RESERVED JUDGMENT

BENCH-1

THE UTTAR PRADESH REAL ESTATE APPELLATE TRIBUNAL, AT LUCKNOW.

APPEAL NO. 585/2021

Aparajita Babbar. ....Appellant.

Versus

M/s Kindle Infraheights Pvt. Ltd. ....Respondent.

Hon'ble Mr. Justice (Dr.) D. K. Arora, Chairman.
Hon'ble Mr. Kamal Kant Jain, Technical Member.

1. The present appeal has been preferred by Ms. Aparajita Babbar (hereinafter referred to as the 'appellant') under Section 44(1) of the Real Estate (Regulation and Development) Act 2016 (hereinafter referred to as 'the Act 2016') against the order dated 29.06.2021 passed by the Real Estate Regulatory Authority, Regional Office, Gautam Budh Nagar (hereinafter referred to as the 'Regulatory Authority') in Complaint No. NCR144/12/66635/2020 whereby the following directions were issued:-

(1) The respondent is directed to deliver possession of the unit to the complainant by 31.08.2021 after completing all the facilities as per allotment letter/agreement along with OC/CC and four certificates for completion; and get the registry after taking stamp fee as per rules.

(2) The respondent is directed to ensure payment of interest at the rate of MCLR+1% per annum from 21.11.2019 till (a) receipt of OC/CC (or after 8 days from the date of application for OC/CC along with electrical certificate, fire safety certificate, structural certificate and lift installation certificate) or (b) offer of possession, whichever is later. The amount of interest shall be adjusted towards the amount of final payment. In case the amount of interest exceeds the amount due, then the excess amount shall be returned to the complainant. Keeping in view the lockdown and force majeure for prevention and control of

Covid-19 the interest shall not be calculated for the delay period from 25.03.2020 to 25.09.2020.

(3) If any rate of interest is charged by the promoter for default of allottee, then under Section 2(za)(i) of the Act 2016 the same rate of interest will be paid for default by promoter to the allottee. The rate of interest notified by the State Government is MCLR+1%.

(4) If the respondent fails to give possession to the complainant by 31.08.2021 then the respondent shall ensure to refund the amount deposited by the complainant along with interest at the rate of MCLR+1% per annum, after 45 days from 31.08.2021.

2. The facts of the case, in brief, as culled out from the memo of appeal, are that the appellant had booked a flat on 16.11.2011 by paying Rs.3,82,903/- to the respondent.

2.1 Vide Allotment Agreement dated 25.06.2012 the appellant was allotted a flat, unit no. 405, fourth floor, Tower Cheer, admeasuring 1150 sq.ft. in "Sikka Kamna Greens", a project of the respondent, at basic rate of Rs.3246/- per sq. ft. plus preferred location charges at Rs.100/- per sq. ft. and IFMS at the rate of Rs.25/- per sq. ft., thus, for a total consideration of Rs.38,76,650/-.

2.2 As per Allotment Agreement the consideration was to be paid by the allottee/appellant as per the Construction Linked Payment Plan. The appellant never defaulted in payment as per the payment schedule and till date the appellant has made 95% payment i.e. till the stage of 'on start of external development'.

2.3 As per Allotment Agreement the appellant paid additional Preferential Location Charges (PLC) at the rate of Rs.100/- per sq. ft. for getting the flat next to central green park area of the project.

2.4 As per clause 2 of the Allotment Agreement the respondent/promoter agreed to sub-lease the allotted flat to the allottee/appellant in the complex as per the plan and specifications mentioned therein. The promoter promised to give possession of the appellant's booked unit with complete development of entire complex including all common area and facilities.

2.5 As per clause 14 of the Allotment Agreement timely payments by the allottee/appellant to the respondent/promoter as per the payment plan is the essence of Allotment Agreement. The appellant never defaulted in making payments as agreed.

2.6 As per clause 22 of the Allotment Agreement, in case of delay in payments, the allottee is liable to pay 24% interest.

2.7 As per clause 26 the respondent/promoter had to complete the project in 40 months +/- 6 months from the date of start of casting of the raft of the respective towers. At the time of booking in June 2012 the raft of the tower was already laid and certain floors were constructed in Tower Cheer. As such the unit was to be handed over by April 2016.

2.8 As per clause 26 promoter agreed to give possession on completion of the flat and building, only on execution and registration of sub-lease deed.

2.9 The appellant took loan for financing the allotted flat by executing a tripartite agreement dated 22.06.2012 with the respondent/promoter and Housing and Development Finance Corporation Limited for availing loan of Rs.25,00,000/-.

2.10 The appellant has paid total Rs.36,61,164/- till 10.01.2018. This paid amount is confirmed by the account statement dated 21.10.2020 shared by the respondent/promoter.

2.11 The respondent/promoter admitted timely payments of amount of Rs.36,61,164/- paid by the complainant.

2.12 At the time of booking in 2011 the respondent/promoter had assured the appellant that the project shall be completed in any event by the year 2017 as it has to comply with the terms of land-lease agreement dated 29.06.2011 whereby the promoter is required to complete construction in 7 years and as per clause 4 thereof, only 3 extensions of one year each can be granted by the NOIDA.

2.13 The extension granted by the Regulatory Authority has also expired on 29.12.2020 as per information available on UP RERA website.

2.14 Till date the respondent/promoter has not received occupancy or completion certificate for the project. The project is still majorly under construction.

2.15 The respondent/promoter has not developed any green area in the project.

2.16 The respondent/promoter has not developed any park, club, gym, sports facilities, roads, basement parking, and fire-fighting system in the project.

2.17 The building map dated 02.12.2012 for the project sanctioned by NOIDA Authority has validity of only 5 years and on the date of filing of this appeal it has expired and has not been renewed. The respondent/promoter is not entitled to make construction without renewal of the same.

2.18 The appellant had filed an RTI application dated 26.03.2021 and in reply to the same the NOIDA vide letters dated 09.07.2021 and 13.07.2021 informed the appellant that (a) the promoter is in default of Rs.229.80 Crores against the land premium, (b) the NOIDA has not allowed the respondent/promoter for executing and registering sub-leases for flats constructed by it in the concerned project, (c) the NOIDA has sanctioned map dated 02.02.2012 against the project and its validity is of 5 years, and (d) temporary Occupation Certificate dated 11.05.2021 was issued to two towers i.e. Cheers T-7 and Jubilent T-1 in the project.

2.19 The project is being developed on a land admeasuring 50,166.300 square meters and NOIDA Building Regulations 2010 are applicable on the same. Total FAR sanctioned for the project as per sanctioned map dated 02.02.2012 is 1,37,671.329 square meters. The construction was to be completed within 7 years as per land lease deed dated 29.06.2011. As per the sanctioned map dated 02.02.2012 it was to be completed in 5 years. As per the Allotment Letter/BBA it was to be completed in 36 months. But it is 15% complete as per temporary OC dated 11.05.2021.

2.20 The project is not even 30% complete till date as mentioned by the NOIDA Authority in its temporary occupation certificate dated 11.05.2021. As per Regulation 24.2.16 of NOIDA Building Regulations 2010 a group housing project being developed on land admeasuring between 20,000 sq. meter to 1,00,000 sq. meter must have minimum built up construction of 30% for completion or occupancy, but in the present project, without application of mind, conditional temporary occupancy certificate dated 11.05.2021 has been granted in arbitrary and illegal manner by exercising colourable powers by the NOIDA.

2.21 The Temporary Occupation Certificate issued by the NOIDA Authority dated 11.05.2021 is illegal, arbitrary, without jurisdiction, in colourable exercise of power and has been issued without application of mind, and as such is non-est.

2.22 The Temporary Occupation Certificate has been issued by NOIDA Authority on 11.05.2021 for two towers i.e. Cheers Tower-7 and Jubilent Tower-1 whereas no such towers exist in the sanctioned map dated 02.02.2012.

2.23 Being aggrieved by the act of the respondent in not offering possession of the unit to the appellant, the appellant filed a complaint before the Regulatory Authority, which was disposed of by the Regulatory Authority vide impugned order dated 29.06.2021, in the manner mentioned in para 1 above.

3. The appellant has challenged the impugned order dated 29.06.2021 passed by the Regulatory Authority on the following grounds:--

(1) Because the impugned order dated 29.06.2021 passed by the Regulatory Authority is in violation of principles of natural justice, illegal, without application of mind, cyclostyle, perverse, suffers from patent illegality, irrational and contrary to the material available on record.

(2) Because the Regulatory Authority neither provided the copy of the W.S. filed before it by the respondent/promoter to the appellant nor did it give opportunity to the appellant to file replication in the matter.

(3) Because the Regulatory Authority did not provide opportunity of hearing to the appellant.

(4) Because the respondent/promoter did not serve the copy of its W.S. dated 24.02.2021 upon the appellant. It was served upon the counsel of the appellant by the Regulatory Authority only on 30.06.2021 after many emails sent by the appellant's counsel.

(5) Because the Regulatory Authority never got the pleadings exchanged between the parties and illegally reserved the order on very first date of hearing.

(6) Because the Regulatory Authority did not follow even the minimum principles of natural justice in adjudicating the dispute and for passing the impugned order.

(7) Because the apartment/unit was booked by the complainant on 16.11.2011, allotment agreement whereof was executed between the parties on 25.06.2012 according to which delivery of apartment became due by April 2016. However, the Promoter has committed unreasonable delay of over 5 years in the project and in delivering the Unit.

(8) Because neither the apartment unit is unconditionally complete and fit for occupation nor is the project.

(9) Because, after waiting for 10 years the Appellant cannot be forced to live in an under construction building and project which is just 15% completed.

(10) Because the Promoter could not complete even 30% construction in last 10 years. Given such pace it will complete the project in next 40 years. The Appellant does not want to live all his life in an under construction project and suffer from pollution related diseases.

(11) Because the approach of Regulatory Authority of giving contingent orders of refund under section 18 is de hors the provision of the RERA Act.

(12) Because, the Regulatory Authority erroneously believed without any material on record that the Project has received occupation/ completion certificate merely on the statement of the Promoter.

(13) Because nothing was brought on record that the towers or the projects are complete.

(14) Because the Regulatory Authority has erroneously relied upon the judgment of Bombay High Court in Neelkamal Realtors Suburban Pvt. Ltd. v. Union of India, (2018) 1 AIR Bom R 55 in which, the Hon'ble High Court has observed that under Section 18 (1), if the promoter fails to complete or is unable to give possession of an apartment, he is liable to refund the amount including compensation.

Whereas, in the impugned order the judgment is quoted to deny the prayer of the Appellant/Complainant.

(15) Because it is erroneous on the part of the Ld . UP RERA to rely upon and quote paragraphs and observations of the Hon'ble Supreme Court from the judgments of Chitra Sharma v . Union Of India (W.P. 744 of 2017) and Bikram Chaterjee v. Union of India (W.P. 940 of 2017) as the orders passed in these judgments were passed the Hon'ble Supreme Court by exercising its powers under Article 32 and 142 of the Constitution of India and Regulatory Authority cannot rely upon to deny relief to the Appellant.

(16) Because the Regulatory Authority has erroneously applied the irrelevant observation from the judgment dated 09.08.2019 of Pioneer Urban Land and Infrastructure Ltd. v. Union of India passed by Apex Court.

(17) Because the Regulatory Authority did not consider the judgments passed in favour of allottees by the Hon'ble Supreme Court in the cases of:

(a) Fortune Infrastructure (now known as HICON Infrastructure) v. Trevor D'Lima (Civil Appeal No. 3533-3534 of 2017 decided on 12.03.2018),

(b) Kolkata West International City Pvt. Ltd. v. Devashish Rudra; Civil Appeal No. 3182/2019.

(c) Pioneer Urban Land Infrastructure Ltd. v. Govind Raghwan, Civil Appeal No. 12238/2018.

(d) Marvel Omega Builders Pvt. Ltd. v. Shri Hari Gokhle, Civil Appeal No. 3207-3208/2019.

(e) Imperia Structures Ltd. v. Anil Patni, Civil Appeal Nos. 3581-3590 of 2020, decided on 02.11.2020.

(18) Because the Regulatory Authority did not consider the judgment dated 07.06.2021 passed by this Hon'ble Tribunal in Aadi Best Consortium Pvt. Ltd. v. Gita Devi .

(19). Because the Regulatory Authority did not consider the unreasonable delay of over 10 years in the project and hardship and harassment suffered by the Appellant/Complainant.

(20) Because the sanctioned map approved by the NOIDA, and time granted for completion by the land lease deed and by the Regulatory Authority has expired.

(21) Because, the promoter has failed to construct any common facilities and services and the project is not at all habitable.

(22) Because the Complainant is not at all interested in taking the possession of the concerned flat because of the unreasonable delay of 5 years and also because the project is still just 15 percent complete.

(23) Because neither Regulatory Authority nor the Promoter can rely on the conditional temporary occupancy certificate dated 12.05.2021 to forcefully give possession to the complainant as the said certificate is also illegal and de-hors the NOIDA Building Regulations 2010.

(24) Because the Complainant has unconditional right under section 18 of the RERA Act, 2016 to exit from the project if the flat is not delivered within the time as promised in the sale agreement and is entitled for refund.

(25) Because the Regulatory Authority did not apply its mind while deciding the complainant's case.

(26) Because the Regulatory Authority did not take into account that the appellant was not interested in taking possession of any unit rather it wanted return of her money paid to the respondent/promoter.

(27) Because the impugned order dated 29.06.2021 is perverse and contrary to material available on record.

4. The appellant has prayed for the following reliefs:--

(a) To set aside the order dated 29.06.2021 passed by the Ld. Bench-2 of U.P. RERA at Gautam Budha Nagar in Complaint Case No. NCR144/12/66635/2020; Aparajita Babbar V. Kindle Infraheights Private Limited.

(b) To direct the respondent/promoter to return a sum of Rs.36,61,164/- (Rupees Thirty Six Lakh Sixty One Thousand One Hundred and Sixty Four Only) along with SBI MCLR+1% annual compound interest (as per the then prevalent SBI MCLR+1% in the years between payment date to actual return date) to the complainant from actual date of payment made by the appellant to the date of return by respondent.

(c) Pass any other order as the Hon'ble Tribunal may deem fit in the interest of justice.

5. The respondent filed its objection to the memo of appeal and submitted that:

5.1 The present appeal is liable to be dismissed on the grounds that (a) the appellant has committed concealment before this Tribunal whereas the true fact is that the appellant has committed delay in payments and she filed some documents with the respondent/promoter in which she admitted that the delay has been caused; (b) the appellant has made an attempt to mislead this Tribunal by submitting that the Regulatory Authority without application of mind, without providing opportunity of hearing and without providing opportunity of perusal of the W.S. filed by the respondent, has passed the impugned order. The Regulatory Authority has granted full opportunity of hearing to the appellant; (c) it is settled law that if a person does not approach the court with clean hands then the court has power to refuse to grant any relief as observed by Hon'ble Apex Court in Oswal Fats & Oils Ltd. Vs. Addl. Commissioner, (2010) 4 SCC 728 (paras19-25,45,48); (d) it is an admitted case that the respondent/promoter has offered possession to the appellant and the order passed by the Regulatory Authority has been complied with on the part of the respondent, but the appellant herself has denied to obtain possession of the flat in question.

5.2 Due to unavoidable circumstances the project could not be completed at time, but now the project is going to complete very soon. The promoter has completed some units of the project and has received the occupation certificate from the competent authority. The respondent has completed above 30% of the project. The respondent is ready to give possession of the flat with delay penalty as provided under the agreement, further the respondent will provide all the facilities to the appellant as provided under the agreement.

5.3 The appellant has committed delay in regular payments and he is misleading the Tribunal with the narration that she never defaulted in making payments. The respondent has not admitted that timely payments have been made by the appellant.

5.4 The project construction was valid trill 29.12.2021 and for that purpose the UP RERA had granted registration certificate.

5.5 The respondent/promoter has received the occupation certificate from the competent authority, in which the flat of the appellant is situated. The occupation certificate has been granted by the competent authority after fulfilling the mandatory requirement and the occupation certificate is correct and valid.

6. The respondent/promoter also filed a supplementary objection dated 03.08.2022 wherein it has been stated that the respondent has obtained the occupation certificate from the competent authority on 11.05.2021 and the respondent, after applying for the OC/CC, has offered possession to the appellant on 20.10.2020, but the appellant has not obtained the possession of the flat in question and has also not paid the charges as mentioned in the demand letter.

6.1 After obtaining the OC, the respondent has given a reminder dated 16.09.2021 to the appellant regarding demand and offer of possession, second reminder on 16.10.2021 and final reminder on 25.11.2021, but the appellant has not taken possession of the flat in question.

6.2 The respondent/promoter is ready to provide the possession of the flat, if the appellant pays the necessary charges to the respondent/promoter. The respondent/promoter has imposed charges only in accordance with the law and Builder Buyer Agreement.

6.3 The appellant has challenged the order which is beneficiary to her and it is settled law that beneficiary order cannot be challenged, therefore, the present appeal is liable to be dismissed.

7. The appellant filed reply to the objections of the respondent denying the averments made by the respondent and reiterating the averments made by the appellant in the appeal. The appellant further submitted that:

7.1 The appellant has made regular payments and has deposited 95% of the total amount as established by the account statement dated 21.10.2021. Due to some personal issues the appellant made a request for waiver dated 11.12.2013, but subsequently continued making regular payments and deposited the due amount with delay interest of 24% as per clause 22 of the Builder Buyer Agreement.

7.2 The appellant had executed the agreement by believing that the entire project will be completed and then she will get possession, however, the respondent has partially completed the project by partially completing only the tower of the appellant which is still not habitable. When the appellant visited the site along with her husband, she found that all lifts were not installed in the tower, firefighting equipments were also not installed, no tiles, no sanitary, bathroom fittings, electricity fittings were fitted, making the apartment inhabitable. The towers to which partial occupancy certificate has been given do not even have fire tender passage to tackle any fire disaster thereby ignoring the safety of residents.

7.3 The respondent is forcing the appellant to take possession of the flat in an under construction project.

7.4 The NOIDA issued Temporary Occupancy Certificate which is in contravention to the Noida Building Regulations 2010 and is currently challenged in Allahabad High Court vide Writ Petition (C) No.30283 of 2021 wherein the Hon'ble Allahabad High Court vide order dated 24.11.2021 has been pleased to issue notice to the respondent/promoter.

7.5 The site inspection report dated 12.02.2022, available on UP RERA website, clearly shows that even after 10 years the construction of the said project is not complete and Tower-Cheer is only 80-90% complete. The delay caused is due to mismanagement of the respondent and not because of any unavoidable circumstances. The approved layout plans have expired. As per UP RERA portal last extension of approved layout plans expired on 29.12.2021 and no further extension has been granted.

7.6 It is denied that the flat of the appellant is ready for possession and even if it is ready then the appellant while exercising her right under Section 18 of the Act 2016 does not wish to take possession and seeks refund from the respondent/promoter.

7.8 The respondent did not furnish any objection or written statement against the complaint of the appellant before the Regulatory Authority. When the case was listed for hearing on 25.02.2021 and 15.04.2021 the learned Presiding Member directed the respondent to upload the WS/objection and serve the copy of the same on the appellant, but the same was not complied by the respondent. Instead, to the surprise of the appellant, the order of reserving the case was recorded in the proceeding dated 15.04.2021 without any exchange of written statement and without providing appropriate opportunity to the appellant. The Regulatory Authority, vide email dated 15.04.2021 admitted that order in proceeding dated 15.04.2021 was wrongly transcribed. The written statement of the respondent was received by the appellant on 30.06.2021 vide email dated 30.06.2021 i.e. after 3 months and 15 days from the hearing dated 15.04.2021.

8. Heard Sri Ankit Kumar Singh, Advocate, holding brief of Sri Prashant, learned counsel for the appellant and Sri Surendra Kumar, learned counsel for the respondent.

9. In order to examine the issue involved in the instant appeal and on the basis of the record we deem it proper to frame the following issues:--

(1) Whether the Regulatory Authority passed the impugned order beyond the pleadings and prayer of the complainant/allottee/appellant?

(2) Whether reliance placed on the case of ***Chitra Sharma Vs. Union of India (Civil Appeal No. 744/2017, decided on 09.08.2018)*** while deciding issue no. 1 relating to refund of the amount of the complainant, is correctly appreciated?

(3) Whether the claim of the appellant/allottee for refund of his deposited amount along with interest is in consonance with the provisions of Section 18 of the Act, 2016?

(4) Whether the project in question of the respondent is delayed?

(5) Whether it is necessary and mandatory for the Promoter to have first Completion Certificate (C.C.) and Occupation Certificate (O.C.) under the provisions of the Act of 2016 and Rules of 2016, read with the U.P. Apartments (Promotion of Construction, Ownership and Maintenance) Act 2010 before offering possession as well as asking the allottee to settle the account and satisfy the final demand?

(6) Whether the appellant is entitled to interest for the delay in completion of the Project under the scheme of Act, 2016 and if yes, what rate of interest is required to be paid by the Promoter to the allottee?

10. **Vide issue no. (1)** we are required to examine, as to whether the order passed by the Regulatory Authority is beyond the pleadings and prayers of the complainant (allottee).

10.1 The issues of pleading, prayer & moulding of reliefs have been examined time & again by Hon'ble Supreme Court as well as by the Judicial Forums holding therein that the rights of the parties stand crystallized on the date of institution of the proceeding and no party should be permitted to travel beyond the pleadings & prayer.

10.2 In ***Bhagwati Prasad vs. Shri Chandramaul AIR 1966 SC 735,*** the Hon'ble Supreme Court was pleased to observe that:-

> *"The importance of the pleadings cannot, of course, be ignored, because it is the pleading that lead to the framing of issues and a trial in every civil case has inevitably to be confirmed to the issues framed in the suit. The whole object of framing the issues would be defeated if parties allowed to travel beyond them and claim or oppose reliefs on grounds not made in the pleadings and not covered by the issues."*

10.3 In ***S.S. Sharma and Ors. Vs. Union of India (UOI) and Ors. AIR 1981 SC 588,*** the Hon'ble Supreme Court observed that:-

> *"We are of the opinion that the Courts should ordinarily insist on the parties being confined to their specific written pleadings and should not be permitted to deviate from them by way of modification or*

supplementation except through the well-known process of formally applying for amendment. We do not mean that justice should be available to only those who approach the Court confined in a strait-jacket. But there is a procedure known to the law, and long established by codified practice and good reason, for seeking amendment of the pleadings. If undue laxity and a too easy informality is permitted to enter the proceedings of a court it will not be long before a contemptuous familiarity assails its institutional dignity and ushers in chaos and confusion undermining its effectiveness. Like every public institution, the Courts function in the security of public confidence, and public confidence resides most where institutional discipline prevails. Besides this, oral submission raising new points for the first time tend to do grave injury to a contesting party by depriving it of the opportunity, to which the principles of natural justice hold it entitled, of adequately preparing its response.”

10.4 In the case of ***Krishna Priya Ganguly and Anr. vs. University of Lucknow and Ors. reported in 1984 SCC 307,*** while dealing with a matter arising out of a writ petition where the writ-petitioners prayed for merely consideration of his case for admission, Hon’ble Supreme Court was pleased to observe that a court cannot go a step further and grant the relief which the petitioner did not ask for, and held:-

“We do not see any proper material for this conclusion to which the High Court has suddenly jumped apart from the fact that admissions were not to be given by the High Court according to its own notions.

Finally, in his own petition in the High Court, the respondent had merely prayed for a writ directing the State or the college to consider his case for admission yet the High Court went a step further and straightaway issued a writ of mandamus directing the college to admit him to the M.S. course and thus granted a relief to the respondent which she herself never prayed for and could not have prayed for.”

10.5 The Hon’ble Supreme Court in ***Ram Sarup Gupta (dead) byLRs. v. Bishun Narain Inter College MANU/SC/0043/1987*** : [1987] 2SCR805 was pleased to observe:-

"……It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise……"

10.6 The Hon'ble Supreme Court in ***Orissa Cement Ltd. Vs. State of Orissa, 1991 Supp (1) SCC 430 (at page 498)*** has been pleased to observe that it is well settled proposition that it is open to the court to grant, mould or restrict the relief in a manner most appropriate to the situation before it in such a way as to advance the interests of justice.

10.7 The Hon'ble Supreme Court in the case of ***Bachhaj Nahar vs Nilima Mandal &Ors; reported in (2008) 17 SCC 491***,was pleased to observe thata Court cannot make out a case not pleaded. The Court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.

10.8 In ***Om Prakash vs. Ram Kumar (1991) 1 SCC 441,*** the Hon'ble Supreme Court observed**:-**

"A party cannot be granted a relief which is not claimed, if the circumstances of the case are such that the granting of such relief would result in serious prejudice to the interested party and deprive him of the valuable rights under the statute."

10.9 In ***Shiv Kumar Sharma Vs. Santosh Kumari (2007) 8 SCC 600*** the Apex Court observed that the appellate court had no power to grant relief not prayed for in the suit.

10.10 The issue was again examined by the Hon'ble Supreme Court in the case of ***Bharat Amratlal Kothari and Anr. Vs. Dosukhan Samadkhan Sindhi and Ors.; (2010) 1 SCC 234*** and the Hon'ble Supreme Court in paras 29 and 30 of the judgment was pleased to examine and observe that "normally the Court will grant only those reliefs specifically

prayed for by the petitioner". The relevant paras 29 and 30 are quoted as under:

> *"29. The approach of the High Court in granting relief not prayed for cannot be approved by this court. Every petition under Article 226 of the Constitution must contain a relief clause. Whenever the petitioner is entitled to or is claiming more than one relief, he must pray for all the reliefs. Under the provisions of the Code of Civil Procedure, 1908, if the plaintiff omits, except with the leave of the court, to sue for any particular relief which he is entitled to get, he will not afterwards be allowed to sue in respect of the portion so omitted or relinquished.*
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> *30. Though the provisions of the Code are not made applicable to the proceedings under Article 226 of the Constitution, the general principles made in the Civil Procedure Code will apply even to writ petitions. It is, therefore, incumbent on the petitioner to claim all reliefs he seeks from the court. Normally, the court will grant only those reliefs specifically prayed for by the petitioner. Though the court has very wide discretion in granting relief, the court, however, cannot, ignoring and keeping aside the norms and principles governing grant of relief, grant a relief not even prayed for by the petitioner."*

10.11 The Hon'ble Supreme Court in ***Civil Appeal No. 973 of 2007 Manohar Lal (D) by Lrs. Vs. Ugrasen (D) by Lrs. &Ors.*** (decided on 03.06.2010) while examining the issue, whether the court can grant **relief** which had not been asked for, was pleased to observe that the court cannot grant relief which has not been specifically prayed by the parties. Relevant para nos. 29 to 33 are extracted as follows:-

> *"29.In **Messrs. Trojan & Co. Vs. RM.N.N. Nagappa Chettiar AIR 1953 SC 235**, this Court considered the issue as to whether relief not asked for by a party could be granted and that too without having proper pleadings. The Court held as under:-*
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> > *"It is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint, the Court was not entitled to grant the relief not asked for and no prayer was ever*

made to amend the plaint so as to incorporate in it an alternative case."

"30. A similar view has been re-iterated by this Court in Krishna Priya Ganguly etc.etc. Vs. University of Lucknow &Ors. etc. AIR 1984 SC 186; and Om Prakash &Ors. Vs. Ram Kumar &Ors., AIR 1991 SC 409, observing that a party cannot be granted a relief which is not claimed."

"31.Dealing with the same issue, this Court in Bharat Amratlal Kothari Vs. Dosukhan Samadkhan Sindhi &Ors., AIR 2010 SC 475 held:

"Though the Court has very wide discretion in granting relief, the court, however, cannot, ignoring and keeping aside the norms and principles governing grant of relief, grant a relief not even prayed for by the petitioner."

"32. In Fertilizer Corporation of India Ltd. & Anr. Vs. Sarat Chandra Rath &Ors., AIR 1996 SC 2744, this Court held that "the High Court ought not to have granted reliefs to the respondents which they had not even prayed for."

"33. In view of the above, law on the issue can be summarized that the Court cannot grant a relief which has not been specifically prayed by the parties."

10.12 The Hon'ble Supreme Court in ***Civil Appeal No. 4887 of 2014 (Arising out of SLP (C) No 22742 of 2005) with Civil Appeal No. 4888 of 2014 (Arising out of SLP (C) No 22772 of 2005) Gaiv Dinshaw Irani &Ors. Vs. Tehmtan Irani &Ors.***(decided on 25.04.2014) while examining the issue, whether the High Court taking note of the subsequent events can mould a relief, observed as follows in para nos. 34, 35:-

"34. Considering the aforementioned changed circumstances, the High Court taking note of the subsequent events moulded the relief in the appeal under Section 96 of the Code of Civil Procedure and the same has been challenged by the appellants before us. In ordinary course of litigation, the rights of parties are crystallized on the date the suit is instituted and only the same set of facts must be considered. However, in the interest of justice, a court including a court of appeal under Section 96 of the Code of Civil Procedure is not precluded from taking note of developments subsequent to the commencement of the litigation, when such events have a direct bearing on the

relief claimed by a party or one the entire purpose of the suit the Courts taking note of the same should mould the relief accordingly. This rule is one of ancient vintage adopted by the Supreme Court of America in Patterson vs. State of Alabama followed in Lachmeshwar Prasad Shukul vs Keshwar Lal Choudhury. The aforementioned cases were recognized by this Court in Pasupuleti Venkateswarlu vs. The Motor and General Traders wherein he stated that:

> *"…If a fact, arising after the lis has come to court and has a fundamental impact It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fairplay is violated, with a view to promote substantial justice — subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial court. If the litigation pends, the power exists, absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myriad. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the Court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed."*

"The abovementioned principle has been recognized in a catena of decisions. This Court by placing reliance on the Pasupuleti Venkateswarlu Case (supra), held in Ramesh Kumar vs. Kesho Ram that:

> *"6. The normal rule is that in any litigation the rights and obligations of the parties are adjudicated upon as*

> *they obtain at the commencement of the lis. But this is subject to an exception. Wherever subsequent events of fact or law which have a material bearing on the entitlement of the parties to relief or on aspects which bear on the moulding of the relief occur, the court is not precluded from taking a 'cautious cognizance' of the subsequent changes of fact and law to mould the relief."*

"This was further followed in Lekh Raj vs. Muni Lal &Ors.. This Court in Sheshambal (dead) through LRs vs. Chelur Corporation Chelur Building &Ors. while discussing the issue of taking cognizance of subsequent events held that:

> *"19. To the same effect is the decision of this Court in Om Prakash Gupta case where the Court declared that although the ordinary rule of civil law is that the rights of the parties stand crystallised on the date of the institution of the suit yet the court has power to mould the relief in case the following three conditions are satisfied:…*
>
> *(i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted;*
>
> *(ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and*
>
> *(iii) that such subsequent event is brought to the notice of the court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise."*

"This Court in ***Rajesh D. Darbar and Ors. vs. Narasinghro Krishnaji Kulkarni and Ors.*** *, a matter regarding the elections in a registered society, held that the courts can mould relief accordingly taking note of subsequent events. Furthermore, in Beg Raj Singh vs. State of Uttar Pradesh &Ors. while deciding on the issue of renewal of a mining lease held that:*

"….A petitioner, though entitled to relief in law, may yet be denied relief in equity because of subsequent or intervening events i.e. the events between the commencement of litigation and the date of decision. The relief to which the

petitioner is held entitled may have been rendered redundant by lapse of time or may have been rendered incapable of being granted by change in law. There may be other circumstances which render it inequitable to grant the petitioner any relief over the respondents because of the balance tilting against the petitioner on weighing inequities pitted against equities on the date of judgment."

"Even this Court while exercising its powers under Article 136 can take note of subsequent events (See: Bihar State Financial Corporation &Ors. vs. Chemicot India (P) Ltd. &Ors., Parents Association of Students vs. M.A. Khan & Anr. , State of Uttar Pradesh &Ors. vs. Mahindra & Mahindra Ltd.)"

"35. Thus, when the relief otherwise awardable on the date of commencement of the suit would become inappropriate in view of the changed circumstances, the courts may mould the relief in accordance with the changed circumstances for shortening the litigation or to do complete justice."

10.13 The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the Court for its consideration. Pleadings made in a case lead to framing of issues to be examined by the Courts. Further when the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the Court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. No party should be permitted to travel beyond its pleadings and the Courts are to avoid making out a case not pleaded.

10.14 Similarly, when there is no prayer for a particular relief and no pleadings to support such a relief, and when defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief.

10.15 Further it is well established principle that in an action where a party has prayed for a larger relief it is always open to the Court to grant him any smaller relief that he may be found to be entitled in law and thereby render substantial justice. The Court can undoubtedly take note of changed circumstances or subsequent events and suitably mould the relief to be granted to the party concerned in order to meet out justice in the case. As far as possible, the anxiety and endeavour of the Court should be to remedy an injustice when it is brought to its notice.

10.16 It is our considered view that the Regulatory Authority had passed the impugned order directing the promoter to give possession of the apartment to the allottee without appreciating the pleading & prayer of the allottee, in other words the impugned directions for giving possession to the allottee is beyond the pleading and relief sought by the Allottee. The Regulatory Authority in the name of moulding relief passed orders against and contrary to the prayer of the allottee/appellant, which is also against the object and spirit of the provisions of Section 18 as well as other provisions of the Act, 2016. Further, while deciding a complaint the administrative functions of the Regulatory Authority provided in Sections 32 and 34 of the Act, 2016 cannot be clubbed and complaint ought to have been decided on its merit after examining the pleading and prayer. **Issue no. (1)** is answered accordingly.

11. **Vide Issue No. (2)** we are required to examine as to whether reliance placed on the case of ***Chitra Sharma Vs. Union of India (Civil Appeal No. 744/2017, decided on 09.08.2018)*** while deciding issue no. 1 relating to refund of the amount of the complainant, is correctly appreciated.

11.1 The Regulatory Authority in the impugned order has placed reliance on the judgment of Hon'ble Supreme Court in the case of ***Chitra Sharma and others Vs. Union of India and others*** [Writ Petition (Civil) No. 744 of 2017 decided on 9th August, 2018]. The examination of the said judgment reveals that the proceedings were initiated under Article 32 of the Constitution of India for protecting the interest of home buyers in the project floated by Jaypee Infratech Ltd., who had been left in lurch and faced with a situation of human distress, occasioned by the failure of the developers to meet their contractual obligations and a legal regime as it then stood under the IBC

which provided no solace to home buyers. The Hon'ble Supreme Court taking into consideration the fact that an amount of Rs. 750 crores was lying in deposit before the Hon'ble Supreme Court in pursuance to the interim direction along with interest accrued and some home buyers have earnestly sought the issuance of interim direction to facilitate a pro-rata disbursement of this amount to those of the home buyers who seek a refund, declined to accede the request of home buyers for the reason that during the pendency of the CIRP, it would be a matter of law, be impermissible for the Court to direct a preferential payment being made to a particular class of financial creditors, whether secured or unsecured. Further directing disbursement of the amount of Rs. 750 crores to the home buyers, who seek refund would be manifestly improper and cause injustice to the secured creditors since it would amount to a preferential disbursement to a class of creditors and once recourse to the discipline of the IBC has been taken, it is necessary that its statutory provisions be followed to facilitate the conclusion of the resolution process. Secondly, the figures available on the web portal opened by the amicus curiae, indicate that 8% of the home buyers have sought refund of their money while 92% would evidently prefer possession of the homes, which they have purchased. They would have a legitimate grievance if the corpus of Rs. 750 crores (together with accrued interest) is distributed to the home buyers who seek a refund. The purpose of the process envisaged by the IBC for the evaluation and approval of a resolution plan is to form a composite approach to deal with the financial situation of the corporate debtor. Allowing a refund to one class of financial creditors will not be in the overall interest of a composite plan being formulated under the provisions of the IBC. Further RBI had moved before the Court seeking permission to initiate an insolvency resolution process, etc.

11.2 In our considered view, the observations of Hon'ble Supreme Court in para-40 of judgment rendered in the case of ***Chitra Sharma*** (supra) was in a peculiar facts and circumstances of the said case and do not apply to the cases of home buyers seeking refund on account of delay in completion of the Project/giving possession of the apartment/flat to a home buyer in accordance with the terms of the agreement for sale under the scheme of Act 2016. **Issue no. (2)** is answered accordingly.

12. **Vide Issue No. (3)** we are required to examine as to whether the claim of the appellant/allottee for refund of his deposited amount along with interest is in consonance with the provisions of Section 18 of the Act, 2016.

12.1 The Real Estate (Regulation & Development) Act, 2016 has been enacted 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, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the Adjudicating Officer and for matters connected therewith or incidental thereto . The Real Estate (Regulation & Development) Act, 2016 delineates functions and duties of promoter in Chapter 3, and rights and duties of allottees in Chapter 4. The Real Estate Regulatory Authority has been assigned functions and have been given powers as detailed out in Chapter 5.

12.2 A perusal of the statement of objects and reasons of the Act of 2016 makes it clear that the Real Estate Sector had been largely unregulated and the Consumer Protection Act, 1986 was not adequate to address all the concerns of the buyers in the Real Estate Sector, and therefore the present Act of 2016 has been promulgated with a view to protect the interests of the consumers in the Real Estate Sector and to ensure greater accountability towards consumers and to significantly reduce frauds and delays, and also to curb the current high transaction costs.

12.3 The Act spells out the obligations of the Promoter of a real estate project and the consequences if the Promoter fails to fulfill those obligations. Some of those obligations are enumerated in Section 11,12,13 and 18 of the Act which are as follows:--

> ***"11. Functions and duties of promoter.—***
>
> *(1)………………………*
>
> *(2)………………………*
>
> *(3)………………………*
>
> *(4) The promoter shall—*

(a)be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be: Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.

(b) be responsible to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees, as the case may be;

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

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

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

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

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

authority, as the case may be, as provided under section 17 of this Act;

(g) pay all outgoings until he transfers the physical possession of the real estate project to the allottee or the associations of allottees, as the case may be, which he has collected from the allottees, for the payment of outgoings (including land cost, ground rent, municipal or other local taxes, charges for water or electricity, maintenance charges, including mortgage loan and interest on mortgages or other encumbrances and such other liabilities payable to competent authorities, banks and financial institutions, which are related to the project):

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

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

(5)…………………..

(6)…………………..

12. Obligations of promoter regarding veracity of the advertisement or prospectus.—*Where any person makes an advance or a deposit on the basis of the information contained in the notice advertisement or prospectus, or on the basis of any model apartment, plot or building, as the case may be, and sustains any loss or damage by reason of any incorrect, false statement included therein, he shall be compensated by the promoter in the manner as provided under this Act:*

Provided that if the person affected by such incorrect, false statement contained in the notice, advertisement or prospectus, or the model apartment, plot or building, as the case may be, intends to withdraw from the proposed project, he shall be returned his entire investment along with interest at such rate as may be prescribed and the compensation in the manner provided under this Act.

13. No deposit or advance to be taken by promoter without first entering into agreement for sale. –

(1) A promoter shall not accept a sum more than ten per cent of the cost of the apartment, plot, or building as the case may be, as an advance payment or an application fee, from a person without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force.

(2) The agreement for sale referred to in sub-section (1) shall be in such form as may be prescribed and shall specify the particulars of development of the project including the construction of building and apartments, along with specifications and internal development works and external development works, the dates and the manner by which payments towards the cost of the apartment, plot or building, as the case may be, are to be made by the allottees and the date on which the possession of the apartment, plot or building is to be handed over, the rates of interest payable by the promoter to the allottee and the allottee to the promoter in case of default, and such other particulars, as may be prescribed.

12.4 A plain reading of Section 11 and 12 of the Act reveals that a promoter has an obligation and responsibility towards the allottees in terms of the Agreement for Sale. The promoter is also responsible for obtaining the C.C. and/or O.C. from the Competent Authority, as well as for execution of the registered conveyance deed in favour of the allottees. Further, in case a person is aggrieved on account of misinformation or false information, he/she has a right to withdraw from the project, and the promoter is liable to return his entire investment alongwith interest and/or compensation. Section 13 imposes responsibilities on the promoter for not accepting a sum of more than 10 percent of the cost of the apartment without first entering into and registering an agreement for sale, which should indicate the payment

schedule for the allottees as well as the date on which possession of the apartment is to be handed over to the allottees.

12.5 Section 18 deals with the issue of return of amount and compensation, the relevant portion of Section 18(1) is extracted as follows:-

> ***"Section 18- Return of amount and compensation –(1)*** *If the promoter fails to complete or is unable to give possession of an apartment, plot or building,–*
>
> *(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or*
>
> *(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,*
>
> *he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act :*
>
> *Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."*

Section 18(1) of the Act provides that if an allottee wishes to withdraw from the project on the ground that the promoter has failed to complete or is unable to give possession of the property in accordance with the agreement for sale within the date specified therein, or due to discontinuance of the promoter's business on account of suspension or revocation of its registration or for any other reason, then the promoter shall return the amount received from the allottee in respect of that property with

interest and compensation, on the allottee's demand. Further, if an allottee does not wish to withdraw from the project, he shall be paid by the promoter interest for every month of delay till the handing over of the possession, at such rate as may be prescribed.

As per the provisions of Section 18 of the Act, the option of either withdrawing from the project or staying in the project remains with only the allottee. The intent of the legislature is quite clear that the right of exercising the option of either staying in the project or for withdrawing from it is unqualified and if the option is availed by the allottee to withdraw from the project, the money deposited by the allottee has to be refunded by the promoter along with interest at such rate as may be prescribed.

12.6 Section 19 deals with the Rights and Duties of allottees. Sub-section (4) is relevant for the present case and the same is reproduced hereinbelow:--

"***19. Rights and duties of allottees.—***

(1) ………………………..

(2)…………………………

(3)………………………..

(4) The allottee shall be entitled to claim the refund of amount paid along with interest at such rate, as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder."

12.7 From the conjoint reading of these provisions, it is evident that if the Promoter/developer fails to fulfill his obligations to hand over the possession as per terms of the agreement, the allottee is entitled to claim refund, along with interest and compensation.

12.8 The Hon'ble Bombay High Court in the case of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. Union of India, W.P.No. 2737/2017, 2017 SCC Online Bom 9302,*** decided on 06.12.2017 was pleased to observe as under:-

> *"……The plain language of Section 18(1)(a) shows that if the promoter fails to complete or is unable to give possession of an apartment, plot or building in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein, he would be liable to return the amount received by him together with interest including compensation. In case the allottee does not intend to withdraw from the project, the promoter is liable to pay interest for every month's delay till handing over of possession. The purpose of Section 18(1)(a) is to ameliorate the buyers in real estate sector and balance the rights of all the stake holders. The provisions of RERA seek to protect the allottees and simplify the remedying of wrongs committed by a promoter. ……."*

12.9 The Hon'ble Supreme Court, while dealing with the provisions of Section 18 of the Act, 2016, in the case of ***M/S Imperia Structures Ltd. Vs. Anil Patni and another***, Civil Appeal Nos. 3581-3590 of 2020, decided on 02.11.2020, in para 23, observed as under:-

> ***"23.*** *In terms of Section 18 of the RERA Act, if a promoter fails to complete or is unable to give possession of an apartment duly completed by the date specified in the agreement, the Promoter would be liable, on demand, to return the amount received by him in respect of that apartment if the allottee wishes to withdraw from the Project. Such right of an allottee is specifically made "without prejudice to any other remedy available to him". The right so given to the allottee is unqualified and if availed, the money deposited by the allottee has to be refunded with interest at such rate as may be prescribed. The proviso to Section 18(1) contemplates a situation where the allottee does not intend to withdraw from the Project. In that case he is entitled to and must be paid interest for every month of delay till the handing over of the possession. It is upto the allottee to proceed either under Section 18(1) or under proviso to Section 18(1). The case of Himanshu Giri came under the latter category. The RERA Act thus definitely provides a remedy to an allottee who wishes to withdraw from the Project or claim return on his investment."*

12.10 The Hon'ble Supreme Court in ***Civil Appeal No. 12238/2018 (Pioneer Urban Land Infrastructure Ltd. Vs. Govind Raghwan***) has observed as follows:-

> *"We see no illegality in the Impugned Order dated 23.10.2018 passed by the National Commission. The Appellant – Builder failed to fulfill his contractual obligation of obtaining the Occupancy Certificate and offering possession of the flat to the Respondent – Purchaser within the time stipulated in the Agreement, or within a reasonable time thereafter. The Respondent – Flat Purchaser could not be compelled to take possession of the flat, even though it was offered almost 2 years after the grace period under the Agreement expired. During this period, the Respondent – Flat Purchaser had to service a loan that he had obtained for purchasing the flat, by paying Interest @10% to the Bank. In the meanwhile, the Respondent – Flat Purchaser also located an alternate property in Gurugram. In these circumstances, the Respondent – Flat Purchaser was entitled to be granted the relief prayed for i.e. refund of the entire amount deposited by him with Interest."*

12.11 The Hon'ble Supreme Court in ***M/s Fortune Infrastructure (now known as HICON Infrastructure) and Anr. Vs. Trevor D'Lima&Ors***(Civil Appeal No. 3533-3534 of 2017 decided on 12.03.2018) was pleased to observe that a person cannot be made to wait indefinitely for the possession and if there is no delivery period mentioned in the agreement, a reasonable time has to be taken into consideration, and had observed that in such a situation a period of 3 years would have been reasonable for completion of the contract.

12.12 The Hon'ble Supreme Court in ***Civil Appeal No. 3182/2019 (Kolkata Best International City Pvt. Ltd. Vs. Devashish Rudra***), while examining the issue of delay in possession beyond reasonable period and refund of the amount of home buyer, has been pleased to observe as follows:-

> *"It would be manifestly unreasonable to construe the contract between the parties as requiring the buyer to wait indefinitely for possession. By 2016, nearly seven years had elapsed from the date of the agreement. Even according to the developer, the completion certificate was received on 29 March 2016. This was nearly seven years after the extended date for the handing over of possession prescribed by the agreement. A buyer can be expected to wait for possession for a reasonable period. A period of seven years is beyond what is reasonable. Hence, it would have been manifestly unfair to non-suit the buyer merely on the basis of the first prayer in the reliefs sought before the SCDRC. There was in any event a prayer for refund. In the circumstances, we are of the view that the orders passed by the*

SCDRC and by the NCDRC for refund of moneys were justified."

12.13 The Hon'ble Supreme Court in ***Civil Appeal No. 3207-3208/2019 (Marvel Omega Builders Pvt. Ltd & Ors. Vs. Shri Hari Gokhle***) has observed as follows:-

> *"Even assuming that the villa is now ready for occupation (as asserted by the Appellants), the delay of almost five years is a crucial factor and the bargain cannot now be imposed upon the Respondents. The Respondents were, therefore, justified in seeking refund of the amounts that they had deposited with reasonable interest on said deposited amount. The findings rendered by the Commission cannot therefore be said to be incorrect or unreasonable on any count."*

12.14 Recently Hon'ble Supreme Court in ***Civil Appeal No. 62 of 2021 M/S Nexgen Infracon Pvt. Ltd. Vs. Manish Kumar Sinha and another*** vide judgment dated 11th January, 2021, while examining the issue of non-willingness of the allottee to take possession of the apartment and his willingness to be satisfied in taking refund of the amount deposited by him with interest at such rate as may deem appropriate by the Court, pleased to observe that "we see no reason to take a different view in respect of the entitlement of the respondents to seek refund of the amount deposited by them. We, therefore, hold that the respondents were justified in seeking refund."

12.15 Further, in terms of Sub-Section 5 of Section 4 of the U.P. Apartments Act 2010, *"an apartment may be transferred by the promoter to any person only after obtaining the completion certificate from the prescribed sanctioning authority concerned as per building bye-lays."*

12.16 Evidently, there is a delay in completion of the Project/Tower, in which the flat in question was allotted to the appellant, therefore, we conclude that the delay is solely attributable to the respondent/promoter and allottee cannot be bound to take possession of the Unit/Flat.

12.17 On the basis of the aforesaid analysis we are of the considered view that the claim of the allottee/appellant for seeking refund of her deposited amount along with interest on account of delay in completion of the Project/handing over of possession of the allotted Unit/Flat is in consonance with the

provisions of Section 18 of the Act, 2016. **Issue no. (3)** is answered accordingly.

13. **Vide Issue No. (4)** we are required to examine as to whether the project in question of the respondent is delayed.

13.1 From the pleadings on record it is evident that the appellant booked Flat No. 405, fourth floor, admeasuring 1150 sq. ft. in Sikka Greens, a project of the respondent, at basic rate of Rs.3246/- per sq. ft. plus preferred location charges at Rs.100/- per sq. ft. for a total consideration of Rs.38,76,650/-. The appellant paid Rs.36,61,164/- till 10.01.2018. At the time of booking in 2011 the respondent promoter had assured the appellant that the project shall be completed in any event by the year 2017.

13.2 As per clause 26 of the Allotment Agreement the respondent/promoter had to complete the project in 40 months +/- 6 months from the date of start of casting of the raft of the respective towers. At the time of booking in June 2012 the raft of the tower was already laid and certain floors were constructed in Tower Cheer. As such the unit was to be handed over to the appellant by April 2016. The extension granted by the Regulatory Authority for completion of the project has also expired on 29.12.2020 as per information available on UP RERA website. Till date the respondent has not received occupancy or completion certificate for the project. The project is not even 30% complete till date as mentioned by the NOIDA Authority in its temporary occupation certificate dated 11.05.2021.

13.3 The respondent/promoter in its objection to the memo of appeal admitted that the project could not be completed at time, but now the project is going to complete very soon. The respondent has completed above 30% of the project. In view of the admission of the respondent we hold that the project of the respondent was delayed. **Issue no. (4)** is answered accordingly.

14. **Issue No. (5)** is as to whether offer of possession can be given by a promoter without completion and occupation certificate or is it necessary and mandatory to obtain the same before offering possession and asking the allottee to settle the account and satisfy the final demand, under the scheme of Act & Rules 2016, read with U.P. Apartments Act 2010.

14.1 In order to appreciate the issue, we examine Section 2(q) and Section 2(zf) of the Act of 2016, which defines Completion & Occupancy Certificate, the same are extracted as follows:-

> ***"Section 2:- Definitions - In this Act, unless the context otherwise requires,-***
>
> …………………………………………………………………………………………
> ……………………………………………………………
>
> ***"Section 2 (q)*** *"completion certificate" means the completion certificate, or such other certificate, by whatever name called, issued by the competent authority certifying that the real estate project has been developed according to the sanctioned plan, layout plan and specifications, as approved by the competent authority under the local laws;"*
>
> ***"Section 2 (zf)*** *"occupancy certificate" means the occupancy certificate, or such other certificate by whatever name called, issued by the competent authority permitting occupation of any building, as provided under local laws, which has provision for civic infrastructure such as water, sanitation and electricity;"*

14.2 On examination of the provisions of Section 2 (q) and Section 2(zf), we find that completion certificate is basically a certificate issued by the competent authority certifying that the Real Estate Project has been developed according to the sanctioned plan, lay out plan and specifications, as approved by the competent authority under the local laws. On the other hand, the occupancy certificate is issued by the competent authority permitting occupation of any building, as provided under local laws, which has provision for civic infrastructure such as water, sanitation and electricity etc.

14.3 Similarly, Section 4(5) of the U.P. Apartments Act, 2010 prescribes for Completion Certificate, which reads as follows:-

> *"**Section 4(5) of the U.P. Apartments Act, 2010**:-An apartment may be transferred by the promoter to any person only after obtaining the completion certificate from the prescribed sanctioning authority concerned as per building bye-laws. The completion certificate shall be obtained by promoter from prescribed authority [within the period specified for completion of the project in the development permit or the building permit as the case may be] Provided that if the construction work is not completed within the stipulated period, with the permission of the prescribed authority;*
>
> *Provided further that if the completion certificate is not issued by the prescribed sanctioning authority within three months of submission of the application by the promoter complete with all certificates and other*

documents required, the same shall be deemed to have been issued after the expiry of three months.

Explanation: For the purposes of this sub-section "completion" means the completion of the construction works of a building as a whole or the completion of an independent block of such building, as the case may be.”

14.4 Section 4(5) of the U.P. Apartments Act 2010 clearly lays down that an apartment may be transferred by the Promoter to any person (allottee) only after obtaining the C.C. from the prescribed sanctioning authority concerned as per building by-laws. The C.C. is required to be obtained by the Promoter, meaning thereby that Allottee has no role to play in obtaining C.C. from the prescribed authority. A Promoter is required to first obtain C.C./O.C. from the prescribed authority, only thereafter register conveyance deed of the real estate in favour of the Allottee(s) and a legal & habitable possession can be offered to the Allottees.

14.5 The issue of offering handing over possession prior to obtaining occupancy certificate was also examined by the Hon’ble Supreme Court in ***Civil Appeal Nos. 1232 and 1443-1444 of 2019 R.V. Prasannakumaar and ors. Vs. Mantri Castles Pvt. Ltd. and ors.decided on 11.02.2019*** wherein it has been observed that possession cannot be handed over prior to obtaining occupancy certificate.

14.6 In view of the aforesaid analysis, we are of the considered view that as per the provisions of the U.P. Apartments Act, 2010 read with the provisions of Act, 2016 a Promoter is required to offer legal and habitable possession to the allottees only after obtaining C.C./O.C. and ask for clearing dues by raising final demand. **Issue no. (5)** is answered accordingly.

15. **Issue No (6)** relates to the entitlement of the appellant for the interest on account of delay in completion of the Project under the scheme of Act, 2016 and the rate of interest required to be paid by the Promoter to the allottee for delay.

15.1 Section 18 (1) of the Act clearly provides that if an Allottee wishes to withdraw from the Project on the ground that the Promoter is unable to give possession in accordance with the Agreement for Sale within the date

specified therein, then the Promoter shall return the amount received from the Allottee in respect of that property with interest and compensation, on the Allottees' demand. The power of exercising the option of either staying in the Project or for withdrawing from it lies only with the Allottees under the provisions of Section 18 (1) of the Act. Further, Section 19(4) of the Act 2016 gives right to the allottees to claim refund along with interest and/or compensation in case the Promoter fails to give possession of the apartment in accordance with the terms and conditions of Agreement for sale.

15.2 The Hon'ble Bombay High Court in the case of ***Neelkamal Realtors Suburban Pvt. Ltd. And others Vs. Union of India (2018)1 Bom R 558*** observed as under:--

> *"Section 18(1)(b) lays down that if the promoter fails to complete or is unable to give possession of an apartment due to discontinuance of his business as a developer on account of suspension or revocation of the registration under the Act or for any other reason, he is liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice in this behalf including compensation. If the allottee does not intend to withdraw from the project he shall be paid by the promoter interest for every month's delay till handing over of the possession. The requirement to pay interest is not a penalty as the payment of interest is compensatory in nature in the light of the delay suffered by the allottee who has paid for his apartment but has not received possession of it. The obligation imposed on the promoter to pay interest till such time as the apartment is handed over to him is not unreasonable. The interest is merely compensation for use of money".*

15.3 Subsequently, in ***Wg. Cdr. Arifur Rahman Khan & Others Vs. DLF Southern Homes Pvt. Ltd., reported in (2020) SCC Online 667*** affirming the view taken in the Judgment in Pioneer's case (Supra) the Hon'ble Supreme Court held that the term of the agreement authored by the Developer does not maintain a level platform between the Developer and the flat purchaser. The stringent terms imposed on the flat purchaser are not in consonance with the obligation of the Developer to meet the timelines for construction and handing over possession, and do not reflect an even bargain. The failure of the Developer to comply with the contractual obligation to provide the flat within the contractually stipulated period,

would amount to a deficiency of service. Given the one-sided nature of the Apartment Buyer's Agreement, the consumer fora had the jurisdiction to award just and reasonable compensation as an incident of the power to direct removal of deficiency in service.

15.4 Recently the Hon'ble Supreme Court, while dealing with the provisions of Section 18 of the Act, 2016, in the case of ***M/S Imperia Structures Ltd. Vs. Anil Patni and another***, Civil Appeal Nos. 3581-3590 of 2020, decided on 02.11.2020, vide para 23, was pleased to observe that the right so given to the allottee is unqualified and if availed, the money deposited by the allottee has to be refunded with interest at such rate as may be prescribed and the proviso to Section 18(1) contemplates a situation where the allottee does not intend to withdraw from the Project. In that case he is entitled to and must be paid interest for every month of delay till the handing over of the possession. It is upto the allottee to proceed either under Section 18(1) or under proviso to Section 18(1).

15.5 U.P. Government framed "Uttar Pradesh Real Estate (Regulation and Development) (Agreement for Sale/Lease) Rules, 2018" (hereinafter referred to as Rules, 2018), wherein under Rule 9.2(ii) and 9.3(i), the rate of interest payable by the promoter or by the allottee respectively are defined in case of default by either of the party. These Rules are extracted below :-

Rule 9.2(ii)

The Allottee shall have the option of terminating the Agreement in which case the Promoter shall be liable to refund the entire money paid by the Allottee under any head whatsoever towards the purchase of the apartment, along with interest at the rate equal to MCLR (Marginal Cost of Lending Rate) on home loan of State Bank of India + 1% unless provided otherwise under the Rules, within forty-five days of receiving the termination notice:

Provided that where an Allottee does not intend to withdraw from the Project or terminate the Agreement, he shall be paid, by the Promoter, interest at the rate prescribed in the Rules, for every month of delay till the handing over of the possession of the Apartment/Plot, which shall be paid by the Promoter to the Allottee within forty-five days of it becoming due.

Rule 9.3

The Allottee shall be considered under a condition of Default, on the occurrence of the following events :

Rule 9.3(i)

In case the Allottee fails to make payments for 2(two) consecutive demands made by the Promoter as per the Payment Plan annexed hereto, despite having been issued notice in that regard the Allottee shall be liable to pay interest to the promoter on the unpaid amount at the rate equal to MCLR (Marginal Cost of Lending Rate) on home loan of State Bank of India + 1% unless provided otherwise under the Rules. The Promoter must not be in default to take this benefit.

15.6 On examination, we find that these Rules-2018 notified by U.P. Government are in consonance with the definition of interest as provided in Section 2(za) of the Act, in as much as that the interest chargeable from the allottee by the promoter, in case of default in payment as per demand, is equal to the rate of interest which the promoter is liable to pay to the allottee, in case of default/delayed possession on the part of promoter.

15.7 We have come across various orders of the Regulatory Authority wherein it had granted interest at the rate of MCLR+1% per annum in case of delayed projects and had an occasion to examine the issue of rate of interest at MCLR+1% awarded by the Regulatory Authority in ***Appeal No. 295 of 2019 (U.P. Avas Vikas Parishad Vs. Devesh Kumar Tiwari) decided on 20.02.2020*** and held as under:--

“We feel that this imbalance is on account of the fact that the buyer/allottee has much less bargaining power as compared to the seller in the real estate market and therefore the buyers/allottees have no choice but to sign on such "dotted line", "one sided, unfair and unreasonable" terms and conditions/Agreements. We are therefore of the view that the rate of MCLR +1% , as prescribed by the Government and as being ordered by the Regulatory Authority, be payable from the date of deposit of money in case the allottee wishes to withdraw from the project; and from the specified/expected date of possession in case the allottee wishes to stay in the project, would balance the equities and are just and fair and will fall within the term "interest at such rate as may be prescribed" as used in Sections 12, 18 & 19.........”

It is our considered view that drawing light from the Rules of 2018, and the fact that often an allottee/buyer has to supplement his savings by taking loan at the MCLR percent interest (compound), the simple rate of interest at MCLR+1 percent balances the equities and is in line with the word and spirit of the Act and can be taken as "interest at such rate as may be prescribed" as mentioned in Sections 12,18 and 19 of the Act, till the rate of interest for the purpose is notified by the State Government.

15.8 It is important to mention herein that the **Hon'ble Supreme Court** in ***Civil Appeal No. 4910-4941/2019 DLF Homes Panchkula Pvt. Ltd. Versus D. S. Dhanda etc. etc.*** while examining the issue of compensation, was pleased to observe as under;-

> *"If compensation comprises of two parts, (i) by way of interest on the deposited amount from the assured date (milestone date) of completing construction and handling over possession to the actual date of handling over possession, and, (ii) lumpsum amount, we find nothing wrong in it. We do not agree with the builder co.'s contentions that interest on the deposited amount should not be provided since it is not a case of refund but a case of delay in possession. The interest on the deposited amount has to be viewed in the light of the purpose for which it is intended. It is but a way of computing compensation for delay in possession that is commensurate with the amount deposited by the complainant, and here it has been computed after adopting a milestone date as per the builder co.'s own (unfair and deceptive) letter of 05.06.2013. There can be and is no question of not agreeing to an endorsing the award of interest from the said milestone date. Here we may however add that the rate of interest also cannot be arbitrary or whimsical, some reasonable and acceptable rationale has to be evident, subjectivity has to be minimized, a logical correlation has to be established. Albeit detailed arithmetic or algebra is not required. Logical (to the extent feasible) objective parameters should be adopted. Rounding off simplification etc. to make the computation doable could be adopted. We feel it appropriate that, considering that the subject units in question are dwelling units, in a residential housing project, the rate of interest for house building loan for the corresponding period in a scheduled nationalized bank (take, State Bank of India) would be appropriate and logical, and , if 'floating'/ varying/different rates of interest were/ are prescribed, the higher rate of interest should be taken for this instant computation."*

15.9 Further, an allottee deposits amount under the hope and trust that he/she will get the flat within the time schedule advertised at the initial stage. There may be certain cases where allottees might be residing in rented houses and they might have managed their financial position in such a manner that after deposit of amount, they will get flats of their own and thereafter they will be free from payment of rent as then they will shift from rented houses to allotted flats but on account of inordinate delay in delivery of possession of allotted flats, their financial calculations and legitimate expectations stand frustrated causing various types of financial losses to them. On the other hand once the promoter/builder made offers and same are accepted by the allottees with legitimate expectation, the obligation cast upon the promoter/builder is to complete the same within the time schedule mentioned in the offer and if they fail to discharge the same the affected allottees are entitled to the interest and/or compensation for delayed delivery of possession, as the allottees have parted with money which was earning interest. If an allottee chooses to remain in the project and in case the allottee seeks refund then he is entitled for interest on the deposited amount and/or compensation in accordance with the provisions of the Act 2016, which in our considered view will be in accordance with the principles of equity as well.

15.10 On the basis of aforesaid analysis the **Issue no. (6)** is answered in affirmative in favour of appellant.

16. The Hon'ble Supreme Court vide its judgments (i) Civil Appeal No. 3182 of 2019 ***Kolkata West Industrial City Pvt. Ltd. Vs. Devashish Ryudra,****(ii)*Civil Appeal No. 3207 & 3208 of 2019***Marvel Omega Builders Pvt. Ltd. & others Vs. S. Wiharis Gokhale & others,*** *(iii)*(2018)5 SCC 442 ***Fortune Infrastructure and another Vs. Trevor D. Lima & others*** *and (iv)*(2007)6 SCC 711 ***Bangalore Development Authority Vs. Syndicate Bank*** was pleased to observe that it would be unreasonable to require the allottee to wait indefinitely for possession of the unit and the allottee is entitled to seek refund of the amount paid by him along with compensation.

17. The submission of learned counsel for the respondent is that since direction no. 4 of the impugned order was available with the appellant whereby the Regulatory Authority directed that in case the respondent/promoter fails to provide possession to the allottee/complainant by 31.08.2021, the

allottee/complainant will be entitled for refund of the entire amount along with interest at the rate of MCLR+1% after expiry of 45 days from 31.08.2021, as such the appellant is at liberty to move application before the Regulatory Authority for execution of direction no. 4 and the appeal can be disposed of with the said direction.

17.1 On examination of the record we found that against the impugned order dated 29.06.2021 the instant appeal has been preferred by the allottee/complainant on 25.08.2021 for setting aside the impugned order with further prayer to direct the respondent/promoter to return a sum of Rs.36,61,164/- along with SBI's MCLR+1% annual compound interest (as per the then prevalent SBI's MCLR+1% in the years between payment date to actual return date) to the complainant from actual date of payment made by the appellant to the date of return by respondent.

17.2 We are of the considered view that the objection of the respondent is not sustainable as the allottee/complainant approached the Tribunal for setting aside the entire impugned order dated 29.06.2021 and direction no. 4 of the impugned order might have come into operation during pendency of the present proceedings. We are required to examine the cause of action from the date of filing the complaint before the Regulatory Authority and legality of the order of the Regulatory Authority in its entirety.

18. On the basis of the aforesaid analysis we are of the considered view that the judgment and order dated 29.06.2021 passed by the Regulatory Authority in Complaint No. NCR144/12/66635/2020 (Aparajita Babbar Vs. M/s Kindle Infraheights Pvt. Ltd.) is not sustainable in the eyes of law. Accordingly, the same is hereby set aside and **we allow the appeal** with the following directions:--

(i) The respondent is directed to refund the amount of Rs.36,61,164/- to the complainant/appellant.

(ii) The respondent is further directed to pay interest to the complainant/appellant on the amount of Rs. 36,61,164/- from the date of deposit till the refund of the amount at the rate of MCLR+1% per annum.

(iii) The respondent is further directed to comply this order within 45 days from the date of receipt of this order.

(iv) The appellant is at liberty to approach the U.P. Real Estate Regulatory Authority for execution of this order in case of non-compliance within the time frame fixed by this Tribunal.

19. No order as to costs.

Dated: December 8, 2022
Shakir **(K. K. Jain)** **(D. K. Arora)**