BEFORE THE HARYANA REAL ESTATE APPELLATE TRIBUNAL

Appeal No.52 & 64 of 2018
Date of Decision: 03.11.2020

Appeal No.52 of 2018

Emaar MGF Land Ltd.

Registered Office: at 306-308, Square One, C-2 District Centre, Saket, New Delhi-110016.

Corporate Office: at Emaar Business Park, MG Road, Sikanderpur, Sector-28, Gururam-122002, Haryana.

Appellant

Versus

1. Ms. Simmi Sikka, Resident of A-662, Sushant Lok, Phase-I, Gurugram-122001.
2. Haryana Real Estate Regulatory Authority, Gurugram.

Respondents

Appeal No.64 of 2018

Ms. Simmi Sikka d/o Sh. Ashok Sikka, Resident of A-662, Sushant Lok, Phase-I, Gurugram, Haryana.

Appellant

Versus

M/s Emaar MGF Land Limited, Emaar Business Park, MG Road, Sikanderpur, Sector-28, Gurugram.

Respondent

CORAM:

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

Argued by: Shri Ashish Chopra, Advocate, with Ms. Swati Dayalan, Advocate, learned counsel for the appellant in Appeal No.52 of 2018 and for respondent in Appeal No.64 of 2018.

Shri Vibhor Bagga, Advocate, learned counsel for respondent in Appeal No. 52 of 2018 and for appellant in Appeal No.64 of 2018.

ORDER:

JUSTICE DARSHAN SINGH (Retd.) CHAIRMAN:

This judgment of ours shall dispose of both the appeal mentioned above having arisen out of the common order dated 21.08.2018 passed by the learned Haryana Real Estate Regulatory Authority, Gurugram (hereinafter called the 'Authority') in Complaint No.07 of 2018.

2. In order to avoid the confusion with respect to the identity of the parties, the appellant in Appeal No.52 of 2018 and respondent in Appeal No.64 of 2018 shall be referred as the 'Promoter'. Similarly, the respondent in Appeal No.52 of 2018 and appellant in Appeal No.64 of 2018 shall be referred as the 'Complainant' who is the allottee of the shop space in question.

3. The factual matrix can be summed up as under: -

That the complainant Ms. Simmi Sikka had booked a shop space bearing no.EPS-SF-019 measuring 928.50 sq. ft. in the project Emerald Plaza at Emerald Hills, Sector-65, Gurugram. The total sale consideration of the shop space was Rs.86,91,134/-. The complainant has paid a sum of Rs.21,74,234/- and Rs.6,96,472/- on 21.03.2014. A further sum of Rs. 30,00,000/- was paid in advance which was to be counted towards the early rebate payment with interest @ 12%

on 19.04.2014. The 'Retail Space Buyer's Agreement' (hereinafter called the 'Buyer's Agreement') was executed on 09.05.2014. The date for completion of the project was thirty months from the date of execution of the Buyer's Agreement. The promoter defaulted to maintain the time schedule for completion of the construction due to their internal infighting. The period of 30 months stipulated for completion of the construction has expired on 09.11.2016. The complainant has also pleaded that the notice received by her to make payment of Rs.20,00,000/- on 25.08.2017 was a fraudulent act on the part of the promoter. It was also alleged that the shop space booked was measuring 928.65 sq. ft. but the area of the shop space has been reduced by 228 sq. ft. It is alleged that inspite of repeated reminders, no reply was received by the complainant which caused her mental agony and torture. The possession was offered on 22.02.2018.

4. Though, initially the complaint was filed to seek compensation but during the pendency of the complaint learned counsel for the complainant gave up the relief for compensation and pleaded to pursue the complaint for issuance of direction to the promoter for payment of interest of every month's delay till handing over of the possession. Thus, the relief sought by the complainant was with respect to the interest for delayed possession and for the shortfall of the covered area of 228 sq. ft.

Thus, the complainant sought for issuance of the directions to redress her grievance by exercising the powers by the learned Authority under Section 37 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter called 'the Act') as the promoter has violated the provisions of Section 11(4)(a) of the Act. Hence the complaint.

5. The complaint was contested by the promoter raising the preliminary objections that the provisions of the Act were not applicable being an un-registered project; that the project was not covered within the definition of an 'ongoing project' as defined under rule 2(1)(o) of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter called the 'Rules'). It was pleaded that the promoter had already submitted an application for issuance of the 'Occupancy Certificate' to the competent authority. It was further pleaded that as per sub-code 4.10(5) of the Haryana Building Code, 2017, if there is no response from the competent Authority within 60 days from the date of submitting the application, then the occupancy certificate is deemed to have been issued. It was pleaded that the application for occupancy certificate was moved on 22.05.2017 and accordingly the deemed date of issuance of occupancy certificate comes to 21.07.2017 and the actual occupancy certificate in pursuance to the said application was granted on 08.01.2018. The promoter has also challenged the

jurisdiction of the learned Authority to entertain the complaint for compensation and interest for violation of Sections 12,14, 18 and 19 of the Act and it was pleaded that such a complaint is only maintainable before the Adjudicating Officer under rule 29 of the rules read with sections 31 and 71 of the Act. All other averments raised in the complaint were controverted by the promoter and dismissal of the complaint was prayed for.

6. After appreciating the contentions of the parties, the material on record, various clauses of the Act and the Rules, the learned Authority vide impugned order dated 21.08.2018 disposed of the complaint with the following observations: -

> *"(a) The authority has complete jurisdiction to decide the present complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer.*
>
> *(b) The Real Estate (Regulation & Development) Act, 2016 came into force on 01.05.2018 and on that date the respondent had not received completion certificate from the concerned authorities and thus the respondent was under a legal obligation to get the project registered with this authority within three months from 01.05.2017 which the respondent has failed to do so. Further even on this ground itself this authority has the jurisdiction to adjudicate the present complaint and further to initiate action against the respondent as per the Act for their non-*

compliance of getting their project registered under the Act.

(c) *Even if the definition of ongoing project as given under rule 2(1)(O) of the Haryana Real Estate (Regulation and Development) Rules, 2017 is accepted although it is not in consonance with the provisions of the Real Estate (Regulation and Development) Act, 2016, then also in that case that part of any project for which part completion/ completion/ Occupancy Certificate or part thereof has been granted on or before publication of these rules is not included in the definition of 'ongoing project'. Accordingly, projects which do not have Occupation Certificate or part Occupation Certificate on the date of publication of the Haryana Real Estate (Regulation and Development) Rules, 2017 i.e. 28.07.2017 are not exempted from the definition of the ongoing project and are thus registrable. Keeping in view the fact that the Haryana Real Estate (Regulation and Development) Rules, 2017 were published on 28.07.2017 accordingly, the authority may allow a period of three months thereafter for applying for registration without invoking any penal provision or late fee. Even after lapse of this additional period the promoter was not in possession of part completion/ completion or part occupation/ Occupation certificate for this part of the project accordingly violated section 3(1) of the Act for which separate action is to be initiated.*

(d) In the present case the application for Occupancy Certificate/part Occupation Certificate for part project was made on 22.05.2017. The respondent took the plea that occupation certificate was deemed to be granted after sixty days i.e. on 21.07.2017, which is prior to the publication of rules on 28.07.2017. The application was incomplete and incomplete application is no application in the eyes of law. The fact that application was incomplete is evident from the perusal of Occupation Certificate/part occupation certificate granted by DTCP on 08.01.2018 only after completion of formalities and submission of requisite certificates. There were many deficiencies in the application such as fire NOC was not in existence on the date of application and same was issued on 29.11.2017 by the Director Fire Services apart from many other short comings. That the respondent at the time of filing of its application for partial occupation/Occupation Certificate of the part project submitted an incomplete application and thus cannot take the aid of the concept of deemed occupation certificate and that is why the project needs to be registered with the authority.

That the mere filing of the application for part of the project for occupancy certificate by the respondent under the sub-code 4.10 of the Haryana Building Code, 2017 does not absolve from the liability of the respondent from getting their project registered with this authority and

moreover in the light that the application itself filed by the respondent was not as per the law.

(e) The advance amount of Rs.30,00,000/- which the complainant had paid to the respondent and had to be rebated with interest @ 12% p.a., has been adjusted upto 21.02.2018 i.e. a day prior to the date of offer of possession. Thus, the respondent has fulfilled his obligation regarding payment of interest on the advance amount of Rs.30,00,000/-.

(f) The prayer of the complainant regarding payment of interest at the prescribed rate for every month of delay, till handing over of possession on account of failure of the promoter to give possession in accordance with the terms of the agreement for sale as per provisions of section 18(1) is hereby allowed. The authority issues directions to the respondent u/s 37 of the Real Estate (Regulation and Development) Act, 2016 to pay interest at the prescribed rate of 10.45% per annum on Rs.29,00,706/- the amount of the complainant with the promoter on the due date of possession i.e. 09.11.2016 upto the date of offer of possession i.e. 22.02.2018. The payment of interest on the advance amount of Rs.30,00,000/- has already been paid by the promoter as mentioned in the above para. The interest to be allowed on the investment of the complainant comes out to be Rs.3,89,851/-.

The complainant reserves the right to seek compensation in addition if required, the

application for which may be filed separately to be adjudicating officer.

(g) As per the accounts of statement submitted by respondent, the outstanding amount as on the date of offer of possession, which the complainant has to pay is Rs.7,04,582/-. The respondent is liable to pay to the complainant interest of Rs.3,89,851/-. The authority directs the respondent to adjust the interest amount of Rs.3,89,851/- in the final outstanding amount of Rs.7,04,582/- against the complainant. The balance amount payable to respondent after adjustment of the interest comes out to Rs.3,14,781/-.

(h) Since the respondent has reduced the area of the said unit by 228 sq. ft. therefore the complainant shall only be charged for the area being offered and not for the total area mentioned in the agreement. The parties may accordingly settle their accounts and possession be handed over as per law."

7. Aggrieved with the aforesaid findings, the promoter has filed the appeal bearing No.52 of 2018 wherein it has sought the setting aside of the impugned order dated 21.08.2018.

8. The complainant/allottee has also filed the appeal bearing No.64 of 2018 wherein she has sought setting aside of the impugned order to the extent of grant of interest for delayed possession @ 10.45% per annum. It is pleaded that she may be

awarded compound interest for delayed possession @ 24% per annum.

9. We have heard learned counsel for the parties and have meticulously examined the record of the case. The parties have also filed the written arguments.

10. Vide order dated 19.11.2019 as a result of discussions with learned counsel for the parties, the following points for determination were settled in the main appeal no.52 of 2018: -

> *"(i) Whether the provisions of the Real Estate (Regulation and Development) Act, 2016 are not applicable to the projects which do not require registration.*
>
> *(ii) What projects are covered in the definition of 'ongoing projects' as provided in rule 2(i)(o) of the Haryana Real Estate (Regulation and Development) Rules, 2017.*
>
> *(iii) The jurisdiction of the Authority to deal with and adjudicate the matter in hand."*

11. Initiating the arguments, learned counsel for the promoter contended that it is an admitted fact that the project in question is not registered with the learned Authority nor the same requires registration as per the provisions of Section 3 of the Act. He contended that the learned Authority has erred in holding that the project was registrable. He contended that the first proviso to Section 3 of the Act provides that the projects

which are 'ongoing' on the date of commencement of the Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the project within a period of three months from the date of commencement of the Act. He further contended that Section 3(2) of the Act exempts the projects mentioned in sub clauses (a) to (c) thereof from registration. Clause (b) of Section 3(2) of the Act exempts the project which has received the "Completion Certificate" prior to the commencement of the Act.

12. He contended that Section 3 of the Act mandates prior registration before the promoter shall advertise, market, book, sell or offer for sale or invite persons for purchase in any manner any plot, apartment or building in any real estate project or the part thereof. He further contended that obligations of the promoter would only arise if he carries on the activities mentioned in Section 2(zk) of the Act for the purpose of sale of the apartment or plot. Thus, he contended that it could not be suggested that the said obligations would be *de hors* of registration of the real estate project. He contended that the provisions of the Act only become applicable once the project is registered.

13. He further contended that it is also evident from the Legislative intent at the time of discussions on the Real Estate

(Regulation and Development) Bill, 2013 in Parliament. From the debate in the Parliament and the replies given by the concerned minister, the intention was only to bring the registered projects within the ambit of the Act.

14. He further contended that in case **Neelkamal Realtors Suburban Pvt. Ltd. And anr. Vs. Union of India and others 2018(1) RCR (Civil) 298 (DB)**, the Hon'ble Bombay High Court has held that where a project is not complete, it shall be required to be registered under the Act.

15. He pleaded that learned Authority has wrongly mentioned that if the provisions are not applied to the un-registered projects, the allottees will be rendered remediless. The learned Authority has lost sight to section 88 of the Act which provides that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other laws at the time being in force. So, the allottees can very well avail the remedies before the Consumer Forum and even to some extent before the Civil Court.

16. He further contended that even to bring the unsold inventory of a project within the purview of the Act, such a project has to be the one, which would require registration so that the Authority could inter alia monitor, ensure and see the fulfilment of the purpose of registration. He contended that the learned Authority has misdirected and rather self-contradicted

in holding that the obligation post-expiry of validity of registration would even arise in the cases of projects exempted from registration as once the project stands exempted from registration or is not required to be registered, there can be no question of fulfilment of any obligation under the provisions of the Act. He further contended that even Section 11 of the Act refers to the promoters who have got their real estate projects registered.

17. He further contended that the 'ongoing projects' have been defined under rule 2(1)(o) of the Rules, 2017. He further contended that the learned Authority has wrongly held that the development works mean external development works as well as internal development works. It is a fact of common knowledge that the external development of the area is carried out by the government agencies and not by the private promoters. He further contended that in its wisdom, the Legislature has mentioned that the "Completion Certificate" or the 'Occupancy Certificate' shall be as per the prevalent local laws. As per Rule 16 of the Haryana Development and Regulation of Urban Areas Act, 1976 (hereinafter called '1976 Rules'), the promoter is only required to carry out the internal development works as per sanctioned design and specification but the Authority has lost sight of its statutory provisions.

18. He further contended that the Authority cannot travel beyond the rules framed by the State Government but the learned Authority has not only transgressed its jurisdiction and passed the impugned order which is itself in contradiction, but has also failed to take into consideration the local laws prevailing in the State of Haryana.

19. He contended that as per exception 1 to rule 2(1)(o) of the Rules, where an application under Rule 16 of the 1976 Rules or under sub-code 4.10 of Haryana Building Code, 2017 (hereinafter called the 'Building Code') has been made to the competent authority on or before publication of the rules, the said project shall not be considered 'ongoing project'. He contended that in this case, the promoter has moved the application for issuance of the 'Occupancy Certificate' on 22.05.2017 before the publication of the Rules and the same was granted in pursuance of the said application on 08.01.2018. He further contended that the learned Authority was not competent to conclude that the application was incomplete as only the competent authority i.e. Director, Town & Country Planning has powers to declare an application as incomplete under the Building Code and 1976 Rules. He further contended that as per sub code 4.10(5) of the Building Code, the 'Occupancy Certificate' is deemed to have been issued after completion of 60 days from the date of filing the application.

Thus, he contended that the 'Occupancy Certificate' shall be deemed to have been issued in this case within 60 days from 22.05.2017, whereas the Rules have become applicable w.e.f. 28.07.2017. So, even before the publication of the Rules, the Occupancy Certificate was deemed to have been issued and the project was not registerable. Consequently, the provisions of the Act were not applicable to the project in question.

20. He further contended that the learned Authority had no jurisdiction to entertain the complaint moved by the complainant which was for grant of compensation and interest. He contended that there was no provision in the Act to give up the claim of compensation to bring it within the jurisdiction of the Authority. It was only the Adjudicating Officer who could have entertained the complaint filed by the complainant in view of Section 71 of the Act. Thus, he contended that the learned Authority has usurped the functions of the Adjudicating Officer and exceeded its jurisdiction to entertain the complaint.

21. He further contended that the provisions of the Act cannot operate retrospectively and penalise any of the parties. The provisions of the Act have only prospective operation, especially when it *inter alia* seeks to impose new burden. He contended that it is well settled law that a Statute shall operate prospectively unless retrospective operation is clearly made out in the language of the Statute. He contended that the Buyer's

Agreement in this case was executed prior to the Act came into force. Thus, it is not an agreement for sale as laid down in Annexure-A of the Rules and the provisions of the Act cannot be made applicable.

22. He further contended that the interest as per Rule 15 of the Rules has been wrongly awarded by the learned Authority. The interest under Rule 15 can only be awarded in case of refund and not for delay in delivery of possession.

23. He further contended that during the pendency of this appeal, the Rules have been amended vide notification dated September 12, 2019. The amendment of the said Rules shall only be prospective and not retrospective. So, the amendment of Rule 15 will not be applicable to this case. He contended that the complainant was only entitled for interest as per the terms and conditions of the agreement for sale and not as per Rule 15 of the Rules.

24. He further contended that even the due date of delivery of possession has been wrongly determined by the learned Authority to be November, 2016.

25. Finally, learned counsel for the appellant has contended that the learned Authority has not followed the correct procedure of Rule 28 of the Rules. Thus, he pleaded that the impugned order dated 21.08.2018 passed by the learned Authority is liable to be set aside.

26. Per contra, Shri Vibhor Bagga, learned counsel for the complainant contended that bare reading of Section 3 of the Act makes it mandatory for all the 'ongoing projects' to get it registered within three months from the commencement of the Act if the said project has not received the completion certificate on the date of commencement of the Act. He contended that the Act came into force on 01.05.2016. On that date, the promoter had not received any "Completion Certificate" from the competent authority. Thus, the promoter was under a legal obligation to get the project registered with the learned Authority within three months from 01.05.2016 but the promoter has failed to do so.

27. He further contended that Rule 2(o) of the Rules is in total contradiction to Section 3 of the Act. It enlarged the definition of 'ongoing project' and provided a window of more than a year to the builders like the present promoter. He contended that when there is a conflict between the provisions of the Act, Rules and Regulations framed thereunder, the Act will prevail. To support his contentions, he relied upon case ***National Stock Exchange Member vs. Union of India & Anr. 125(2005) DLT 165.*** Thus, he contended that the present promoter was required to get its project registered with the learned Authority under Section 3 of the Act and Rule 2(o) of the Rules cannot come to its aid.

28. He further contended that the promoter has not applied for issuance of the 'Occupancy Certificate' for whole licensed projects i.e. Emerald Hills. The application dated 22.05.2017 was only with respect to the part of the said project namely "Emerald Plaza" which is a commercial project within the project. He contended that mere filing of the application for 'Occupancy Certificate' will not exclude the project from the purview of the 'ongoing project'. Even as per Rule 2(o)(ii) of the Rules, the exemption can be claimed if 'part Occupancy Certificate' has been granted on the date of publication of the Rules, though the said provision is contrary to Section 3 of the Act. Admittedly, no 'Occupancy Certificate' or 'part Occupation Certificate' was granted in favour of the promoter on or prior to 28.07.2017, the date on which the Rules came into force. He further contended that moreover the application submitted by the promoter was incomplete. The fire NOC was received on 29.11.2017 much after enforcement of the Rules. So, the promoter is not entitled to any benefit under sub-code 4.10(5) of the Building Code to contend that the 'Occupancy Certificate' shall be deemed to have been issued after completion of the period of 60 days from the date of submission of the application.

29. He further contended that once the learned Authority was looking into the compliance of the provisions by the promoter, it could have always taken into consideration as to

whether the act committed by the promoter was complete in all respects as per the requirement of 1976 Rules and the Building Code.

30. He further contended that 'Occupancy Certificate' and 'Completion Certificate' are two different certificates issued as per the local laws of the State of Haryana for two different purposes. Mere application for 'Occupancy Certificate' will not bring the project out of the purview of the Act. The promoter was required to get its project registered and the provisions of the Act are fully applicable to the project in question.

31. He further contended that the relief sought by the complainant for compensation was given up. The complainant has pursued the complaint for compliance of obligations by the promoter under Section 18(1) of the Act, as the promoter had failed to deliver possession on the due date i.e. 09.11.2016 and has sought interest for delayed possession. So, the learned Authority had every jurisdiction to entertain the complaint. He further contended that the learned Authority has rightly determined the due date of possession in view of the terms and conditions of the agreement.

32. Learned counsel for the complainant contended that the complainant has filed her own appeal bearing no.64 of 2018, wherein the modification of the impugned order has been sought to the limited extent with respect to the grant of interest. He

contended that as per terms and conditions of the agreement, the interest for delayed payment was 24% per annum. So, the complainant is also entitled to the same rate of interest and therefore the impugned order dated 21.08.2018 passed by the learned Authority should be modified to this extent.

33. We have duly considered the aforesaid contentions.

Points for determination no.(i) and (ii) :

(i) Whether the provisions of the Real Estate (Regulation and Development) Act, 2016 are not applicable to the projects which do not require registration.

(ii) What projects are covered in the definition of 'ongoing projects' as provided in rule 2(i)(o) of the Haryana Real Estate (Regulation and Development) Rules, 2017.

34. The above-mentioned points for determination are being taken together as the findings recorded in one issue will definitely affect the result of the other issue and these issues are interconnected.

35. Before proceeding further, we can refer some of the provisions of the Act and the Rules with advantage to appreciate the controversy. Thus, the relevant provisions of the Act are reproduced below: -

"2. Definitions: In this Act, unless the context otherwise requires:

(q) "completion certificate" means the completion certificate, or such other certificate, by whatever

name called, issued by the competent authority certifying that the real estate project has been developed according to the sanctioned plan, layout plan and specifications, as approved by the competent authority under the local laws;

(s) "development" with its grammatical variations and cognate expressions, means carrying out the development of immovable property, engineering or other operations in, on, over or under the land or the making of any material change in any immovable property or land and includes re-development;

(t) "development works" means the external development works and internal development works on immovable property;

(w) "external development works" includes roads and road systems landscaping, water supply, sewerage and drainage systems, electricity supply transformer, sub-station, solid waste management and disposal or any other work which may have to be executed in the periphery of, or outside, a project for its benefit, as may be provided under the local laws;

(zb) "internal development works" means roads, footpaths, water supply, sewers, drains, parks, tree planting, street lighting, provision for community buildings and for treatment and disposal of sewage and sullage water, solid waste management and disposal, water conservation, energy management, fire protection and fire safety requirements, social infrastructure such as education health and other public amenities or any other work in a project for its benefit, as per sanctioned plans;

(zf) "occupancy certificate" means the occupancy certificate, or such other certificate, by whatever name called, issued by the competent authority permitting occupation of any building, as provided under local laws, which has provision for civic infrastructure such as water, sanitation and electricity;

3. Prior registration of real estate project with Real Estate Regulatory Authority*. —*

(1) No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act:

Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act:

Provided further that if the Authority thinks necessary, in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority, and the provisions of this Act or the rules and regulations made thereunder, shall apply to such projects from that stage of registration.

(2) Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required—

(a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases:

Provided that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act;

(b) where the promoter has received completion certificate for a real estate project prior to commencement of this Act;

(c) for the purpose of renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment,

plot or building, as the case may be, under the real estate project.

Explanation. —For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a stand alone real estate project, and the promoter shall obtain registration under this Act for each phase separately."

Rule 2(1)(o) is as under: -

"2. Definitions; (1) In these rules, unless and context otherwise requires-

(o) "on going project" means a project for which a license was issued for the development under the Haryana Development and Regulation of Urban Area Act, 1975 on or before the 1st May, 2017 and where development works were yet to be completed on the said date, but does not include:

(i) any project for which after completion of development works, an application under Rule 16 of the Haryana Development and Regulation of Urban Area Rules, 1976 or under sub code 4.10 of the Haryana Building Code 2017, as the case may be, is made to the Competent Authority on or before publication of these rules; and

(ii) that part of any project for which part completion/completion,occupation certificate or part thereof has been granted on or before publication of these rules."

36. The main thrust of the contentions raised by learned counsel for the promoter is that the project in question was not registerable as it does not fall within the purview of 'ongoing project' on the ground that the application for issuance of the 'Occupancy Certificate' was moved on 22.05.2017 i.e. much prior to the date of publication of the Rules i.e. 28.07.2017.

37. The 'ongoing project' has not been defined in the Act. As a matter of common-sense word 'ongoing' indicates the projects in which the development works have not been completed and the development activities are still going on. By enacting explanation (i)(ii) of Rule 2(1)(o), the Government of Haryana has excluded certain projects from the purview of the 'ongoing projects' which is evident from the provisions reproduced above.

38. First proviso to Section 3(1) of the Act provides that the projects which were 'ongoing' on the date of commencement of the Act and for which the completion certificate has not been issued, shall make an application to the learned Authority for registration of the said project within a period of three months from the date of commencement of the Act. The position further becomes clear from Section 3(2(b) of the Act that the registration of the real estate project shall not be required where the promoter had received the completion certificate for the said project prior to the commencement of the Act. Thus, if we read Section 3 of the Act, between the lines, it is evident that only that project shall be excluded from the purview of the 'ongoing project' which had received the completion certificate prior to the commencement of the Act and such project will not require registration.

39. In the Rules, the purview of 'ongoing project' has been restricted. It has been provided in explanation (i) of Rule 2(1)(o) that those projects for which after completion of development works an application under Rule 16 of 1976 Rules or under sub-code 4.10 of the Building Code was made to the competent authority on or before publication of the rules will not be 'ongoing project'. Rule 2(1)(o)(ii) of the Rules further provides that the 'ongoing project' does not include any part of any project for which part completion/completion, occupancy certificate or part thereof had been granted on or before publication of these rules. Rules 2(1)(o)(i) and 2(1)(o)(ii) are apparently inconsistent to Section 3 of the Act.

40. We are conscious of the fact that this Tribunal has no jurisdiction to declare any rule ultra vires but at the same time Article 254 of the Constitution of India mandates that the law made by the Parliament shall prevail. Article 254 of the Constitution becomes applicable in case of inconsistency between the law enacted by the Parliament and the law made by the State. Here in this case the Act has been enacted by the Parliament. The rules are subordinate legislation by the appropriate government i.e. State of Haryana. The subordinate legislation is also a legislation of the State according to Section 84 of the Act; thus, it cannot be stated that the provisions of Article 254 of the Constitution of India will not apply to

subordinate legislation. Therefore, we are of the opinion that the provisions of Section 3 of the Act will prevail over the explanations appended to Rule 2(1)(o) of the Rules. This legal position is also illustrated from the latest authoritative pronouncement of the Division Bench of our Hon'ble High Court in a bunch of writ petitions lead case being ***CWP No.38144 of 2018 Experion Developers Pvt. Ltd. Vs. State of Haryana and others*** decided on 16.10.2020, wherein the Hon'ble High Court has laid down as under: -

> 74. The Act is intended to apply even to 'ongoing' Real Estate Projects. The expression 'ongoing project' has not been defined under the Act but under Rule 2 (o) of the Haryana Rules which reads as under:
>
> > "ongoing project" means a project for which a license was issued for the development under the Haryana Development and Regulation of Urban Area Act, 1975 on or before the 1st May, 2017 and where development works were yet to be completed on the said date, but does not include:
> >
> > (i) any project for which after completion of development works, an application under Rule 16 of the Haryana Development and Regulation of Urban Area Rules, 1976 or under sub code 4.10 of the Haryana Building Code 2017, as the case may be, is made to the Competent Authority on or

before publication of these rules and

(ii) that part of any project for which part completion/completion, occupation certificate or part thereof has been granted on or before publication of these rules."

41. It was further laid down as under: -

"77. Rule 3 of the Haryana Rules talks of application for registration and Rule 4 of 'additional disclosure by Promoters of ongoing projects.' Therefore, all 'ongoing projects' i.e. those that commenced prior to the Act, and in respect of which no completion certificate is yet issued, are covered under the Act. It is plain that the legislative intent was to make the Act applicable to not only to the projects which were to commence after the Act became operational but also to ongoing projects. The issue that arises is whether this is permissible in law?"

42. The Hon'ble High Court further laid down as under: -

"78. The decision of the Bombay High Court in ***Neelkamal Realtors Suburban Pvt. Ltd.*** *(supra) has dealt with this issue quite extensively. The conclusion of the Bombay High Court that this retroactive application of the Act, as distinguished from retrospective effect, in relation to ongoing project is consistent with the legal position in this regard. A very conscious*

decision was taken that the Act should apply not only to new projects but to existing projects as well."

43. It was further laid down as under: -

"84. The above submissions have been considered. The Statement of Objects and Reasons preceding the enactment have already been referred to. The relevant passages of the judgment of Bombay High Court in ***Neelkamal Realtors Suburban Pvt. Ltd.*** *(supra) have also been referred to. The very concept of 'ongoing project' is unique to the Act. The legislature was conscious of the impact that the Act would have on such 'ongoing projects'. A collective reading of Section 3 with Section 2 (o) and 2 (zn) indicates that care was taken to specify which of the projects would stand exempted. Section 3 (2) (b) of the Act is categorical that no registration of the project would be required where "the promoter has received completion certificate for real estate project prior to the commencement of this Act." It cannot thus be argued that without satisfying the above requirement or the other two contingencies in Sections 2 (a) and 2 (c) of the Act, a promoter can avoid registering an 'ongoing' project under the Act."*

44. It was further laid down as under: -

"86. The Act was consciously made applicable to 'ongoing projects' i.e. those for which a CC has yet not been received by the promoter. There is also no question of any violation of settled law regarding overriding of the agreements of sale entered into prior to the date of Act coming into force and

Haryana Rules. <u>Those agreements of sale would obviously be subject to the new legal dispensation put in place by the Act and the Rules</u>. In light of the object and purpose of the Act, no comparison can be drawn with the other enactments which were subject matter of the decisions of Supreme Court relied upon by TDI."

45. Thus, the Hon'ble High Court has categorically laid down that as per Section 3(2)(b) of the Act, the registration of project will not be required where the promoter has received the completion certificate for real estate project prior to the commencement of the Act. It is pertinent to mention that completion certificate as defined in Section 2(q) and occupancy certificate as defined in Section 2(zf) are entirely for different purposes. It was further laid down that without satisfying the above requirement or the other two contingencies provided in sub-section 3(2)(a) and 3(2)(c) of the Act, a promoter cannot avoid registering an 'ongoing project'. Consequently, only those projects which had got the completion certificate before the commencement of the Act will not require registration and will certainly fall beyond the purview of the 'ongoing project'. All other projects will require registration and will be squarely covered by the definition of the 'ongoing project'.

46. It is not the case of the promoter that the completion certificate of this project was issued by the competent authority before the commencement of the Act. As already mentioned, the

promoter is seeking exemption from registration simply on the ground that the application for occupancy certificate was moved on 22.05.2017 i.e. before the publication of the rules. It was also alleged that the occupancy certificate shall be deemed to have been issued on 21.07.2017 i.e. on completion of 60 days from the date of moving the application as provided in sub-code 4.10(5). But this plea raised by learned counsel for the promoter is misconceived. Code 4.10 of the Building Codes reads as under: -

> *"4.10. Occupation Certificate*
>
> *(1) Every person who intends to occupy such a building or part thereof shall apply for the occupation certificate in Form BR-IV(A) or BR-IV(B), which shall be accompanied by certificates in relevant Form BR-V(1) or BR-V(2) duly signed by the Architect and/ or the Engineer and along with following documents:*
>
> *(i) Detail of sanctionable violations from the approved building plans, if any in the building, jointly signed by the owner, Architect and Engineer.*
>
> *(ii) Complete Completion drawings or as-built drawings along with completion certificate from Architect as per Form BR-VI.*
>
> *(iii) Photographs of front, side, rear setbacks, front and rear elevation of the building shall be submitted along*

with photographs of essential areas like cut outs and shafts from the roof top. An un-editable compact disc/ DVD/ any other electronic media containing all photographs shall also be submitted.

(iv) Completion certificate from Bureau of Energy Efficiency (BEE)Certified Energy Auditor for installation of Rooftop Solar Photo Voltaic Power Plant in accordance to orders/ policies issued by the Renewable Energy Department from time to time.

(v) Completion Certificate from HAREDA or Bureau of Energy Efficiency (BEE) Certified Energy Auditor for constructing building in accordance to the provision of ECBC, wherever applicable.

(vi) No Objection Certificate (NOC) of fire safety of building from concerned Chief Fire Officer or an officer authorized for the purpose.

(2) No owner/ applicant shall occupy or allow any other person to occupy new building or part of a new building or any portion whatsoever, until such building or part thereof has been certified by the Competent Authority or by any officer authorized by him in this behalf as having been completed in accordance with the permission

granted and an 'Occupation Certificate' has been issued in Form BRVII. However, Competent Authority may also seek composition charges of compoundable violations which are compoundable before issuance of Form BRVII. Further, the water, sewer and electricity connection be released only after issuance of said occupation certificate by the Competent Authority.

(3) The 'Occupation Certificate' shall be issued on the basis of parameters mentioned below:- The Haryana Building Code, 2017 24 Haryana Government (i) Minimum 25% of total permissible ground coverage, excluding ancillary zone, shall be essential for issue of occupation certificate (except for industrial buildings) for the first time or as specified by the Government: Provided, in case of residential plotted, minimum 50% of the total permissible ground coverage shall be essential to be constructed to obtain occupation certificate, where one habitable room, a kitchen and a toilet forming a part of submitted building is completed. (ii) The debris and rubbish consequent upon the construction has been cleared from the site and its surroundings.

(4) After receipt of application, the Competent Authority shall communicate in writing within eighteen days, his decision for grant/ refusal of such permission for occupation of the building in Form BR-VII. The E-register shall be maintained as specified in Code-4.8 for maintaining record in respect of Occupation Certificate.

(5) If no communication is received from the Competent Authority within 60 days of submitting the application for "Occupation Certificate", the owner is permitted to occupy building, considering deemed issuance of "Occupation certificate" and the application Form BR-IV (A) or BR-IV(B) shall act as "Occupation Certificate". However, the competent authority may check the violations made by the owner and take suitable action.

(6) If the owner or Architect or Engineer or Consultant as mentioned in Code 4.10(1)(i), (iv) and (v) as the case may be, submits a wrong report while making application under this Code or if any additional construction or violation is reported to exist at site or has concealed any fact or mis-represented regarding completion of construction of building along with its

> *eligibility for seeking occupation certificate or before the completion of such report, he shall be jointly and severally held responsible for such omission and complaint against the Architect for suspension of his registration and the owner shall be liable to pay for the penalty as may be decided by the competent authority after giving an opportunity of hearing. Further, if it is emerged that the information is concealed by Engineer/ Consultant/ Owner, necessary penal proceedings will be initiated along with debarring Engineer/ Consultant/ Architect from practicing in the State of Haryana."*

47. The aforesaid provisions provide that the application for issuance of occupancy certificate shall be moved in the prescribed forms and accompanied by the documents mentioned in sub-code 4.10(1). It is an admitted fact that the application submitted by the promoter was not accompanied with the fire NOC which has been issued only on 29.11.2017. By that time, the rules had already become applicable.

48. We do not find any substance in the plea raised by learned counsel for the promoter that the learned Authority had no jurisdiction to see as to whether the application moved by the promoter was complete or incomplete as this function falls

within the administrative jurisdiction of the Director Town & Country Planning, because once the promoter was claiming issuance of deemed occupancy certificate before the learned Authority on the basis of the provisions of the Building Code, the learned Authority was fully justified to ascertain as to whether the provisions of the Building Code were complied with or not. In ***Experion Developers Pvt. Ltd. Vs. State of Haryana and others'*** case (Supra), the Hon'ble High Court has laid down that if it is the case of the promoter that completion certificate has been deliberately delayed, that would be examined by the Adjudicating Officer, Authority or the Appellate Tribunal as the case may be and the decision on that issue shall be taken into account while deciding the case. So, the learned Authority could not be a silent spectator to the deficiency in the application submitted by the promoter for issuance of the occupancy certificate. Thus, in view of the deficiency in the application, the promoter cannot claim the deemed issuance of the occupancy certificate. The occupancy certificate has been issued for this project on 08.01.2018 and by that time the Rules had already become applicable. Therefore, this project was neither issued occupancy certificate nor the completion certificate on or before the date of enforcement of the Act. So, there is no escape from the conclusion that the project in question required registration under Section 3 of the Act. Once

it is found that the project in question required registration, it will certainly be considered to be the 'ongoing project' and provisions of the Act, Rules and Regulations framed thereunder will become applicable.

49. Even otherwise, the plea raised by learned counsel for the promoter that the provisions of the Act will not be applicable to the projects which do not require registration, is also without any substance. We have already dealt with this issue in Appeal No.182 of 2019 titled as ***M/s Omaxe Limited Vs. Mrs. Arun Prabha***, decided on 19.12.2019 as under: -

> *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."

50. Thereafter, we had referred to un-amended rule 28 and 29 of the Rules which also provide remedy to the aggrieved person to file the complaint before the Authority or the Adjudicating Officer, as the case may be, without any reference to registered or unregistered project.

51. In ***M/s Omaxe Limited Vs. Mrs. Arun Prabha*** (Supra), we have further observed as under: -

> *"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*** **Appeal No.49 of 2018 titled as *M/s Silver City Construction Ltd. versus State of Punjab and others*, decided on July 24, 2019.**

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."

52. We reiterate the same legal position in this case and the provisions of the Act shall become applicable even to the un-registered projects or the projects which do not require registration with respect to the fulfilment of the obligations as per the provisions of the Act, Rules and Regulations framed thereunder.

53. Learned counsel for the promoter has pleaded that the legislative intent as per the debate in the Parliament was to apply the provisions of the Act to the future projects but the said plea is again devoid of any merits. The court can take the aid of report of Parliamentary Committee for the purpose of appreciating historical background of the statutory provisions and it can also refer to a Committee Report or the speech of the minister on the floor of the Parliament if there is any kind of ambiguity and equivocality in the provisions of enactment of the Act. But in our opinion the legislative intent is clear from the plain/literal meaning of the provisions of the Act. So, there is no need to refer to the debate in the Parliament to interpret the provisions of the Act.

54. Learned counsel for the promoter has also pleaded that the provisions of the Act cannot be made applicable retrospectively. The Division Bench of the Hon'ble High Court in ***Experion Developers Pvt. Ltd. Vs. State of Haryana and***

others case (Supra), has laid down by relying upon the observations of the Hon'ble Bombay High Court in ***Neelkamal Realtors Suburban Pvt. Ltd. And anr. Vs. Union of India and others*** case (Supra) that retroactive application of the Act, as distinguished from retrospective effect, in relation to 'ongoing project' is consistent with the legal position in this regard and a very conscious decision was taken that the Act should apply not only to new projects but to existing projects as well. These observations of the Hon'ble High Court is the complete answer to this plea raised by learned counsel for the promoter.

55. Consequently, the project in question falls within the purview of the 'ongoing project' and required registration. The provisions of the Act, Rules and Regulations made thereunder had become applicable to the project in question.

56. **Point for determination No.(iii): -**

(iii) The jurisdiction of the Authority to deal with and adjudicate the matter in hand.

57. No doubt, initially the complaint was filed by the complainant for grant of compensation and interest. But during the pendency of the complaint, learned counsel for the complainant had stated that the complaint be considered for compliance of obligations by the promoter under Section 18(1) keeping in view the fact that the promoter had failed to give possession on the due date i.e. 09.11.2016 as per agreement for sale. Thus, the complainant had claimed the interest for every

month of delay till handing over of the possession. The other relief was with respect to the shortfall of 228 sq. ft. in the covered area of the shop space. It cannot be disputed that the claim regarding interest for delayed possession and dispute with respect to the shortfall in the covered area will squarely fall within the jurisdiction of the learned Authority.

58. The claim can be abandoned or substituted or scale down at any state of the lis. Though the strict provisions of the Code of Civil Procedure, 1908 (hereinafter called the 'C.P.C.') are not applicable to the proceedings under the Act, yet the principles provided therein are the important guiding factors. Order XXIII Rule 1(1) of the C.P.C. reads as under: -

> *" ORDER XXIII*
>
> *WITHDRAWAL AND ADJUSTMENT OF SUITS*
>
> *[1. Withdrawal of suit or abandonment of part of claim— (1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:*
>
> *Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court."*

59. The aforesaid provisions clearly show that at any time after the institution of the suit, the plaintiff may abandon his

suit or a part of his claim against all or any of the defendants. Thus, the complainant being dominus litis can choose to abandon the relief of compensation and to claim the alternative/substituted relief for grant of interest for delayed possession at any stage, which is clearly an exercise by the complainant within the purview of Order XXIII Rule 1(1) C.P.C. and is legally permissible. Reference can be made to cases **Shri Umakant B. Kenkre & Another Vs. Shri Yeshwant P. Shirodkar & others, 1999(3) BomCR 611** and **Gurmeet Kaur and others Versus Hardeep Singh and another, 2005(2) R.C.R. (Civil) 149**. Thus, we cannot find any fault in the jurisdiction exercised by the learned Authority.

60. In addition to the points for determination discussed above, learned counsel for the parties have also raised certain ancillary issues at the time of arguments.

61. The plea raised by learned counsel for the promoter that the learned Authority was not competent to award the interest at the prescribed rate as per rule 15 of the Rules as the said rate of interest is only permissible in case of refund, does not hold any ground, particularly in view of amended rules. The Government of Haryana vide notification dated 12.09.2019 has amended the Rules. The amended Rule 15 of the Rules reads as under: -

> *"**15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and sub-section (7) of section 19]**-For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate+2% ;*
>
> *Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public."*

62. The above said rule provides that for the purpose of proviso to Section 12; 18; and sub-sections (4), (7) and 19, the prescribed rate of interest shall be rate of State Bank of India highest marginal cost of lending rate +2%. So, this prescribed rate of interest shall be applicable even in case of the interest payable for delay in delivery of possession. The Hon'ble High Court in ***Experion Developers Pvt. Ltd. Vs. State of Haryana and others*** case (Supra) has laid down as under:

> *"71. The further issue that arises is regarding the prospective application of the amended Rules 28 and 29 of the Haryana Rules. Here, the settled legal proposition is that a change of forum would be 'procedural'. It was explained by the Supreme Court in **Securities and Exchange Board of India v. Classic Credit Limited (2018) 13 SCC 1**, as under:*

> *"34……In our considered view, the legal position expounded by this Court in a large number of judgments including New India Insurance Co. Ltd. v. Shanti Misra, (1975) 2 SCC 840; Securities and Exchange Board of India v. Ajay Agarwal, (2010) 3 SCC 765; and Ramesh Kumar Soni v. State of Madhya Pradesh, (2013) 4 SCC 696, is clear and unambiguous, namely, that procedural amendments are presumed to be retrospective in nature, unless the amending statute expressly or impliedly provides otherwise.*
>
> *And also, that generally change of 'forum' of trial is procedural, and normally following the above proposition, it is presumed to be retrospective in nature, unless the amending statute provides otherwise.*
> *35. We have also no doubt, that alteration of 'forum' has been considered to be procedural, and that, we have no hesitation in accepting the contention advanced on behalf of the SEBI, that change of 'forum' being procedural, the amendment of the 'forum' would operate retrospectively, irrespective of whether the offence allegedly committed by the accused, was committed prior to the amendment."*

72. In view of the settled legal position, the position that emerges is this. As long as the complaint is yet to be decided as on the date of the notification publishing the Haryana Amendment Rules 2019, that will now be decided consistent with the procedure outlined under the amended Rules 28 and 29 of the Haryana Rules. In other words, if the pending or future complaint seeks only compensation or interest by way of compensation, and no other relief, it will be examined only by the

AO. If the pending or future complaint seeks other reliefs i.e. other than compensation or interest by way of compensation, the complaint will have to be examined by the Authority and not the AO. If the pending or future complaint seeks a combination of reliefs, the complaint will have to be examined first by the Authority. If the Authority finds there to be a violation of Sections 12, 14, 18 and 19 of the Act by the promoter, and the complaint is by the allottee, then for determining the quantum of compensation such complaint will be referred by the Authority to the AO in terms of the amended Rule 28 of the Haryana Rules. A complaint that has already been adjudicated prior to the coming into force of the amended Rules 28 and 29 of the Haryana, and the decision has attained finality, will not stand reopened."

63. Thus, the Hon'ble High Court has unequivocally laid down that the amended rule shall be applicable to the pending cases. So, the amended Rule 15 of the Rules will be applicable in this case.

64. Taking the case from another angle, the allottee was only entitled to the delayed possession charges/interest only at the rate of Rs.15/- per sq. ft. per month as per clause 18 of the Buyer's Agreement for the period of such delay; whereas, the promoter was entitled to interest @ 24% per annum compounded at the time of every succeeding instalment for the delayed payments. The functions of the Authority/Tribunal are

to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the homer buyers. This Tribunal is duty bound to take into consideration the legislative intent i.e. to protect the interest of the consumers/allottees in the 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. There are various other clauses in the Buyer's Agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the Buyer's Agreement dated 09.05.2014 are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the Buyer's Agreement will not be final and binding.

65. To support this view reference can be made to case **Pioneer Urban Land & Infrastructure Limited vs. Govindan Raghavan, 2019(2) R.C.R. (Civil) 738** wherein 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 on the contractual rate.

66. The legislature in its wisdom in the subordinate legislation i.e. the rules, has determined the prescribed rate of interest as per rule 15 of the Rules. So, the rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases. Thus, there is no error in the rate of interest

awarded by the learned Authority for delay in delivery of possession of the shop space to the complainant.

67. Learned counsel for the promoter has disputed that the due date of possession has been wrongly determined to be 09.11.2016. He contended that the promoter was entitled for a period of 30 months plus four months grace period as per Clause 16 of the Buyer's Agreement. The relevant portion of Clause 16 of the Buyer's Agreement reads as under: -

> *"16. POSSESSION*
>
> *(a) Time of handing over the Possession:*
>
> *(i) That the possession of the Retail Spaces in the Commercial Complex is proposed to be handed over to the Allottee(s), within thirty (30) months of the execution hereof, subject however to the Allottee(s) having strictly complied with all the terms and conditions of this Agreement and not being in default under any provisions of this Agreement and all amounts due and payable by the Allottee(s) under this Agreement having been paid in time to the Company. The Company shall give notice to the Allottee(s), offering in writing to the Allottee to take possession of the Retail Spaces for this occupation and use ("Notice of Possession").*

> *(ii) The Allottee(s) agrees and understands that the Company shall be entitled to a grace period of one hundred and twenty (120) days over and above the period more particularly specified herein-in-above in sub-clause (a)(i) of Clause 16, for applying and obtaining necessary approvals in respect of the Commercial Complex."*

68. As per the above provisions in the Buyer's Agreement, the possession of Retail Spaces was proposed to be handed over to the allottees within 30 months of the execution of the agreement. Clause 16(a)(ii) of the agreement further provides that there was a grace period of 120 days over and above the aforesaid period for applying and obtaining the necessary approvals in regard to the commercial projects. The Buyer's Agreement has been executed on 09.05.2014. The period of 30 months expired on 09.11.2016. But there is no material on record that during this period, the promoter had applied to any authority for obtaining the necessary approvals with respect to this project. The promoter had moved the application for issuance of occupancy certificate only on 22.05.2017 when the period of 30 months had already expired. So, the promoter cannot claim the benefit of grace period of 120 days. Consequently, the learned Authority has rightly determined the due date of possession.

69. We do not find any substance in the contentions of Shri Vibhor Bagga, Advocate, learned counsel for the complainant that the complainant is entitled to interest @ 24% per annum for the delay in delivery of possession. As already discussed, the provisions of the Act and the Rules made thereunder had become applicable to the project in question, so the complainant shall be entitled to the prescribed rate of interest only as per Rule 15 of the Rules. Thus, the rate of interest awarded by the learned Authority in favour of the complainant for delay in delivering possession is also perfectly legal and does not require any interference by this Tribunal.

70. Thus, keeping in view our aforesaid discussions, the project in question required registration as no completion certificate was issued to the promoter by the competent authority on or before the commencement of the Act and therefore the project in question falls within the purview of the 'ongoing project'. As a result of abandoning the claim of compensation, the learned Authority had every jurisdiction to adjudicate the complaint filed by the complainant. The provisions of the Act being retroactive in nature, will apply to the present project. We also do not find any error in the findings of the learned Authority with respect to the determination of the due date of the offer of possession of the retail space of the shop and the rate of interest. The complainant cannot claim

compound interest @ 24% for delay in delivery of possession as prayed for in the cross appeal bearing no.64 of 2018.

71. Consequently, the impugned order passed by the learned Authority does not suffer from any legal infirmity or illegality calling for any interference by this Tribunal. Resultantly, both the appeals being without any merit are hereby dismissed.

72. No orders as to costs.

73. The copy of this judgment be communicated to learned counsel for the parties/parties and the learned Authority.

74. The original judgment be attached with appeal no.52 of 2018 and the certified copy thereof be attached with appeal no.64 of 2018.

75. Files be consigned to the records.

Announced:
November 03rd, 2020

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

Inderjeet Mehta
Member (Judicial)

Anil Kumar Gupta
Member (Technical)

CL

Emaar MGF Land Ltd.
Versus
Ms. Simmi Sikka & anr.
Appeal No.52 of 2018

Present: None.

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

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

File be consigned to the records.

Announced:
November 03rd, 2020

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

Inderjeet Mehta
Member (Judicial)

Anil Kumar Gupta
Member (Technical)

CL