as immoral

or opposed to public policy; (iii) wagering agreements (iv) agreement in restraint of marriage; (v) agreement in restraint of trade; (vi) or the agreement without consideration. An agreement to be called void has to be so specified in a statuary law or it has to be so declared by a Court of law.

In the opinion of Ld. Members, merely by virtue an explanation attached to a draft model agreement annexed with the Rules framed by the State Government a vital and lawful provision of the agreements executed several years prior to enactment of RERA between the parties shall be declared void-ab-initio. This opinion is incorrect and not supported by any law or ruling of the Higher Courts. Firstly, the State executive is not competent to declare any provision of an agreement lawfully made

by the parties void even with prospective effect not to mention with retrospective effect. Such a law even if passed by the State Legislator will have to get the ascent of the President of India to be enforceable within the State. The State executive is competent to frame rules which can be applied only with prospective effect. It is simply not competent to declare any provision of a lawful agreement made between the parties void-ab-initio. Something which is not within the competency of even the State Legislature cannot be presumed to be within the competency of the State executive. More importantly, even the state executive have not expressed any such intent. Such an intent has been misread by the learned Members.

(b) The model agreement annexed with the rules framed by the State Government,

which came into force w.e.f. 27.05.2017, are mere guidelines for the prospective buyers and sellers of properties for entering into agreements while being placed at a level playing field in future. If consent of both the parties is free, then they may even enter into an agreement at variance with the draft model agreement which is only a guideline for protecting the interests of consumer so that they are not made to sign standard form of agreements. However, if both parties consciously desire to deviate from the model agreement, and that agreement is in accordance with laws of the land, the referred explanation with the model agreement cannot act as an impediment, much less rendering it void-ab-initio. The draft model agreement annexed with Rules cannot have the effect of amending and altering of the past agreements which

are at variance with it. The draft model agreements are meant to guide relationship of the parties in future. Further, model agreements cannot be called substantive law which in turn could alter the existing contractual obligations between the parties. The assumptions of the Hon'ble Member, therefore, in this regard cannot be accepted.

(c) My learned friends have used the term "discriminatory provision in the buyers agreement." As stated in earlier parts of this order, the Hon'ble Supreme Court has upheld the agreement which provide that the sellers would pay holding charges calculated at the rate of Rs.5/- per sq.ft. per month to the buyer in case the seller delays the delivery of possession to the buyer beyond the period agreed in the buyer's agreement.

The Hon'ble Supreme Court, however, has also held that a stipulation that in the event of buyer causing delay in making payments to the sellers, the buyer will be liable to pay an interest @ 24% as an unfair trade practice.

As per the law laid down by the Hon'ble Supreme Court this kind of unfair clause in the agreement can be revised and read down and the buyers liability for payment of interest for delayed payments can be suitably reduced to bring it to a reasonable level. This Authority should not go beyond this ruling and at its own level revise the vital terms and conditions of the agreement.

(d) In the instant case as well as in the referred case of Complaint No.113 of 2018-Madhu Sareen Vs. BPTP Ltd. even there exists a provision in the agreement

that the delayed payment by the buyer to the seller will invite an interest liability @ 18%. In reality, however, such a liability had actually not fallen upon the buyers. Even though there was such a provision but no liability had actually fallen upon the buyers. As per law laid down by the Hon'ble Apex Court, if it had actually fallen, then this Authority could have reduced it suitably. This Authority as well as other judicial bodies can mitigate the effect of an oppressive or unconscionable provision in the agreement if it had actually fallen upon the buyer, but this cannot be made a ground for re-writing other provisions of the agreement. The Authorities are empowered to undo the loss or damage suffered by the buyers at the hand of the seller. In this case as well as in the reference case no damage or loss has

been suffered by the buyers on account of the clause in the agreement which imposes a high interest penalty in the case of delay in making payments. The Authority could have undone such a loss if it had been actually suffered.

My learned friends have at their own level altered the provisions of the agreement entered into between the parties several years prior to enactment of RERA Act with the assumption that there is a disparity in the terms & conditions of both the parties, therefore, for the delay in delivery of possession a penal interest should be paid. This view is not correct.

(e) The entire gamut of economic activities, relationship of buyers and sellers and whole of trade and commerce runs on the basis of lawful agreements made between the parties. The provisions of the lawful

agreement and contracts ordinarily have to be treated sacrosanct. The system of rule of law protects lawful agreements. However, if there is any unconscionable provision in the agreement its effect can be mitigated by the courts and other empowered authorities but this does not empower the Authorities to re-write the agreements. It has to be agreed that many a times sellers are at a strong bargaining position compared with buyers. They enter into standard form of agreements leaving little choice to the buyers. In such situation the court of law is empowered to tone down the effect of the oppressive provision of the contract. As already stated above, the provisions that a very high interest is charged by the sellers in the event of a default in making payments by the buyers has been held unconscionable and accordingly its effect

has been mitigated. To declare a provision to be unconscionable the test is that the term has to be so unfair and unreasonable that it shakes the conscious of the Court. This has to be judged in each case on the basis of its own facts and circumstances. The only power with the Courts is to tone down the effect of unreasonable provision but it does not confer any power upon them to change the contractual relationship between the parties.

(f) Unconscionable provisions surely have to be toned down, but there may be some justification for differential penalties to be paid by buyers and sellers of real estate in the event of their respective defaults because of very different sets of challenge faced by them.

The developers Real Estate have to take various risks. They have to invest

upfront large amount of their own money before commencing a project. They have to obtain numerous clearances from the State Government agencies including Licensing Authorities, infrastructure entities, environment clearances and compliance with the myriads laws. They have to repeatedly face State agencies for obtaining approvals and clearances of their plans etc. In addition, they also have to face the risk of down trend in the market which may affect sale of the unsold assets . Additional risks are faced in the form of default in making payments by the buyers especially when market is slow. Even if a small percentage of buyers default in making timely payments the cash flow of entire project could come to a grinding halt.

Prior to enactment of RERA, relationship between the buyers and

sellers were regulated by ordinary law of the land which is the Indian Contract Act. Keeping in view the risks faced by developers it is not unreasonable for them to stipulate that defaulting buyer to shall pay higher rate of interest on the delayed payments. Surely, as per law pronounced by the Apex Court, such an interest cannot be unreasonable, shocking or unconscionable. If it is so, it shall be brought down.

At this juncture I would also add that there is difference between buying of ready to move in property, like buying goods of the shelf; and becoming part of an under development real estate project. In the later a buyer hopes to get the property at a relatively lower rates and to gain by way of appreciation in the value of the property when completed. Along with the hope of gain he also accepts

risks like delays on account of variety of eventualities including of the nature mentioned in foregoing paragraphs. The cost involved in the hope for gain, and the risk like delays in completion, are deemed to be incorporated in the agreement by way of differential liabilities of both the parties in the event of their respective defaults.

The buyer has the option to put in his money in a bank and earn interest on it and buy ready to move in property whenever needed. In this situation the cost of property may be higher but there is no risk involved. In the second situation when the buyers becomes a part of an under development project some amount of risk like delay in completion of the projects is involved. These decisions are pure discretion of the buyer to suit his convenience. The decision

given by my learned friends runs contrary to the way the market economy operates. Their interpretation of law will create imbalance in this vital sector of economy, the growth and development of which is also one of the responsibilities of the Authority.

In my view, the Courts and Authorities must exercise their powers with restrain and keep balance between parties. While oppressive provision of the agreement, as are shown and recognised as oppressive, have to be toned down but the Authorities cannot impose their own value system over the substantive provisions of the lawful agreements.

The orders passed by my learned friends is therefore, unacceptable and has the potential of creating imbalance in the relationship between the buyers and

sellers of the real estate. This Authority has been conferred with responsibility of balancing the relationships between the parties.

(g) To the aforesaid views, I would add a caveat. There may be variety of developers. There are developers who have faithfully invested the money collected from the buyers on the project itself but the project is facing difficulties and challenges of the kinds mentioned above. Further, there may be projects in which the money collected from the buyers may have been diverted or siphoned away.

Authorities are duty bound to evaluate the projects on these parameters. While in the former case a more sympathetic view could be taken, at the same time a very strict view must be taken in the later case. Remedies

therefore, have to be moulded keeping in view the facts of each case and after analysis of the facts of the case.

In the instant case, as well as in the referred case. No such analysis was made.

6.1 Next, my learned friends have ruled that RERA is not retrospective in nature but is retroactive in operation. The definition of retroactive given by learned colleagues is that anything that has already been done in terms of buyers agreement prior to coming into force of RERA cannot be undone but if something in relation to such agreements needs to be done after enforcement of RERA then such an action shall not be contrary to the provisions of the RERA. Accordingly to my learned friends the discriminatory clause of the agreement between the promoters and the buyers are illegal, not tenable and not enforceable.

I respectfully differ with the arguments given by my learned friends for the following reasons:-

(a) With regard to the discriminatory provisions a detailed reply has already been given in the foregoing paragraphs. This point need not be elaborated further

(b) My learned friends have assigned a meaning to the term "retroactive" which is not supported by any rulings of any court. Hon'ble Supreme Court in several cases as well as the Hon'ble Bombay High Court in Civil Writ Petition No.2737 of 2017 titled Neelkamal Realtors Suburban Pvt. Ltd. and another versus Union of India and Ors. have discussed in detail the concept of retrospectivity/ retroactivity of law.

The principal question before the Hon'ble High Court of Bombay was the constitutional validity of the various provisions of RERA Act. No specific legal dispute was before it for adjudication. While upholding constitutional validity of the RERA Act the Hon'ble Court has observed repeatedly that the RERA Act is prospective in nature. Views of the Government expressed through the learned Advocate General are also similar. The Hon'ble Court has used

the term retrospective/retroactive interchangeably. Hon'ble Court nowhere has supported the definition given by my learned friends. I reproduce below some relevant portions of the aforesaid judgement of the Hon'ble Bombay High Court which will clarify without any doubt that the RERA Act is meant to operate prospectively:-

Submissions made by the Learned Advocate General on behalf of the State.

1. **Para 55.**

"It was submitted by the learned Senior Counsel that the retrospective or retro-active law is one which takes away or impairs vested or accrued rights [Virender Singh Hooda v. State of Haryana (Supra) – para33]. The proviso to Section 3(1) of RERA provides that the projects which are ongoing on the date of commencement of RERA and for which completion certificates have not been issued required registration. Under the said provision, the projects which are already completed are not affected. No vested or accrued rights are being affected by the RERA. The obligations imposed by RERA applied prospectively i.e. after the commencement of RERA. The counsel has referred to para 69 of the affidavit-in-reply filed by the Union of India in support of the submissions, wherein it was averred that promoter is entitled to provide new timelines for project completion. The obligations imposed and consequences for breach of such obligations under RERA are all prospective in their operation. It is not made applicable to past acts which have been completed. It merely relied on continuing acts, although their commencement was antecedent in point

of time. Therefore, only a part of the requisites for action under RERA are antecedent to the coming into force of RERA."

2. **Para 57.**

"It was submitted that in any event no contractual rights are affected by RERA since its provisions operate so as to regulate the existing contracts and facilitate completion of construction in accordance with their terms. The date of contracts entered into by the petitioners with the purchasers is relevant and all that is to be seen is whether a completion certificate has been issued."

3. **Para 64.**

"None of the provisions of RERA imposes any penalty retrospectively even in the case of ongoing projects. The offences referred to in Chapter VIII (Sections 59 to 68) apply to offences committed after the commencement of RERA. The requirement to pay interest under Section 18 of the RERA is not a penalty since payment of interest is compensatory in nature in the light of the delay being suffered by the flat purchaser, who had paid for his flat but did not get the possession. Even assuming that the interest is penal in nature, the levy of interest is not retrospective but is only based on antecedent facts; it operates prospectively. The interest payable under Section 18 as per the definition of interest in Section 2(za) Explanation (ii), is the same interest that would have been payable by the flat purchaser for causing delay in payment."

4. **Para 65.**

"The provisions of Section 18 were framed to be an effective deterrent to stop practices which the Legislature considers against public interest. The learned Senior Counsel, in the alternative, submitted

that in case the court decides that Section 18 is penal in nature affecting the contractual rights entered into between the parties prior to its registration, then the provisions of Section 18 could be read down so as to require the payment of such interest only for the contractual period of delay after registration under the RERA and not from the date on which the flat was to be handed over under the agreement. In the circumstances, no penalty is being imposed retrospectively. The Legislature has the power to make laws with retrospective effect. Even assuming that RERA operates retrospectively, the same would not render it unconstitutional, unless the retrospectivity is shown to be excessive or harsh and injuriously affects a substantial or vested rights."

5. **Para 68.**

"..... .... The question whether an enactment is meant to operate prospectively or retrospectively has to be decided in accordance with well- settled principles .The cardinal principle is that statutes must always be interpreted prospectively, unless the language of the statutes makes them retrospective, either expressly or by necessary implication. Penal statutes which create new offences are always prospective, but penal statutes which create disabilities, though ordinarily interpreted prospectively, are sometimes interpreted retrospectively when there is a clear intendment that they are to be applied to past events. The reason why penal statutes are so construed was stated by Erle, C. J., in Midland Rly. Co. v. Pye (1861) 10 C.B. NS 179 at p. 191) in the following words:-

"Those whose duty it is to administer the law very properly guard against giving to an Act of Parliament a retrospective operation, unless the intention of the legislature that it should be so construed is

expressed in clear, plain and unambiguous language; because it manifestly shocks one's sense of justice that an act, legal at the time of doing it, should be made unlawful by some new enactment".

Submissions of applicants in Chamber

6. **Para 77.**

In para 77 a judgement of the Hon'ble Supreme Court Zille Singh V/s State of Haryana and Others [2004] 8SCC-1 have been quoted as follows:-

"13. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the Legislature to affect existing rights, it is deemed to be prospective only '*nova constitutio futuris formam imponere debet non praeteritis*' a new law ought to regulate what is to follow, not the past. (See : Principles of Statutory Interpretation by Justice G.P. Singh, Ninth Edition, 2004 at p.438). It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole (ibid., p. 440)."

Analysis of the Hon'ble Court

7. **Para 108.**

"Considering the extent of power conferred on the authority under Section 7, we need to put up a harmonious construction on the provision of Section 6

of RERA. The law confers powers under Section 7 on the competent authority, in the larger public interest to regulate the real estate sector. The authority shall be entitled to take into consideration reasons and circumstances due to which the project could not be completed within the extended aggregate period of one year as prescribed under Section 6. We, therefore, find that a balanced approach keeping in view the object and intent of the enactment and the rights and liabilities of promoter and allottee in larger public interest is to be adopted. The authority would exercise its discretion while dealing with the cases under Sections 6, 7, 8 read with Section 37 of RERA. We do not find that on the plea of the petitioners and for the reasons set out by the petitioners, first proviso to Section 6 needs to be declared as unreasonable, arbitrary, violating constitutional mandate of Articles 14, 19(1)(g) and 300-A of the Constitution of India. A harmonious and balance construction of the provisions shall suffice the purpose."

8. **Para 109**

"In case the promoter establishes and the authority is convinced that there were compelling circumstances and reasons for the promoter in failing to complete the project during the stipulated time, the authority shall have to examine as to whether there were exceptional circumstances due to which the promoter failed to complete the project. Such an assessment has to be done by the authority on case to case basis and exercise its discretion to advance the purpose and object of RERA by balancing rights of both, the promoter and the allottee. In such exceptional cases, the authority would be entitled to allow the same promoter to continue with the subject project for getting the remaining development work complete as per the directions issued by the authority. It shall not be interpreted to mean that in every case a promoter who fails to complete the project under the extended time under Section 6 would get further extension as of right."

9. Para 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 vs. Union of India and ors.[46] the Apex Court observed in paras 20 and 21 as under :-

20. Judicial Dictionary (13th Edn.) K.J. Aiyar, Butterworth, p. 857, states 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 creates 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 Disctionary, 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 transactions...." (T.C. Hartley, The Foundations of European Community Law 129 (1981).

`Retrospective- Looking back; contemplating what is past.

Having operation from a past time."

10. **Para 123.**

"The petitioners have challenged validity of Sections 18(1), (2), (3) and 40. As discussed above and in view of the object and scheme of RERA and considering the law laid down in respect of retrospectivity / retroactivity, we are of the view that the challenge made by the petitioners to these provisions as being violative of Articles 14 and 20 is not sustainable in law. The petitioners have failed to establish that the above stated statutory provisions needs to be struck down. We find that RERA has adequate mechanism, which balances the rights and obligations of the promoter, real estate agent and the allottee. The adjudicatory mechanism is prescribed at each level. The provisions of Section 71(1) refers to power to adjudicate. Such powers will be exercised by a person who has been a District Judge, after holding appropriate inquiry. It was submitted that there is no mechanism for adjudication in respect of amount of interest. If we peruse Section 71(3), it is made clear that adjudicatory authority would direct payment of compensation or interest as the case may be. Harmonious reading of these provisions would indicate that adequate mechanism and safeguards are prescribed by the RERA."

11. **Para 124**

"The entire scheme of the RERA is required to be kept in mind. It is already submitted during the course of hearing that in many cases helpless allottees had approached consumer forum, High Courts, Apex Court in a given fact situation of the case. The courts have been passing orders by moulding reliefs by granting interest, compensation to the allottees, and issuing directions for timely completion of project, transit accommodation during completion of project, so on and so forth. Under RERA now this function is assigned to the authority, tribunal. An appeal lies to the High Court. Under one umbrella, under one regulation and one law all the issues are tried to be resolved. Provisions of Section 71 refers to power to adjudicate. A District Judge is conferred with the power to adjudicate compensation under Sections 12, 14, 18 and 19. A promoter could very well put up his case before the adjudicator who deals with the issues in the light of the fact situation of each case. Therefore, there should not be any apprehension that mechanically compensation would be awarded against a promoter on failure to complete the development work....."

12. **Para 126**

"The another plea raised is as to why a promoter shall pay interest for the past contractual rights, in case of failure to complete the project after registration under RERA, till the possession is handed over. Under the scheme of the RERA it is clear by now that a promoter has to self assess and declare time period during which he would complete the project. But in case, inspite of making genuine efforts, a promoter fails to complete the project, then the concerned authorities, adjudicators, forums, tribunals would certainly look into genuine cases and mould their reliefs accordingly. We do not find that on that count the provisions of Section 18(1)(a) are to be declared as contrary and violative of Articles 14 and 19(1)(g). Considering the scheme of the RERA and the provisions of Section 18(1)(b), we are of the view

that the same are not contrary to Articles 14 and 19(1)(g) of the Constitution. The provisions cannot be struck down on the ground of challenge that its operation is retroactive in nature. Neither the provisions of Section 18(1)(a) and (b) violate Article 20 of the Constitution. The payment of interest under Section 18 is compensatory in nature [Abati Bezbaruah vs. Director General, Geological Survey of India – **(2003) 3 SCC 148** (para 18) and Alok Shanker Pandey vs. UOI – **(2007) 3 SCC 545** (para 9)].

13. **Para 127**

"The requirement to pay interest under Section 18 is not penal since payment of interest is compensatory in nature due to delay suffered by the flat purchasers (Alok Shanker Pandey vs. Union of India (Supra). Even assuming that the interest is penal in nature, levy of interest is not retrospective but is only based on antecedent facts; it operates prospectively. The interest payable under Section 18 is as per the definition of "interest" under Section 2(za) Explanation (ii), the same interest that would have been payable by the flat purchaser for delay in payment. Therefore, the payment of interest payable cannot be said to be penal in nature."

14. **Para 154**

"We are conscious of the fact that actual implementation of RERA needs to be closely monitored in years to come. RERA is not a law relating to only regulatory control over the promoter but its object is to develop the real estate sector, particularly, the incomplete projects across the country. The problems are enormous and it is time to take a step forward to fulfil the dream of the Father of the Nation – Mahatma Gandhi to wipe every tear from every eye."

Concurring but separate judgement of Hon'ble Justice RG Ketkar

15. **Para 285.**

"For the reasons already indicated, aforesaid decisions are not applicable to the facts of the present case. I have already indicated that the provisions of RERA are prospective in nature. The penalty under Sections 18, 38, 59, 60, 61, 63 and 64 is to be levied on account of contravention of provisions of RERA, prospectively and not retrospectively. These provisions, therefore, cannot be said to be violative of Articles 14, 19(1)(g), 20(1) and 300-A of the Constitution of India."

6.2 It is evident from the Para 121 of judgement of the Hon'ble High Court of Bombay that retrospective and retroactive expressions are used interchangeably and the meaning assigned to the term "retroactive" by my learned friends is incorrect and unsupported.

7 Learned Members have suggested that had the legislator intended for providing delay compensation to the buyers of ongoing projects in accordance with the agreement for sale for the period prior to coming into force of RERA, then the language of Section 18 and Section 94 of RERA Act would have been provide a very differently. I respectfully differ from my friends. The statute enacted by the Parliament has

to be read as it is. No Court, or Authority should conjuncture about what it could have been or it should have been. Legislative intent has to be read from the provisions of the law itself; from its preamble; and from the law interpreted and declared by the higher Courts. I consider it unnecessary to go any further into this aspect.

8 **Conclusions**:

On the basis of foregoing discussion I conclude and order as follows:-

(i) All agreements executed between the buyers and sellers of the real estate prior to coming into force of the RERA Act shall be treated valid and enforceable as such except those clauses of the agreement which have been declared by the higher courts, and universally acknowledged as such, as unfair trade practices.

(ii) The provisions of the agreements by which a liability of specified amount of money per Sq. ft. of super area to be paid by the sellers to the buyers in the event of delay in handing over the possession shall be treated valid and enforceable in all those cases where the

possession of the apartment/plot has been or is proposed to be offered within the time schedule accepted by the Authority. However, where extraordinary delay of say more than two years has occurred without any justification, the Authority at its own level may allow reasonable compensatory interest for the period of extraordinary delay beyond two years. Such a decision shall depend upon facts of each case.

(iii) Where the possession is not likely to be offered and the Authority orders refund of the money, the money shall be refunded with interest calculated from the date when the money was paid by the buyer to the seller at the rate prescribed in Rules 15 of the RERA Rules.

(iv) The delivery of the possession of apartment/plot to the buyer with the delay, or refund of money by the seller to the buyer, as the case may be, shall be without prejudice to the right of the buyer for being compensated for the mental harassment and agony faced or any other special damage suffered.

Compensation to the aggrieved party can be awarded by way of compensatory interest i.e. interest beyond the rate of interest declared reasonable by the higher court or by way of awarding lump-sum compensatory amount. For awarding compensation which is not quantifiable from record and it requires evaluation of evidence furnished by both the parties, the appropriate forum shall be the Adjudicating Officer. However, if it can be easily calculated from the record, the Authority may itself award it as its own level after passing speaking orders.

(v) The principle tasks of the Real Estate Regulatory Authorities are to ensure delivery of possession of apartments to the buyers in accordance with the schedule given in the agreement or the revised schedule agreed by the Authorities; compliance of the provisions of the agreement in letter and spirit; ensure that both the parties fulfil the obligation cast upon them by agreements and the law; ensure that developers do not exploit buyers by raising unjustified demands; that quality of the apartments is as per

agreement; that all facilities as are agreed are provided; and enforce compliance of its orders etc.

(vi) In the course of discharge of its functions if the Authority comes to a conclusion that one of the parties have unjustifiably suffered at the hand of the other, and that party deserves to be compensated for the same, then the Authority may itself refer the matter to the Adjudicating Officer for determining compensation to be paid to the aggrieved party by holding an enquiry in a lawful manner.

Further, any aggrieved party seeking compensation may directly approach the Adjudicating Officer under Section 71 of the Act. The Adjudicating Officer shall invite claims and counter claims along with justifications thereof before arriving at a conclusion for award of compensation by way of compensatory interest or in the form of award of lump-sum damages.

(vii) The provisions of RERA Act, Rules and Regulations shall be deemed to have come into force with

prospective effect and will not have retrospective/retro-active effect, as elaborated below:-

(a) All new projects or unsold parts of an ongoing projects advertised by the promoters after coming into force of RERA Act have to be fully compliant with the provisions of the RERA Act, RERA Rules and the Regulations framed by the Authority.

(b) After coming into force of RERA Act, all new agreements for sale in respect of apartments/plots, whether in a completed or an ongoing project or a new project, shall be executed in accordance with the model agreement annexed with the RERA Rules.

(c) All agreements executed between the buyers and sellers of real estate prior to coming into force of RERA Act shall remain valid and lawfully enforceable except to the extent that provisions declared unfair trade practices by the higher courts shall be toned down in

accordance with the orders of higher courts w.e.f. the date of execution of such agreements.

(d) RERA can entertain any complaint against the promoters of even a completed project, where possession also has been handed over for getting the subsisting contractual obligations discharged by either of the parties. The expression subsisting obligations will include deficiency in services which the promoter had to provide after completion of the project.

(e) All agreements made preceding the date RERA came into force shall be enforced by RERA in accordance with the terms and conditions settled between the parties. If promoters of an ongoing project have revised the schedule of completion of a project while getting the project registered with RERA, the revised schedule will not be automatically applicable on the existing buyers. Existing buyers will be entitled to delay compensation in accordance with law.

9. Applying the above principles on the facts of the instant case I order that the original agreement as well as the revised agreement made between the parties shall remain enforceable. For the delay caused in handing over the possession the respondent shall be liable to pay the delay compensation as agreed to in the agreement. It is made out from the submissions made by the complainant that respondent has also levied an interest totalling Rs.6,03,482/- on the complainant for the delayed payments. I order that the interest charged by the respondent shall be revised and will be calculated at the rate provided for in Rule 15 of the RERA Rules i.e. SBI MCLR+2%. The excess interest charged by the respondent shall be refunded. The respondent shall issue a fresh offer of possession within a period of 30 days and also furnish a revised statement of accounts in accordance with this order along with the offer of possession. This order will be without prejudice to the right of the complainant for seeking compensation on account of mental harassment and agony suffered. The

claim for the compensation may, however, be preferred before the Adjudicating Officer.

I order accordingly.

(Rajan Gupta)
Chairman