BEFORE THE HARYANA REAL ESTATE APPELLATE TRIBUNAL

Appeal No.21 of 2019
Date of Decision: 20.05.2020

M/s Pivotal Infrastructure Pvt. Ltd., 2nd Floor, Shubham Tower, NIT Faridabad, Haryana.

Appellant

Versus

Prakash Chand Arohi, 2A/06, NIT Faridabad.

Respondent

CORAM:

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

Argued by: Shri Rohan Gupta, Advocate, Ld. Counsel for the appellant.
Shri Anand Bishnoi, Advocate, Ld. Counsel for the respondent.

ORDER:

JUSTICE DARSHAN SINGH (Retd.) CHAIRMAN:

The present appeal under Section 44 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter called 'the Act') has been preferred by appellant/promoter against the order dated 04.09.2018 passed by learned Haryana Real Estate Regulatory Authority, Panchkula (hereinafter called 'the Authority) whereby the complaint filed by the respondent/allottee was disposed of with certain directions.

Judgment - Haryana Real Estate Appellate Tribunal

2. As per averments in the complaint filed by the respondent/allottee, he applied for a flat of the size of 1650 sq.ft. in 'Takshila Garden' (presently known as 'Royale Heritage') vide application dated 14.06.2010 and paid the booking amount of Rs.2.00 lacs to the appellant/promoter. The appellant/promoter had written the letter dated 18.06.2010 that the possession will be delivered within 36 months from the date of start of construction i.e. 15.09.2010, meaning thereby, the possession was to be delivered by 15.09.2013. The allotment letter was issued on 29.09.2010. The 'Apartment Buyer's Agreement' (hereinafter called 'the Agreement') was executed on 14.02.2011 with offer of possession within 42 months. The total cost of the flat, as per the details given in the allotment letter and the buyer's agreement, was Rs.30,07,750/-. The complainant had already made the total payment of Rs.30,91,384/- up to 01.10.2013. The offer of possession was given on 08.12.2017 with a delay of about three years which was unreasonable. It was alleged that the appellant/promoter by its unfair activities and to extort the hard earned money regularly harassed the respondent.

3. The respondent/allottee has also challenged the change of super area from 1650 sq. ft. to 1815 sq. ft., demand for enhanced External Development Charges (EDC), Goods and Service Tax (GST), claim for electricity consumption, legal

Judgment - Haryana Real Estate Appellate Tribunal

and administrative charges and up-gradation charges. Various deficiencies in the flat were also pointed out in the complaint.

4. The respondent/allottee has sought the compensation for the losses to the tune of Rs.30,29,430/- i.e. towards interest on delayed possession, house rent and payment of additional amount and extra charges. The demand of charges for revised super area, enhanced EDC, GST, electricity charges and interest claimed by the appellant/promoter was sought to be declared null and void. It is also prayed that the offer of possession dated 08.10.2017 is not valid as the flat was still incomplete. Hence the complaint.

5. The appellant/promoter contested the complaint by raising the preliminary objections that the learned Authority had no jurisdiction to entertain and adjudicate the present complaint as per the provisions of the Act and the provisions of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter called 'the Rules'), as the appellant had already applied for grant of Occupation Certificate on 12.08.2016. The appellant had applied for registration of the remaining eight towers of the project vide application dated 28.07.2017. It is pleaded that as the appellant had not applied for registration of the tower in dispute under the provisions of the Act and the Rules made

Judgment - Haryana Real Estate Appellate Tribunal

thereunder, so the learned Authority had no jurisdiction to entertain and adjudicate upon the complaint.

6. The appellant/promoter has denied the allegations with respect to the unfair trade practice and that it was promised to deliver the possession within 36 months from the alleged date of start of construction dated 15.09.2013. It is pleaded that the construction of this tower started only on 15.04.2012. The appellant/promoter also denied the execution of the buyer's agreement dated 14.02.2011, rather it is pleaded that the respondent/allottee has executed the buyer's agreement only on 29.03.2013 and as per the terms of the said agreement, the physical possession was to be delivered by 28.09.2016. The respondent/allottee has knowingly and wilfully executed the buyer's agreement dated 29.03.2013. Therefore, he cannot allege that the delivery of possession was promised by 2013 or 2014. It is further pleaded that the total price of the flat excluding the taxes and other charges was Rs.33,72,490/-. After inclusion of the taxes and other charges in terms of the agreement dated 29.03.2013, the total price of the disputed flat will come to Rs.45,65,517/- which the respondent/allottee is bound to pay prior to taking over the physical possession of the allotted unit.

7. It is further pleaded that the super area was revised as per the terms of the buyer's agreement. The respondent

Judgment - Haryana Real Estate Appellate Tribunal

has given a written acknowledgment letter dated 05.03.2012 wherein he has accepted the increase in the super area. It is further pleaded that the demand for enhanced EDC cannot be stated to be illegal as the same has been made in order to protect its interest to recover the enhanced EDC from the respective allottees. The respondent/allottee was liable to pay the GST as applicable. It is further pleaded that upgradation of the flat is carried out when the allottee comes to take over the physical possession of the allotted unit. If the upgradation is carried out earlier, it will either deteriorate, damage or stolen due to the unit lying closed and un-attended. It is further pleaded that the construction of the tower is complete and the flat will be furnished and upgradation will be started only when the respondent/allottee will come forward to take over the physical possession thereof. With these pleas the appellant/promoter pleaded for dismissal of the complaint.

8. On appreciating the contentions raised by the learned counsel for the parties and appreciating the documents taken on record, the present complaint was disposed of by the learned Authority by giving the following directions: -

(i) That the increase in the super area should be calculated on pro-rata by diving the entire commonly useable area of the project with the number of total apartments existing thereon.

Judgment - Haryana Real Estate Appellate Tribunal

(ii) That the demand of GST was unjustified. With respect to the VAT, the appellant should consult a service tax expert and to convey to the respondent/allottee the amount which he is liable to pay up to the deemed date of possession i.e. 10.10.2013.

(iii) The appellant was directed to charge the actual price of the electricity meter as indicated in the purchase bill or as per the actual charges levied by the electricity department after supplying a copy thereof.

(iv) The enhanced EDC will be charged from the complainant only after the vacation of stay by the Hon'ble High Court. In case the liability accrues, then the respondent/allottee shall pay the same to the appellant/promoter within 15 days, failing which, he will be liable to pay interest equivalent to the rate chargeable by the State Government.

(v) The demand for upgradation of the common usable area from the individual allottee was held to be unjustified. However, the appellant was to claim the upgradation charges only on the carpet area of the respondent/allottee.

(vi) The appellant was directed to pay the delayed compensation for 23 months as mentioned in the Statement of Account @ SBI MCLR +2%.

(vii) The appellant was directed to hand over the possession to the respondent/allottee complete in all respects by providing all the facilities in terms of the buyer's agreement and the respondent/allottee was directed to make all the payments as arrived at on the

Judgment - Haryana Real Estate Appellate Tribunal

basis of calculations made in the impugned order within one month from the fresh demand.

9. By writing of separate minority judgment, the learned Chairman agreed with the findings of the learned Members in the majority judgment except issue No.11 relating to compensation payable to the respondent/allottee for delay in offer of possession as he was of the view that the respondent/allottee shall be entitled for delayed compensation as agreed to in the buyer's agreement.

10. Aggrieved with the aforesaid order, the present appeal has been preferred by the appellant/promoter.

11. We have heard Shri Rohan Gupta, Advocate, learned counsel for the appellant and Shri Anand Bishnoi, Advocate, learned counsel for the respondent. Learned counsel for both the parties have also filed the written arguments. We have also meticulously examined the record of the case.

12. Initiating the arguments, learned counsel for the appellant contended that the legislature felt necessity to enact the Act for regulation and promotion of the real estate sector, to ensure the sale of apartments in an efficient and transparent manner and to protect the interest of the customers. He contended that as per Section 3(1) of the Act, the project within the Planning Area is required to be

Judgment - Haryana Real Estate Appellate Tribunal

registered which is intended to be sold or marketed or advertised. He has drawn our attention to the definition of 'real estate project' as provided in Section 2(zn) and contended that the legislature intended to regulate only the units or plots or apartments which were to be put to sale after coming into force of the Act. He contended that meaning thereby the provisions of the Act shall only be applicable to the unsold units of an ongoing project which the promoter intends to sell in the market post registration of the project and not to the units already sold.

13. He contended that the first proviso to Section 3(1) of the Act requires registration of the ongoing project within three months for which the completion certificate has not been issued. In the second proviso, the provision has been made for registration of the project beyond the Planning Area with the requisite permission of the local authority and it has been specifically provided therein that the provisions of the Act, Rules and Regulations made thereunder, shall apply to such projects from the stage of registration. By comparing the terminology of first and second proviso to section 3(1) of the Act, he contended that the legislature in its wisdom has restrained itself from making the Act, Rules and Regulations applicable to the ongoing projects from the stage of registration. He contended that as per the rule of

Judgment - Haryana Real Estate Appellate Tribunal

interpretation, the proviso appended to the main provision is intended to never achieve more than the main provision itself. To support his contention, he relied upon cases **S. Sundaram Pillai and others Vs. R. Pattabiraman and others, AIR 1985 SC 582** and **Ali M.K. and others Vs. State of Kerala and others 2003(11) SCC 632.**

14. He further contended that registration of a project under the Act and applicability of the provisions of the Act, are two different and distinct matters. Simply with the registration of the project, the provisions of the Act shall not be automatically applicable. The registration of the project is pre-requisite only for the unsold apartments of the ongoing projects and it will not be applicable to the apartments already allotted or sold.

15. He contended that the unit in dispute was sold and allotted to the appellant in the year, 2010 i.e. much prior to the enactment of the Act. The subsequent registration of the project with the Authority will not make the provisions of the Act applicable to the unit in dispute. He has also drawn our attention to Clause 20 of the condition of registration to stress his plea that the provisions of the Act will only be applicable to the unsold or unallotted units.

16. He contended that the Occupation Certificate of the towers consisting the unit of the respondent/allottee has already been applied on 01.05.2017. The learned Authority

Judgment - Haryana Real Estate Appellate Tribunal

has limited the applicability of the terms and conditions of the registration to the remaining unsold units of the project. Thus, he contended that none of the terms of the Registration Certificate impliedly or expressly makes the provisions of the Act applicable to all the existing contracts/agreements.

17. He further contended that the legislature never intended to make the provisions of the Act retrospectively and retroactively applicable to cover the units already sold prior to the commencement of the Act. Though the legislature was well aware that large number of real estate projects were going on and some of the units were already sold. The legislature never intended to cause upheaval in the real estate sector by applying the provisions of the Act and to alter the terms governing the already sold apartments. He further contended that the existing agreement for sale executed between the promoter and allottee of an ongoing project has neither been invalidated nor amended nor supplemented in any manner. To support his attention, he has drawn our attention to explanation (a) of Annexure-A (Draft Format of Agreement for Sale) as annexed to the Rules. He contended that any dispute qua the allotted units prior to the commencement of the Act will be governed by the terms and conditions of the existing agreement. He contended that the learned Authority has wrongly interpreted the provisions of the Act and the Rules by

Judgment - Haryana Real Estate Appellate Tribunal

awarding the compensation at SBI MCLR+2% rate under Rule 15 of the Rules.

18. He contended that the legislature never intended to enact a legislation to grant benefit to one party at the cost of other party to the existing transactions. The acts committed prior to the new enactment are to be dealt with as per the existing provisions. Any harsher penalty prescribed by the new legislation shall only be applicable to the acts committed thereafter. To support his contention, he relied upon case **District Collector, Vellore District Vs. K. Govindaraj, (2016)4 Supreme Court Cases 763**.

19. He further contended that in order to interpret a legislative provision, the intention of the legislature, motive and the philosophy of the relevant provisions, the goals to be achieved by enacting the same, have to be taken into consideration. To support his contention, he relied upon case **Mukund Dewangan Vs. Oriental Insurance Company Limited, AIR 2017 Supreme Court 3668**. He further contended that the new legislation cannot apply retrospectively unless it is specifically provided.

20. He further contended that the provisions of the Act only prescribe for registration of the ongoing project on the date of commencement of the Act but any dispute between the promoter and the allottee shall has to be adjudicated upon in terms of the Agreement for sale executed between the parties

Judgment - Haryana Real Estate Appellate Tribunal

and the provisions of the Act shall not be applicable to any such dispute. He contended that this is the only scenario which is applicable to the case in hand. In the alternative, he contended that if this Tribunal reaches to the conclusion that the provisions of the Act are applicable, then the appellant was permitted to complete the project by 31.03.2019, whereas the appellant had offered the possession to the respondent/allottee vide letter dated 08.12.2017. Therefore, there is no delay in offering the physical possession of the allotted unit.

21. By drawing our attention to the definition of the agreement for sale provided in Section 2(c) of the Act and Section 4(2) of the Act, he again contended that the provisions of the Act will only be applicable to the future sale of apartments. By referring to the provisions of Section 11(4)(h), 11(5), 13, 14, 15, 16, 19(4) and 19(6) of the Act, learned counsel for the appellant pleaded that the Act does not create any distinction between the agreement for sale executed prior to or after the commencement of the Act. The provisions of the Act never intended to re-write or amend or supplement or suspend the terms of the agreement for sale executed prior to the enactment of the legislation and the rights of the parties are to be determined in terms of the terms and conditions of the existing agreement. Any other interpretation will lead to confusion and contradictions.

Judgment - Haryana Real Estate Appellate Tribunal

22. He further contended that the learned Authority had no jurisdiction to adjudicate the dispute between the promoter and the allottees as it is none of the functions of the Authority as provided in Section 32 and 34 of the Act. The learned Authority has no jurisdiction to entertain the complaint with respect to the claim of compensation. Such complaints fall within the jurisdiction of the Adjudicating Officer as per Section 71 of the Act. Functions of the Authority are limited to provide the measures to facilitate the conciliation between the promoter and the allottees as specified under Section 32(g) of the Act. He contended that learned Authority can only impose the penalty or interest for non-compliance of the provisions of Section 11(4)(a) of the Act by exercising the powers under Section 38 of the Act. The recourse for breach or contravention of the provisions of the agreement is to be taken care of by the Adjudicating Officer. He contended that Section 34(f), 37 and 38 of the Act, are the general provisions and cannot override the specific provision of Section 71 of the Act with respect to violation of Sections 12, 14, 18 and 19 of the Act. Thus, he contended that the disputes regarding breach of contractual obligation is beyond the jurisdiction of the Authority and such disputes are to be adjudicated upon by the Adjudicating officer. He has drawn our attention to Clause 33 of the format of the model Agreement Annexure-A. He further contended that even Rule

Judgment - Haryana Real Estate Appellate Tribunal

28 of the Rules excludes these matters from the jurisdiction of the Authority and requires to be adjudicated upon by the Adjudicating Officer under Rule 29 of the Rules.

23. He further contended that the respondent/allottee has sought the relief of compensation for losses caused to the complainant due to delay in offering possession amounting to Rs.30,29,430/- alongwith interest @ 18% per annum for a period of four years and also the house-rent for a period of four years alongwith other reliefs. Thus, he contended that the relief granted by the learned Authority in the impugned order is not simplicitor interest for delay, rather the same is compensation which is beyond the jurisdiction of the Authority. To support his contentions, he relied upon cases **Ghaziabad Development Authority vs. Balbir Singh (2004)5 SCC 65** and **Ankur Goel Vs. Unitech Reliable Projects Pvt. Ltd. in Complaint Case No.709 of 2015** decided on 22.07.2016 by National Consumer Disputes Redressal Commission, New Delhi. He contended that even this Tribunal in case **Sameer Mahawar Vs. M.G. Housing Pvt. Ltd. in Appeal No.6 of 2018** decided on 02.05.2019 has held that the grant of compensation is beyond the jurisdiction of the Authority. Thus, he contended that the learned Authority while granting compensation in accordance with Rule 15 of the Rules has exceeded its jurisdiction and only the Adjudicating Officer was entitled to adjudicate the dispute.

Judgment - Haryana Real Estate Appellate Tribunal

24. He further contended that the learned Authority was not justified in awarding the compensation at the uniform rate of SBI MCLR+2% by applying Rule 15 of the Rules as a thumb rule as each case needs to be decided keeping in view its own facts and circumstances.

25. He further contended that the Hon'ble Apex Court has repeatedly laid down that compensation awarded to the allottee to whom the possession is being handed over by the promoter cannot be equated with the compensation to the allottee who is not getting the allotted unit even after investing the money for several years. The Hon'ble Apex Court has laid down that the compensation as agreed by the parties and as mentioned in the Flat Buyer's Agreement to be sufficient compensation to the allottee who is getting possession as he is sufficiently compensated with the appreciation of value of the unit over a period of several years. He further contended that the learned Authority was required to determine the extent of deficiency of service which resulted in any loss or injury to the respondent/allottee but the learned Authority has failed to determine any such loss or injury suffered by the respondent/allottee and has wrongly awarded the compensation in terms of the Rule 15 of the Rules. To support his contention, he again relied upon case **Ghaziabad Development Authority Vs. Balbir Singh** (Supra).

Judgment - Haryana Real Estate Appellate Tribunal

26. He further contended that the interest or compensation cannot be granted by a forum by applying the rule of thumb. The grant of maximum rate of interest charged by the nationalised bank is arbitrary and there is no nexus with the default committed. He contended that once the party agreed for a particular consequence of delay in handing over of possession, then there has to be exceptional and strong reasons for granting the compensation at more than the agreed rate. In support he placed reliance upon case **DLF Homes Panchkula Pvt. Ltd. Vs. D.S. Dhanda and Ors. AIR 2019 SC 3218**.

27. He contended that in the instant case the parties have agreed that compensation/interest @ Rs.5/- per sq. ft. per month of the super area shall be granted in case of delay, as per the terms and conditions of the agreement. The respondent/allottee has never challenged the said terms of contract of the agreement dated 29.03.2013 till the filing of the present complaint. Thus, he contended that the compensation awarded by the learned Authority is against the established principle of law.

28. He further contended that the learned Authority has applied the wrong method to calculate the super area. The respondent/allottee vide his letter dated 05.03.2012 had agreed to pay the proportionate price for increase in the super area from 1650 Sq.ft. to 1815 Sq. ft. but the learned Authority

Judgment - Haryana Real Estate Appellate Tribunal

without any rhyme and reason had directed the appellant that the entire common area of the project deserves to be proportionately divided by total number of units in order to assess the increase in the super area. The said direction is completely vague and inconsistent with the market practice. The learned Authority did not wrongly take into consideration the water tanks on the terrace, the mumties built on the staircase and the machine rooms of lifts which fall in the definition of super area as provided in the Flat Buyer's Agreement.

29. Learned counsel for the appellant further contended that the learned Authority has wrongly held the demand of GST/VAT as unjustified. He contended that the respondent/allottee has nowhere challenged the demand and amount of VAT being charged by the appellant but the learned Authority without the same being agitated by the respondent/allottee had directed the appellant to consult a service-tax expert to determine the amount of VAT payable, by exceeding the scope of the complaint. He further contended that the learned Authority had failed to mention as to how it had reached to the conclusion that the deemed date of delivery of possession will be either 01.10.2013 or 10.10.2013 which is not supported from the terms and conditions of both the agreements dated 14.02.2011 and 29.03.2013. He further contended that the respondent/allottee had agreed to pay all

Judgment - Haryana Real Estate Appellate Tribunal

Government rates, tax on land, municipal property taxes and other taxes levied or leviable now or in future by the Government, Municipal Authorities or any Government Authority. In support of his contentions, he has drawn our attention to Clause 4.12, 5.1.2, 4.2 and definition of the total price mentioned in the agreement dated 29.03.2013. Thus, he contended that the respondent/allottee shall be liable to pay the GST/VAT as per law and relevant provisions of Flat Buyer's Agreement.

30. He further contended that the learned Authority did not take into consideration the relevant terms and conditions of the Flat Buyer's Agreement dated 29.03.2013 to hold that the charges for installation of the electricity meter are exorbitant and wrongly directed the appellant to charge the actual price of the meter or actual charges levied by the electricity department. He contended that the definition of the total price as provided in the agreement dated 29.03.2013 clearly mention that cost of electricity and water meter as well as charges for electricity connection and consumption in addition to the total price shall be paid by the respondent/allottee as he has agreed to make all the payments as per the agreement.

31. He further contended that the minority judgment of the learned Authority has wrongly directed that the appellant cannot charge interest on delayed payment more

Judgment - Haryana Real Estate Appellate Tribunal

than SBI MCLR+2%. He contended that the respondent/allottee has committed multiple and gross delay in making the payment. As per the terms of the agreement, the appellant had charged interest @ 18% per annum on delayed payments. He contended that the provisions of the Act and the rules made thereunder are not appliable in this case as the allotment was made much prior to the enforcement of the Act. So, the learned Authority cannot restrict the right of the appellant to claim the interest on delayed payments as per rule 15 of the Rules.

32. Learned counsel for the appellant further contended that the respondent/allottee has neither challenged the charging of up gradation charges of the super area on the ground of wrong calculations nor pleaded for calculation of up gradation charges on the carpet area. The respondent/allottee has only alleged that since the appellant has not been able to complete the flooring work, therefore, the appellant was not entitled to claim the up gradation charges whereas the learned Authority on its own without any evidence or claim had directed the appellant not to charge the up gradation charges on the super area and rather the up gradation charges have been confined only to the carpet area. He contended that as per the terms and conditions of the agreement dated 29.03.2013, all the consideration amounts were determined on the basis of super area of the unit,

Judgment - Haryana Real Estate Appellate Tribunal

therefore, the upgradation charges were also payable by the allottee on the basis of the super area. But the learned Authority has wrongly directed to charge the up gradation charges on the basis of carpet area alone. The said relief was never sought by the respondent/allottee in the complaint and the Authority has exceeded its jurisdiction in granting this relief.

33. With these contentions, learned counsel for the appellant pleaded that the impugned order passed by the learned Authority is illegal.

34. On the other hand, Shri Anand Bishnoi, learned counsel for the respondent/allottee contended that the impugned order passed by the learned Authority is perfectly legal and valid. He contended that the provisions of the Act are retroactive in operation. The Act became applicable w.e.f. 01.05.2017. By that time even the possession of the flat was not offered to the respondent/allottee and even the Occupation Certificate was not granted. So, the transaction was pending when the Act became applicable. He contended that the contentions raised by learned counsel for the appellant that the provisions of the Act will apply only to the un-allotted units, is without any substance. It is not disputed that the appellant has got its project registered with the learned Authority as per the provisions of the Act and the

Judgment - Haryana Real Estate Appellate Tribunal

Rules made thereunder. So, the appellant cannot dispute the applicability of the provisions of the Act.

35. He further contended that there was delay of 39 months in delivery of possession. The possession was offered vide letter dated 08.12.2017. In the second agreement, it has been categorically mentioned that the said agreement will have retrospective effect and shall be deemed to have come into force w.e.f. 14.02.2011. In view of the terms and conditions of the agreement dated 14.02.2011, the deemed date for delivery of possession comes to 13.08.2014. So, the learned Authority has wrongly considered the delay of 23 months. He further contended that the learned Authority has rightly charged the interest as per rule 15 of the Rules.

36. He further contended that the appellant has wrongly added the area of the water tank installed on the terrace, mumty built on the staircase and machine room of the lift. He contended that the area occupied for the common utility services cannot be considered to be a part of the super area as it rests on a space which already has been counted towards the common utility area and the appellant was rightly directed to exclude these structures on the calculation of the super area. The direction given by the learned Authority to recalculate the super area is perfectly legal and valid.

Judgment - Haryana Real Estate Appelate Tribunal

37. He further contended that the learned Authority has rightly prohibited the demand of the appellant for GST as the liability to pay GST had not accrued on the deemed date of possession. The appellant has also wrongly charged the VAT @ 4% instead of 1.05%.

38. He further contended that the direction of the learned Authority to calculate the interest for delayed payments at the SBI MCLR+2% is also valid as the appellant is entitled to charge the same rate of interest which it is required to pay for delayed possession. The direction given by the learned Authority with respect to the payment of EDC, upgradation charges, electricity installation etc. is also perfectly legal and valid.

39. He further contended that the learned Authority has every jurisdiction to entertain the complaint filed by the respondent/allottee as the respondent has only sought the interest for delayed possession alongwith other reliefs such as illegal demand of GST, VAT, electricity charges, wrong calculation of upgradation charges and super area. All these disputes can only be adjudicated upon before the learned Authority and the Adjudicating Officer has no jurisdiction to entertain such disputes. Moreover, respondent has given up the relief of compensation vide his application and affidavit

Judgment - Haryana Real Estate Appelate Tribunal

dated 13.03.2020. With these contentions, he contended that the appeal filed by the appellant is without any substance.

40. We have duly considered the aforesaid contentions raised by learned counsel for both the parties.

41. Before proceeding further on the merits of the main appeal, it will be appropriate to decide the application filed by the respondent/allottee. During the pendency of this appeal, the respondent/allottee has moved an application supported by his affidavit for giving up the claim for compensation. Learned counsel for the appellant has vehemently contended that the learned Authority had no jurisdiction to adjudicate upon the dispute between the promoter and allottees and it also cannot entertain the complaint with respect to the claim of compensation. In the application, the respondent/allottee has categorically mentioned that the learned Authority while passing the impugned order has already given liberty to file complaint for claim of compensation before the Adjudicating Officer as per law and the learned Authority has granted interest on account of delayed possession as per the provisions of the Act. In view of the above, the respondent does not press his claim for compensation in this case and he be granted interest on account of delayed possession as per the provisions of the Act. It is further mentioned that the

Judgment - Haryana Real Estate Appellate Tribunal

claim for compensation may be allowed to be withdrawn at this stage.

42. The appellant/promoter has contested this application by filing the written reply wherein it has been pleaded that this application cannot be considered at this belated stage as the respondent had already submitted his written arguments on 14.01.2020 and in the said written arguments, he has not given up his claim for seeking compensation for delay in delivery of possession. It is further pleaded that no useful purpose is being served by moving this application as the respondent is admitting that Authority had granted interest for delay in delivery of possession. Therefore, he has not challenged the impugned order by way of filing the appeal. It is further pleaded that the respondent has sought the compensation in the form of interest and not interest simplicitor which is the main prayer in the complaint. It is further pleaded that if the respondent is permitted to amend the prayer which was never the plea of the respondent/allottee in his complaint, that would amount to making the fresh prayer before this Tribunal. If this Tribunal is of the opinion that the complainant can be permitted to amend the prayer, then he should be asked to approach the learned Authority and seek fresh adjudication of the relief claimed in the application. It is further pleaded that the

Judgment - Haryana Real Estate Appelate Tribunal

respondent had failed to file any appeal against the impugned order. Therefore, he has accepted the order and is not entitled to get amended the relief granted vide impugned order. It is further pleaded that the application cannot be allowed under existing provisions of law and equity as it would tantamount to challenge the appeal filed by the appellant. All other pleas raised in the application were controverted and it was prayed that the application should be dismissed with costs.

43. The present appeal has arisen out of the complaint filed by the respondent/allottee wherein he has claimed compensation for the losses caused to him due to delayed possession alongwith other reliefs. The learned Authority in the impugned order has categorically mentioned that nothing stated in this order shall debar the complainant from filing a complaint before the Adjudicating Officer to claim such compensation as he may be entitled under the law. It shows that the learned Authority has not dealt with the claim of respondent/allottee with respect to compensation and only the interest for delayed possession has been awarded. However, in order to put the record straight, the respondent/allottee has moved this application for withdrawal of his claim for grant of compensation in the present case in view of the liberty granted by the learned Authority.

Judgment - Haryana Real Estate Appellate Tribunal

44. The appellant/promoter has opposed the withdrawal of the claim by the respondent/allottee, but we do not find any substance in the objection/opposition raised by the appellant. Mere this fact that the application has been moved by the respondent/allottee at a belated stage when the arguments were already heard, is itself no ground to render the application not maintainable. A party is at liberty to withdraw the claim at any stage of the proceedings before the pronouncement of the judgment. In the instant case, though the arguments were heard but the judgment is yet to be pronounced. It also cannot be stated that if this application is allowed, then it would amount to making a fresh case before the appellate forum because the respondent/allottee has sought the relief with respect to the delay in delivery of possession, though he has mentioned it to be compensation instead of interest. So, it cannot be stated that anything new is being sought to be introduced in the relief clause by the respondent/allottee by moving this application. Moreover, there is no legal prohibition to the respondent/allottee to withdraw the claim of compensation mentioned in his complaint. Consequently, this Tribunal find no reason not to consider the option exercised by the respondent/allottee in this application. Thus, the application moved by the respondent/allottee for giving up his claim for compensation is hereby allowed.

Judgment - Haryana Real Estate Appellate Tribunal

45. Thus, in view of the application moved by the respondent/allottee, the claim of the respondent/allottee with respect to the grant of compensation stands withdrawn from the original complaint and he is just claiming the interest on account of delay in the delivery of the possession. It is settled principle of law that the appeal is continuation of the suit. The claim given up by the respondent/allottee during the pendency of this appeal will relate back to very institution of the complaint and the complaint filed by the respondent/allottee shall be treated to be the complaint for grant of interest for delayed possession alongwith the other reliefs raised by him.

46. The impugned order dated 04.09.2018 is split verdict. The majority judgment has been authored by the Members of the learned Authority and the minority judgment has been authored by the learned Chairman of the Authority. The learned Chairman has agreed with the findings in the majority judgment on all the issues except issue no.11 relating to compensation payable to the complainant for delayed offer of possession beyond the deemed date of possession. In the majority judgment the interest for delayed possession has been awarded at the rate SBI MCLR+2% for delay of 23 months. However, in the minority judgment the learned Chairman has held that the appellant/promoter shall be liable to pay the delayed compensation as agreed in the

Judgment - Haryana Real Estate Appellate Tribunal

agreement. The learned Chairman has also ordered that the appellant/promoter shall be entitled to claim interest for delayed payment as provided in rule 15 of the Rules and excess interest charged by the appellant shall be refunded.

47. Learned counsel for the appellant has repeatedly contended with respect to the intention of legislature for interpretation of the provisions of the Act.

48. There was a vacuum in the legal field to effectively and expeditiously deal with the disputes between the promoters and the home buyers. Therefore, the necessity was felt to enact the present Act to provide effective and simplicitor remedy for redressal of the grievances of the home buyers.

49. The preamble of the statute is a guiding light to ascertain the legislative intent and background of the enactment in case of any ambiguity. 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,

Judgment - Haryana Real Estate Appellate Tribunal

> directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto."

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 the real estate sector. The goal of the Act is to ensure the sale of plots, apartments or building or the sale of real estate project in an efficient and transparent manner. The adjudicating mechanism for speedy disputes redressal has also been established.

Judgment - Haryana Real Estate Appellate Tribunal

50. Let us have a look on the case laws with respect to the interpretation of the statute. The Hon'ble Apex Court in case **M/s Hiralal Ratanlal Vs. STO AIR 1973 SC 1034** laid down as under: -

> *"In construing a statutory provision the first and foremost rule of construction is the literally construction. All that the Court has to see at the very outset is what does the provision say. If the provision is unambiguous and if from the provision the legislative intent is clear, the Court need not call into aid the other rules of construction of statutes. The other rules of construction are called into aid only when the legislative intent is not clear."*

51. The same legal proposition has been reiterated by the Hon'ble Apex Court in case **Union of India and anr.**

Versus National Federation of the Blind and Ors. 2013(10) SCC 772 wherein the Hon'ble Apex Court has laid down as under:-

> *"43. It is settled law that while interpreting any provision of a statute the plain meaning has to be given effect and if language therein is simple and unambiguous, there is no need to traverse beyond the same. Likewise, if the language of the relevant section gives a simple meaning and message, it should be interpreted in such a way and there is no need to give any weightage to headings of those paragraphs. This aspect has been clarified in Prakash Nath Khanna & Anr. V. Commissioner of Income Tax & Anr., (2004)9 SCC 686. Paragraph 13 of the said judgment is relevant which reads as under:-*
>
> *"13. It is a well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said. "Statutes should be construed, not as theorems of Euclid", Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them". (See Lenigh Valley Coal Cp. V. Yensavage. The view was reiterated in Union of India v. Filip Tiago De Gama of Vedem Vasco De Gama and Padma Sundara Rao v. State of T.N."*

Judgment - Haryana Real Estate Appellate Tribunal

52. The Hon'ble Karnataka High Court in case **Schneider Electric IT Business India Private Limited, Jigani Industrial Area, Bengaluru Versus American Power Conversion (India) Private Limited Employees' Union, Bagalgunte, Nagasandra Post, Bengaluru and another, 2018(2) KantLJ 229,** has also laid down that in case language is plain and simple, which does not warrant two possible interpretations, then the plain and grammatical meaning would necessarily have to be given effect to.

53. A Division Bench of the Hon'ble Gujarat High Court in case **Sudhaben B. Tamboli Versus Ahmedabad Education Society and anr**. Law Finder Doc Id # 787730, has laid down that while interpreting the provision no part of statute should be seen as redundant or mere surplusage. Every word should be given its importance and meaning and any interpretation which leaves any part of the statute redundant must be avoided.

54. The Hon'ble Apex Court in case **Nathi Devi v. Radha Devi Gupta, AIR 2005 SC 648** has laid down as under: -

> *"It is equally well-settled that in interpreting a statute, effort should be made to give effect to each and every word used by the Legislature. The Courts always presume that the Legislature inserted every*

Judgment - Haryana Real Estate Appellate Tribunal

part thereof for a purpose and the legislative intention is that every part of the statute should have effect. A construction which attributes redundancy to the legislature will not be accepted except for compelling reasons such as obvious drafting errors."

55. The Hon'ble Apex Court in case **Mukund Dewangan vs. Oriental Insurance Company Limited** (Supra) relied upon by the learned counsel for the appellant, the Hon'ble Apex Court has also laid down that the first and primary rule of construction is that the intention of the legislature must be found in the words used by legislature itself. Each word, phrase or sentence is to be construed in the light of the general purpose of the Act itself. The interpretation of the provisions of law depends upon the text and context. The text is the texture and the context is what gives colour and neither of them can be ignored. That interpretation is best which makes the textual matching contextual.

56. The crux of the ratio of law laid down in cases referred above is that the first and foremost rule of construction is the literal construction where language is plain and simple and does not warrant two possible interpretations, then the plain and grammatical meaning would necessarily have to be given effect to. Further any interpretation which renders the provision of a statute

Judgment - Haryana Real Estate Appellate Tribunal

redundant, otiose or surplusage has to be avoided. The court should strive to avoid a construction which will tend to make the statute unjust, oppressive, unreasonable, absurd or contrary to public interest. That construction should be accepted which will make the statute effective and productive, as it is presumed that these results were intended by the legislature. A statute must be given a fair, pragmatic, and common-sense interpretation so as to fulfil the objects sought to be achieved by the legislature.

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

58. This fact is not disputed that the project in question is a registered project with the Haryana Real Estate Regulatory Authority, Panchkula under the provisions of the Act and the rules made thereunder.

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

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

Judgment - Haryana Real Estate Appellate Tribunal

60. In the aforesaid definition of agreement for sale, there is no distinction between the agreements executed prior to the enforcement of the Act and post enforcement of the Act.

61. Learned counsel for the appellant has put forward a total absurbed interpretation of Section 3(1) of the Act. Section 3(1) of the Act reads as under: -

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

62. Section 3(1) of the Act prohibits the advertisement, marketing, booking, sale or offer for sale or inviting the persons to purchase in any manner any plot, apartment or building without registering the real estate project with the

Judgment - Haryana Real Estate Appellate Tribunal

Real Estate Regulatory Authority established under the Act. The legislature was well aware of the fact that various projects at the time of enactment of the Act were ongoing. So, as per the first proviso to Section 3(1) of the Act three months time was given from the date of commencement of the Act, to such ongoing projects for which the completion certificate has not been issued, to move the application to the Authority for registration of the project. In the second proviso, it has been clarified that the real estate projects which are beyond the planning area can also be directed to be registered with the Authority with the requisite permission of the local authority in the interest of the allottees and the provisions of the Act shall apply to such projects from the stage of registration.

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

Judgment - Haryana Real Estate Appellate Tribunal

provisions of the Act shall virtually be rendered redundant and the very purpose of the enactment of the Act shall be defeated. Such interpretation will render the Act ineffective, unproductive and thwart the results intended to be achieved by the Parliament. As per the ratio of law laid down in cases **Sudhaben B. Tamboli Versus Ahmedabad Education Society and anr**. (Supra) and **Nathi Devi v. Radha Devi Gupta** (Supra), such interpretation is always to be avoided and cannot be accepted. Learned counsel for the appellant could not show us any compelling reason for taking such a view.

64. Once the project is registered with the learned Authority, it does not lie in the mouth of the appellant to contend that the provisions of the Act shall be applicable only to the part of the project and part of the project shall be immune from the application of the Act. Any such view shall be ridiculous and anomalous that same project shall be governed by two set of laws/rules. There is also no escape from the conclusion that relevant provisions of the Act are clear and unambiguous so far as the applicability of the Act to the real estate project is concerned. The literal and plain meaning of Section 3, 11(4)(a), 12, 14(3), 15, 17, 18, 19 and 31 etc. clearly indicate that provisions of the Act are applicable to the entire real estate project and not in parts

Judgment - Haryana Real Estate Appellate Tribunal

irrespective of the fact whether the agreement for sale is pre or post-RERA.

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

66. Thus, we are of the considered opinion that mere this fact that the unit of the appellant was allotted prior to the enforcement of the Act, will not take it out of the purview of the Act and the dispute between the parties with respect to the fulfilment of the obligations and responsibilities by the promoter has to be decided in terms of the provisions of the Act and the rules made thereunder.

67. Learned counsel for the appellant has vehemently contended that the Act does not create any distinction between the agreement for sale executed prior to or after the commencement of the Act and this Act never intends to re-

Judgment - Haryana Real Estate Appellate Tribunal

write or amend or supplement or suspend the terms of the agreement for sale executed between the parties prior to the enforcement of the Act and the rights of the parties are to be determined in terms thereof. There is no serious dispute with respect to the proposition that enforcement of the Act will not invalidate the agreement for sale executed into between the parties prior to the enforcement of the Act. But at the same time, it cannot be stated that the Act will have no application to the pre-RERA agreements. The question regarding applicability of the Act and the Rules made thereunder to the pre-RERA agreements was also taken note of by the Hon'ble Bombay High Court in **Neel Kamal Realtors Suburban Pvt. Ltd. & anr. Vs. Union of India and others 2018(1) RCR (Civil) 298 (DB),** wherein it was laid down as under: -

> *"121. The thrust of the argument of the learned counsel for the petitioners was that provisions of Sections 3(1), 6, 8, 18 are* ***retrospective/retroactive*** *in its application. In the case of* ***State Bank's Staff Union V. Union of India and ors., [(2005) 7 SCC 584],*** *the Apex Court observed in paras 20 and 21 as under:-*
>
> > *20. Judicial Dictionary (13th Edn.) K.J. Aiyar, Butterworth, p. 857, state that the word "**retrospective**" when used with reference to an enactment may mean (i) affecting an existing contract; or (ii) reopening up of past, closed and completed transaction; or (iii)*

Judgment - Haryana Real Estate Appellate Tribunal

*affecting accrued rights and remedies; or (iv) affecting procedure. Words and Phrases, Permanent Edn., Vol. 37-A, pp. 224-25, defines a "**retrospective** or **retroactive law**" as one which takes away or impairs vested or accrued rights acquired under existing laws. A **retroactive law** takes away or impairs vested rights acquired under existing laws, or create a new obligation, imposes a new duty, or attaches a new disability, in respect to transaction or considerations already past.*

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

*"**Retroactive-Acting** backward; affecting what is past. (Of a statute, ruling, etc.) extending in scope or effect to matters that have occurred in the past. Also termed **retrospective.** (Blacks Law Discretionary, 7th Edn. 1999) '**Retroactivity'** is a terms often used by lawyers but rarely defined. On analysis it soon becomes apparent, moreover, that it is used to cover at least two distinct concepts. The first, which may be called '**true retroactivity'**, consists in the application of a new rule of law to an act or transaction which was completed before the rule was promulgated. **The second concept, which will be referred to as 'quasi-retroactivity', occurs when a new rule of law is applied to an act or transaction in the process of***

Judgment - Haryana Real Estate Appellate Tribunal

completion..... *The foundation of these concepts is the distinction between completed and pending transaction....” (T.C. Hartley, The Foundation of European Community Law 129 (1981).*

*‘**Retrospective**-Looking back; contemplating what is past.*

Having operation from a past time.

*‘**Retrospective’** is somewhat ambiguous and that good deal of confusion has been caused by the fact that it is used in more senses than one. In general however the Courts regard as **retrospective** any statute which operates on cases of facts coming into existence before its commencement in the sense that it affects even if for the future only the character or consequences of transactions previously entered into or of other past conduct. Thus, a statute is not **retrospective** merely because it affects existing rights; nor is it **retrospective** merely because a part of the requisite for its action is drawn from a time and antecedents to its passing. (Vol.44 Halsbury’s Laws of England, Fourth Edition, Page 8 of 10 pages 570 para 921).”*

*122. We have already discussed that above stated provisions of the RERA are not **retrospective** in nature. **They may to some extent be having a retroactive or quasi retroactive effect** but then on that ground the validity of the provisions of RERA cannot be*

Judgment - Haryana Real Estate Appellate Tribunal

*challenged. The Parliament is competent enough to legislate law having **retrospective** or **retroactive** effect. A law can be even framed to affect subsisting/existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports. As regards Article 19(1)(g) it is settled principles that the right conferred by sub-clause (g) of Article 19 is expressed in general language and if there had been no qualifying provisions like clause (6) the right so conferred would have been an absolute one."*

68. As per the aforesaid ratio of law the provisions of the Act are retroactive or quasi retroactive to some extent. The second concept of quasi-retroactivity occurs when a new rule of law is applied to an act or transaction in the process of completion. Thus, the rule of quasi retroactivity will make the provisions of the Act or the Rules applicable to the acts or transactions, which were in the process of the completion though the contract/agreement might have taken place before the Act and the Rules became applicable.

69. In the instant case, though the agreement for sale between the parties was executed prior to the Act came into

Judgment - Haryana Real Estate Appellate Tribunal

force but the transaction is still incomplete and the contract has not concluded. It is an admitted fact that the present project was an ongoing project. The possession of the unit was not delivered on the date of filing the complaint. Some payments were also due against the respondent/allottee and the conveyance-deed has also not been executed so far. Thus, the concept of quasi retroactivity will make the provisions of the Act and the Rules applicable to the agreements for sale entered into between the parties. The aforesaid view is also supported from the law laid down by the Hon'ble Apex Court in case **M/s Shanti Conductors (P) Ltd. Vs. Assam State Electricity Board 2019(1) Scale 747** wherein the dispute was with respect to the applicability of the provisions of the Interest on Delayed Payment to Small Scale and Ancillary Industrial Undertakings Act, 1993 to the contract for supply entered into between the parties prior to the commencement of the aforesaid Act. The Hon'ble Apex Court laid down that even if the agreement for sale is entered prior to the Act, the liability to make payment under Section 3 and liability to make payment of interest under Section 4 shall arise if the supplies are made subsequent to the enforcement of the Act. As already discussed, in this case also the transaction is still incomplete. Various responsibilities and obligations are yet to be fulfilled by the appellant/promoter.

Judgment - Haryana Real Estate Appellate Tribunal

70. Similar ratio of law has been laid down by the Division Bench of our Hon'ble High Court in case **M/s Harkaran Dass Vedpal Vs. Union of India and Ors.** (Writ Petition No.10889 of 2015 decided on 22.07.2019) wherein it was laid down as under: -

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

Judgment - Haryana Real Estate Appellate Tribunal

> *order passed by any officer senior in rank to the proper officer detailing the circumstances which prevented the proper officer from passing the order within the initial period of one year."*

71. Thus, by applying the principle of retroactive operation the amendment of the Act made subsequently to the show cause notice, was applied in the aforesaid case and benefit thereof was given to the petitioners. The ratio of law laid down in cases referred above is squarely applicable to the case in hand. Thus, even though the agreement for sale was entered into between the parties prior to the Act came into force but the transaction was still in the process of completion when the Act and the Rules became applicable. So, in our view the rights of the parties will be governed by the provisions of the Act and the rules made thereunder. However, the terms and conditions of the agreements still will be taken into consideration with respect to the matters for which there is no specific provision in the Act or the Rules and the same are not inconsistent to the provisions of the Act or the Rules.

72. The plea raised by learned counsel for the appellant that in case the provisions of the Act are applied, then the appellant was permitted to complete the project by 31.03.2019 as per the certificate of registration whereas the

Judgment - Haryana Real Estate Appellate Tribunal

appellant has already offered the possession vide letter dated 08.12.2017, hence was not liable for delayed compensation.

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

> *"Section 4(2)(l)(C) enables the promoter to revise the date of completion of project and hand over possession. **The provisions of RERA, however, do not rewrite the clause of completion or handing over possession in agreement for sale**. Section 4(2)(l)(C) enables the promoter to give fresh time line independent of the time period stipulated*

Judgment - Haryana Real Estate Appellate Tribunal

> *in the agreements for sale entered into between him and the allottees so that he is not visited with penal consequences laid down under RERA.* ***In other words, by giving opportunity to the promoter to prescribe fresh time line under Section 4(2)(l)(C) he is not absolved of the liability under the agreement for sale.”***

The Hon’ble Bombay High Court by taking note of the provisions of section 4(2)(*l*)(c) of the Act has categorically laid down that the provisions of the Act will not re-write the clause of completion or handing over of the possession mentioned in the agreement for sale. The fresh time line independent of the time stipulated in the agreement is given in order to save the developer from the penal consequences but he is not absolved of the liability under the agreement for sale. Thus, the appellant/builder was required to offer the possession of the unit to the respondent/allottee as per the terms and conditions of the agreements, failing which the respondent/allottee will be entitled to claim the remedies as provided under section 18 of the Act.

74. Once the claim for compensation has been withdrawn, the plea raised by learned counsel for the appellant that the jurisdiction of the learned Authority was barred to entertain the complaint and the respondent should had approached the learned Adjudicating Officer, pales into insignificance.

Judgment - Haryana Real Estate Appellate Tribunal

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

76. It is further the settled principle of law that exclusion of the jurisdiction is to be strictly construed. As per the provision of rule 28 of the Rules the Authority is debarred

Judgment - Haryana Real Estate Appellate Tribunal

to deal with the matters, which have been specifically provided in the rule 29 of the Rules to be dealt with by the Adjudicating Officer. Section 71 of the Act provides for appointment of Adjudicating Officer for adjudicating the compensation. The Adjudicating Officer is competent to award the compensation or the interest as the case may be. The interest mentioned in Section 71(3) of the Act is an alternative to the lump sum compensation whereas the interest payable under proviso to Section 18(1) of the Act is the interest simplicitor on the prescribed rate for delay in delivery of possession where the allottee does not intend to withdraw from the project. Said interest automatically flows from the failure of the promoter to complete the project and offer possession in terms of agreement and does not involve intricate adjudication. The interest mentioned in Section 71 is not at the prescribed rate, rather is to be determined keeping in view the factors mentioned in Section 72 of the Act. So, the interest simplicitor is not covered under section 71 of the Act or rule 29 of the Rules. Consequently, there is no specific bar to the Authority to deal with the cases seeking direction for delivery of possession and interest simplicitor for delayed possession.

77. In the instant case, the respondent/allottee has also sought various other reliefs with respect to the increase in the super area, the demand of enhanced EDC, demand of GST/VAT, excessive demand of electricity charges and

Judgment - Haryana Real Estate Appellate Tribunal

upgradation charges in addition to remove the defects in the unit. All these reliefs clearly fall within the jurisdiction of the Authority.

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

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

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

80. On the other hand, the interest is a premium paid for the use of money. Ordinarily a person who is deprived of

Judgment - Haryana Real Estate Appellate Tribunal

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

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

Judgment - Haryana Real Estate Appellate Tribunal

agreement for sale. So, the learned Authority can enforce the compliance of said obligations under section 34(f), which are not expressly prohibited to be taken cognizance of by the Authority under the Act and the rules made thereunder. Thus for awarding the interest under Section 18(1) of the Act due to non-fulfilment of the obligations/responsibilities as per the terms and conditions of the agreement by the promoter, the Authority will be competent to award interest simplicitor by taking the aid of the provision of section 11(4)(a), 34(f) and 37 of the Act as there is no such specific prohibition under rule 29 of the rules.

82. The aforesaid provision of law also empowers the Authority to impose penalty or interest in respect of any contravention of obligations casted upon the promoter, allottee and real estate agent under this Act and Rules and Regulation made thereunder. As already discussed, the obligations/responsibilities of the promoter towards the allottee as per the terms and conditions of the agreement are also the statutory obligation in view of section 11(4)(a) of the Act. So, we are of the considered opinion that the learned Authority has jurisdiction to adjudicate upon the dispute raised by the respondent/allottee in the present complaint and also to award the interest for delay in delivery of possession within the time stipulated in the agreement for sale.

Judgment - Haryana Real Estate Appellate Tribunal

83. There is no dispute with the proposition of law laid down by the Hon'ble Apex Court in **Ghaziabad Development Authority vs. Balbir Singh** (Supra) that there cannot be same yardstick in all the cases to determine the compensation as the compensation has to be based on a finding of loss or injury and has to co-relate with amount of loss or injury. In the instant case as we have already mentioned that the respondent/allottee is not seeking the compensation in the strict sense, he is just pursuing the case for grant of interest for delayed possession. In the agreement for sale it has been provided that compensation/interest @ Rs.5/- per Sq. ft. per month of the super area shall be granted in case of delay. In the majority judgment passed by the learned Authority, the respondent/allottee has been awarded the interest at the prescribed rate as per rule 15 of the Rules. Learned Chairman in the minority view has dissented with the majority view on this issue.

84. In view of our discussion above, the provisions of the Act are retroactive or quasi retroactive to some extent. It is an admitted fact that the transaction between the parties was still in the process of completion. The possession of the unit was yet to be delivered and the conveyance-deed was yet to be executed when the Act came into force. Thus, the provisions of the Act and the Rules have become applicable to the present transaction i.e. the agreement for sale entered

Judgment - Haryana Real Estate Appellate Tribunal

into between the parties. The function of the learned Authority is to safeguard the interest of the aggrieved person whether he is the allottee or the promoter. The rights of the parties are required to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his/its dominant position and to exploit the needs of the home buyers. The learned Authority as well as this Tribunal is duty bound to take into consideration the legislative intent i.e. to protect the interest of the consumers in the real estate sector.

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

> *"6.7 A term of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder.*
>
> *The contractual terms of the Agreement dated 08.05.2012 are ex-facie one-sided, unfair, and unreasonable. The incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice as per section 2(r) of the Consumer Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling the flats by the Builder.*
>
> *7. In view of the above discussion, we have no hesitation in holding that the terms of the Apartment Buyer's Agreement dated 08.05.2012 were wholly one-sided and unfair to the Respondent-Flat Purchaser. The*

Judgment - Haryana Real Estate Appellate Tribunal

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."

86. In the instant case also, there are various clauses in the Act which are ex facie one sided unfair and unreasonable. There are two agreements for sale executed into between the parties. The first agreement was executed on 14.02.2011 and the second agreement was executed on 29.03.2013. There are almost the similar terms and conditions in both the agreements. As per Clause 7.2 of the second agreement, the appellant/promoter has been invested with the powers to cancel the allotment and forfeit the earnest money alongwith interest on delayed payments, interest on instalments, brokerage etc. in the event of default by the allottee. Events of defaults has been detailed in Clause 7.1 of the agreement dated 29.03.2013. Some of the indicative events of default are failure to make payments within the time as stipulated in the schedule of payments, failure to pay the stamp duty, legal, registration, any incidental charges, any increases, including but not limited to IFMS as demanded by the promoter, failure to perform any or all the obligations by

Judgment - Haryana Real Estate Appellate Tribunal

the allottee, failure to take possession within the stipulated period, failure to execute the maintenance agreement or to pay on or before its due date the maintenance charges, security deposits, deposits/charges for bulk supply of electricity energy or any increases in respect thereof, failure to become a member of the association of apartment owners, assignment of the agreement or any interest without prior consent of the Company, dishonour of any cheque, any other acts, deeds or things which the allottee may commit, omit or fail to perform in terms of the agreement. Thus, the appellant/promoter has invested in itself vast powers to cancel the allotment, to forfeit the earnest money alongwith the interest on delayed payments, interest on instalments, brokerage and any amount of fine and penalty without giving any opportunity of being heard to the allottee.

87. As per clause 7.3 of the second agreement, the allottee was liable to pay interest @ 18% per annum on the delayed payments for the first 90 days of default. Whereas, as per Clause 8.2, the allottee was entitled to receive compensation @ Rs.5/- per Sq. ft. per month on the super area for the delay in delivery of possession which comes to 3.52% per annum. As per Clause 9.3 of the second agreement, the promoter has been authorised for abandonment of the project due to the reasons mentioned

Judgment - Haryana Real Estate Appellate Tribunal

therein and, in that case, the allottee will only be entitled for refund of the amount without any interest or compensation. Thus, the aforesaid terms of the agreement are ex-facie one sided unfair and unreasonable which constitute the unfair practice on the part of the appellant/promoter who was in dominant position as the respondent/allottee was in the need of house. They had already parted with their hard-earned money, so they had no other option but to sign the agreement on dotted lines. These type of dominant terms and conditions of the agreement will not be final and are liable to be ignored. In **Pioneer Urban Land & Infrastructure Limited vs. Govindan Raghavan** case (Supra), the Hon'ble Apex Court finding the terms and conditions of the agreement to be one sided unfair and unreasonable 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.

88. **DLF Homes Panchkula's case (supra)** relied upon by counsel for the appellant is quite distinguishable on facts. In that case the earlier cases i.e. Civil Appeal No.11097/2018 with Civil Appeal Nos. 11098-11138 of 2018 and Civil Appeal No. 2285-2330 of 2019 were decided by consent on agreed terms of settlement whereby the refund was allowed with interest at the rate of 9% per annum. In DLF Homes

Judgment - Haryana Real Estate Appellate Tribunal

Panchkula's case (supra) also Hon'ble Apex Court has awarded the same rate of interest as awarded in the previous cases on the basis of settlement. It was also observed by the Hon'ble Apex Court that the causes of delay in delivery of the possession were beyond the control of the appellant. But in the instant case there is no such material to show that causes of delay in delivery of the possession were beyond the control of the appellant. Moreover, in that case also the agreed rate of interest for delay i.e. Rs.10 per square feet per month was not awarded rather the interest at the rate of 9% p.a. was awarded, which was more than the contractual rate of compensation for delay. So, this case is of no help to the appellant.

89. The plea raised by the ld. counsel for the appellant that Rule 15 of the rules is only applicable in case of refund and the rate of interest mentioned therein cannot be awarded in case of delayed possession is also devoid of merits. Though in Rule 15 of the rules the interest for delayed possession is not specifically mentioned but in order to determine the reasonable rate of interest the aid of Rule 15 of the rules can be taken even in case of the grant of interest for delayed possession or delayed possession charges. This will also help to maintain the uniformity in the orders to be passed by the Authority/ Tribunal. Rule 15 of the rules provides for grant of

Judgment Haryana Real Estate Appellate Tribunal

rate of interest at the rate of State Bank of India highest marginal cost of lending rate +2%. This rate of interest has been provided by the appropriate Government in the rules being the reasonable and justified. So, there is no legal impediment to award the same rate of interest in case of delayed possession/delayed possession charges. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges at the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored. Thus, we do not find any illegality in the rate of interest awarded by the learned Authority in the majority judgment to the respondent/allottee for the period of delay in delivery of possession. We also do not find any fault in the period of delay determined by the learned Authority as the appellant/promoter has itself admitted the delay of 23 months in the statement of account filed on 04.09.2018 before the learned Authority.

90. The learned Authority has also directed the appellant to charge the interest on delayed payments at the rate of SBI MCLR+2%. Section 2(za) of the Act reads as under: -

Judgment - Haryana Real Estate Appellate Tribunal

> *(za) (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*

91. As per the aforesaid provision the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay to the allottee in case of default. So, in this case the respondent/allottee has been awarded the interest at the rate SBI MCLR+2% on account of delay in delivery of possession. So, the appellant/promoter shall also be entitled to recover the equal rate of interest from the respondent/allottee. Thus, we do not find any illegality in the aforesaid direction of the learned Authority.

92. Learned counsel for the appellant has pleaded that the learned Authority has exceeded its jurisdiction to issue direction with respect to the re-calculation of the super area, particularly, when the respondent/allottee has accepted the measurement of the super area to be 1815 Sq. ft. vide his letter dated 05.03.2012. As already mentioned, the function of the learned Authority is to impart the substantial justice to the parties. If anything, wrong comes to the notice of the Authority, it can suo moto issue the suitable directions in favour of the aggrieved party. During the proceedings, the learned Authority has directed for the production of the

Judgment - Haryana Real Estate Appellate Tribunal

building plan. The learned Authority after perusal of the building plan and hearing the parties observed as under in Para No.7 of the impugned order: -

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 construed 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

Judgment - Haryana Real Estate Appellate Tribunal

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 that 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.

We do not find any illegality in the direction given by the learned Authority in order to determine the increase in the super area.

93. This fact is not disputed that the GST has become applicable w.e.f. 01.07.2017. As per the first Flat Buyer's Agreement dated 14.02.2011, the deemed date of possession comes to 13.08.2014 and as per the second agreement dated 29.03.2013 the deemed date of possession comes to 28.09.2016. So, taking the deemed date of possession of both the agreements, GST has not become applicable by that date. No doubt, in Clauses 4.12 and 5.1.2 the respondent/allottee

Judgment - Haryana Real Estate Appellate Tribunal

has agreed to pay all the Government rates, tax on land, municipal property taxes and other taxes levied or leviable now or in future by Government, municipal authority or any other government authority. But this liability shall be confined only up to the deemed date of possession. The delay in delivery of possession is the default on the part of the appellant/promoter and the possession was offered on 08.12.2017 by that time the GST had become applicable. But it is settled principle of law that a person cannot take the benefit of his own wrong/default. So, the appellant/promoter was not entitled to charge GST from the respondent/allottee as the liability of GST had not become due up to the deemed date of possession of both the agreements.

94. As far as the liability for VAT is concerned, the learned Authority has rightly advised the appellant/promoter to consult the service-tax expert who will convey to the respondent/allottee the amount which he is liable to pay as per the actual rate of VAT fixed by the Government. The said liability shall extend up to the deemed date of possession as per the second agreement i.e. 28.09.2016. We have failed to understand as to how the learned Authority has mentioned the deemed date of offer of possession as 10.10.2013 as this date does not suit both the agreements executed into between the parties. So, the findings of the learned Authority with

Judgment Haryana Real Estate Appellate Tribunal

respect to the period of liability for payment VAT also stand clarified to this extent.

95. We have perused the definition of total price in the agreement dated 29.03.2013. The respondent/allottee has challenged the imposition of the electricity consumption charges and legal administrative charges. The legal and administrative charges do not form the part of the total price as per agreement. We do not find any illegality in the direction of the learned Authority that the appellant/promoter shall be entitled to charge the actual price of the meter as indicated in its purchase bill or as per the actual charges levied from it by the electricity department.

96. As far as the upgradation charges are concerned, no doubt, in the flat buyer's agreement the unit has been sold/allotted as per the super area mentioned therein. The learned Authority has only discarded the demand for upgradation charges with respect to the common area as the said upgradation was without any consent of the entire body of the allottees. The learned Authority has rightly observed that the individual consent of the respondent cannot be applied to cover the common usable area of the project, rather the appellant/promoter before upgrading the common usable area was required to hold a meeting with the total number of the allottees of the project and to obtain their consent for

Judgment - Haryana Real Estate Appellate Tribunal

upgradation of such area. So, the upgradation charges for the common usable area have not been denied by the learned Authority on this ground that the appellant/promoter was entitled for upgradation charges only for the carpet area, rather the said demand has been discarded as the appellant has not followed the right procedure for upgradation of the common usable area by obtaining the consent of the entire body of the allottees.

97. We do not find any illegality so far as the direction given by the learned Authority with respect to the enhanced EDC is concerned.

98. Thus, keeping in view our aforesaid discussions, we have arrived at the following conclusions: -

(i) That the provisions of the Act and Rules made thereunder, shall be applicable to the project in dispute. The provisions of the Act being retroactive or quasi-retroactive to some extent shall be applicable to the agreements for sale entered into between the parties as the transaction was still in process of completion as the possession was yet to be delivered and the conveyance-deed was also yet to be executed when the Act and rules made thereunder came in force.

Judgment - Haryana Real Estate Appellate Tribunal

(ii) That we do not find any illegality in the rate of interest for delayed possession awarded by the learned Authority (in the majority view).

(iii) That the learned Authority has every jurisdiction to entertain the complaint as the relief for compensation stands given up which will relate back to the very institution of the complaint.

(iv) The liability of the respondent for payment of the VAT shall be as per the actual rate of VAT fixed by the Government and said liability shall extend upto the deemed date of possession i.e. 28.09.2016 as per the second agreement dated 29.03.2013 instead of 10.10.2013 wrongly mentioned to be the deemed date of offer of possession in Para No.8 of the impugned order by the learned Authority. So, the findings of the learned Authority on this issue stands clarified/modified to this extend.

(v) There is no legal infirmity in the observations of the learned Authority with respect to the GST, upgradation charges, electricity charges, interest on delayed payments and the enhanced EDC.

99. Consequently, with aforesaid clarification/ modification with respect to the deemed date of possession for

Judgment - Haryana Real Estate Appellate Tribunal

payment of VAT, the present appeal has no merits and the same is hereby dismissed. However, no order as to costs.

100. File be consigned to records.

101. Copy of this judgment be communicated to both the parties/learned counsel for the parties and the learned Haryana Real Estate Regulatory Authority, Panchkula.

Announced:
May 20th, 2020

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

Inderjeet Mehta
Member (Judicial)

Anil Kumar Gupta
Member (Technical)

Judgment - Haryana Real Estate Appellate Tribunal