

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**1. RERA-APPL-58-2021(O&M)
Date of decision: 26.04.2022**

APEX BUILDWELL PVT. LTD. ..Appellant

Versus

SACHIN KUMAR AND ANR. ..Respondents

2. RERA-APPL-59-2021(O&M)

APEX BUILDWELL PVT. LTD. ..Appellant

Versus

POONAM YADAV AND ANR. ..Respondents

3. RERA-APPL-60-2021(O&M)

APEX BUILDWELL PVT. LTD. ..Appellant

Versus

VARUN MUNJAL AND ANR. ..Respondents

4. RERA-APPL-61-2021(O&M)

APEX BUILDWELL PVT. LTD. ..Appellant

Versus

SUMAN DEVI AND ANR. ..Respondents

5. RERA-APPL-62-2021(O&M)

APEX BUILDWELL PVT. LTD. ..Appellant

Versus

AKASH MATHUR AND ANR. ..Respondents

6. RERA-APPL-63-2021(O&M)

APEX BUILDWELL PVT. LTD. ..Appellant

Versus

PARDEEP KUMAR AND ANR. ..Respondents

7. RERA-APPL-64-2021(O&M)

APEX BUILDWELL PVT. LTD. ..Appellant

Versus

MADHU TRIPATHI AND ANR. ..Respondents

8. RERA-APPL-65-2021(O&M)

APEX BUILDWELL PVT. LTD. ..Appellant

**RERA-APPL-58-2021 (O&M) and
other connected cases**

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Versus

SANDEEP GROVER AND ANR.

..Respondents

9. RERA-APPL-66-2021(O&M)

APEX BUILDWELL PVT. LTD.

..Appellant

Versus

RAVIN NARAIN VATS AND ANR.

..Respondents

10. RERA-APPL-67-2021(O&M)

APEX BUILDWELL PVT. LTD.

..Appellant

Versus

NISHI KAPOOR AND ANR.

..Respondents

11. RERA-APPL-68-2021(O&M)

APEX BUILDWELL PVT. LTD.

..Appellant

Versus

ANITA YADAV AND ANR.

..Respondents

12. RERA-APPL-39-2021(O&M)

M/S APEX BUILDWELL PVT. LTD.

..Appellant

Versus

KRISHAN KUMAR SACHDEVA AND ANR.

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Akshay Bhan, Sr. Advocate
with Mr. Alok Mittal, Advocate
for the appellant.

Mr. Rohan Gupta, Advocate
Mr. Arun Gupta, Advocate
for the appellant.

Mr. Gaurav Bhardwaj, Advocate
Ms. Ayushi Sharma, Advocate
for respondents.

Mr. Mayank Gupta, Advocate

ANIL KSHETARPAL, J.

Through this judgment, various appeals filed under Section 58

of the Real Estate (Regulation and Development) Act, 2016 (hereinafter

referred to as 'the 2016 Act') shall stand disposed of, wherein the

promoter/developer has challenged the various identical orders passed by Haryana Real Estate Regulatory Authority (hereinafter referred to 'HRERA'), which have been affirmed by the Haryana Real Estate Appellate Tribunal (hereinafter referred to as 'Tribunal'). In the background of the various judgments passed by the Supreme Court interpreting the provisions of the 2016 Act, the learned Senior counsel representing the appellant has restricted his arguments only on the following two issues:-

- i. The delay in completing the project cannot be imputed to the promoter particularly when there was a delay in renewal of licence for a period of more than three years.
- ii. The Authorities have wrongly ignored the contractual rate of interest on the delay in delivery of possession of the apartment beyond the contractual period.

The learned Senior counsel has submitted that he intends to press question No.4, 6, 8 and 9, which are extracted as under:-

“4. Whether the registration of the real estate project granted by the Ld. Authority thereby providing extended time to complete the project shall be applicable to the existing agreements which were executed between the promoter and the allottees prior to the coming into force of the Act 2016?

6. Whether the project duly registered under the Act 2016 implies that the existing agreements and the sale transactions done prior to the coming into force of the Act 2016 shall be governed by the provisions of the Act 2016 and rules framed thereunder?

8. Whether the Rules can over write the provisions of the Act thereby prescribing the fixed rate of interest to be granted to the allottees in all eventualities against the promoter, whether it being a case of refund or delay in delivery of possession?

9. Whether the RERA Authorities have the requisite authority, power and competency to grant interest as per section 38 of the RERA Act, 2016 to the allottee for the

delay in delivering the physical possession as permitted under the provision of Section 18 of the RERA Act, 2016?”

It may be noted here that as per Section 48 of the 2016 Act, the appeal to the High Court is maintainable only on a substantial question of law as provided under Section 100 of Code of Civil Procedure, 1908. So for entertaining an appeal under Section 58 of the 2016 Act, the High Court is required to be satisfied that the case involves a substantial question of law which is a *sine qua non*.

Section 58 of the 2016 Act is extracted as under:-

“58. (1) Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the High Court, within a period of sixty days from the date of communication of the decision or order of the Appellate Tribunal, to him, on any one or more of the grounds specified in section 100 of the Code of Civil Procedure, 1908:

Provided that the High Court may entertain the appeal after the expiry of the said period of sixty days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

Explanation.—The expression "High Court" means the High Court of a State or Union territory where the real estate project is situated.

(2) No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties.”

Some facts are required to be noticed.

The promoter/developer was granted the licence, to carry out the project under the name “Affordable Housing Project”, on 22.02.2012 which was valid upto 21.02.2016. The respondent in this appeal was allotted an apartment bearing No.343, 3rd Floor, Tower-Orchid in Group Housing namely 'Our Home', Sector 37, Gurugram, having a carpet area of 48 square mts. at a total sale price of Rs.16,00,000/-. The respondent (allottee) has already paid Rs.15,20,000/- to the appellant-promoter as per the payment

plan.

The Apartment Buyer's Agreement (hereinafter referred to as 'the ABA') was executed between the parties on 12.07.2013. Its clause 3(a) provides that the possession of the apartment shall be delivered to the allottee within a period of 36 months with a grace of period of 6 months from the date of ABA. On a careful reading of Clause 3(a), it is evident that the period of 36 months with a grace period of 6 months shall not be applicable if any of the contingency happens. The same is extracted as under:-

“3. POSSESSION

a) Offer of possession:

That subject to terms of this Clause 3, and subject to the APARTMENT ALLOTTEE(S) having complied with all the terms and conditions of this Agreement and no being in default under any of the provisions of this Agreement and further subject to compliance with hall provisions, formalities, registration of sale deed, documentation, payment of all amount due and payable to the DEVELOPER by the APARTMENT ALLOTTEE(S) under this agreement etc., as prescribed by the DEVELOPER, the DEVELOPER proposes to hand over the possession of the APARTMENT within a period of thirty six (36) months, with a grace period of 6 months from the date of commencement of construction of the Complex upon the receipt of all project related approvals including sanction of building plan/revised plan and approval of all concerned authorities including the Fire Service Department, Civil Aviation Department, Traffic Department, Pollution Control Department etc., as may be required for commencing, carrying on and completing the said Complex subject to force majeure, restraints or restriction from any court/authorities, it is however understood between the parties that the possession of various Blocks/Towers comprised in the Complex as also the various common facilities planned therein shall be ready & completed in phases and will be handed over to the allottees of different Block/Towers as and when completed and in a phased manner

b) Notwithstanding anything to the contrary contained herein, in the following circumstances, the date of possession shall get extended accordingly;

i) The completion of the said LOW

COST/AFFORDABLE GROUP HOUSING PROJECT including the APARTMENT is delayed by reason of non-availability of steel and/or cement or other building materials, or water supply or electric power or slow down, strike or, lock-out or civil commotion or by reason of war by enemy action or terrorist action or earthquake or any act of God or due to circumstances beyond the power and control of the DEVELOPER or due to any Act, Notice, Order, Rule or Notification of the Government and/or any other Public or Competent Authority or due to delay in sanction of any revised delay in sanction of any revised building/zoning plans/grant of occupation certificate or for any other reasons beyond and control of the DEVELOPER, then the APARTMENT ALLOTTEE(S) agrees that the DEVELOPER shall be entitled to the extension of time for offering the possession of the said APARTMENT. The DEVELOPER as a result of such a contingency arising reserves the right to alter or vary the terms and conditions of this Agreement or if the circumstances beyond the control of the DEVELOPER so warrant, the DEVELOPER may suspend the construction of the LOW COST/AFFORDABLE GROUP HOUSING PROJECT and this Agreement for such period as it may consider expedient and the APARTMENT ALLOTTEE(S) agrees not to claim compensation of any nature whatsoever for the period of suspension of the construction of the LOW COST/AFFORDABLE GROUP HOUSING PROJECT and this Agreement.

ii) If as a result of any law that maybe passed by any legislature or Rule, Regulation or Order on notification that maybe made an/or issued by the Government or any other Authority including a Municipal Authority or an account of delay in sanctioning or approval for development or issuance of occupation certificate by appropriate Authorities, the DEVELOPER is not in a position to hand over the possession of the APARTMENT, then the DEVELOPER may, if so advised, though not bound to do so, at its sole discretion challenge the validity, applicability and/or efficacy of such Legislation, Rule, Order or notification by moving the appropriate Courts, Tribunal(s) and/or Authority. In such situation, the money(ies) paid by the APARTMENT ALLOTTEE(S) in pursuance of this Agreement, shall continue to remain with the DEVELOPER and the APARTMENT ALLOTTEE(S) agrees not to move for or to obtain specific performance of the terms of this Agreement, it being specifically agreed that this Agreement shall remain in abeyance till final determination by the Court(s)/Tribunal(s)/Authority(ies).”

It was provided in the ABA that if the allottee defaults in the payment of the installments or commits any other default, the developer shall have the right to cancel the allotment. It may be noted here that there are various clauses which are, *prima facie*, one sided, unfair and unreasonable. Under Clause 2(c), the appellant has the enabling power to cancel the allotment and forfeit the earnest money along with interest on the delayed payments, interest on installments, brokerage etc. in the event of default by the allottees. The various events of the default have been delineated in Clause 7 of the ABA, which are extracted as under:-

“7. Events of Defaults and Consequences

- i. *It is specifically made clear to the APARTMENT ALLOTTEE(S) that the APARTMENT ALLOTTEE(S) shall perform and comply with all covenants and obligations required to be performed or complied with under this Agreement and any default, breach of covenants, or non-compliance of any of the terms and conditions of this Agreement shall be deemed to be events of defaults liable for consequences stipulated herein. With a view to acquaint the APARTMENT ALLOTTEE(S), some of the indicative events of defaults are mentioned below which are merely illustrative and are not exhaustive:*
 - a) *Failure to make payments within the time as stipulated in the Schedule of Payments as given in **Annexure I** and failure to pay the stamp duty, legal fee, registration charges, maintenance charges any incidental charges, any increase in security deposit including the DEVELOPER, any other charges, taxes etc. as may be notified by the DEVELOPER to the APARTMENT ALLOTTEE(S) under the terms of this Agreement, default in the payment of installments under the Schedule of Payments as given in **Annexure-I**, interest on installments by whatever name called and all other defaults of similar nature;*
 - b) *Failure to perform and observe any or all of the APARTMENT ALLOTTEE(S)' obligations as set forth in this Agreement or to perform any other occupancy obligation, if any, set forth in this or any other related Agreement.*
 - c) *Failure to take over possession of the*

APARTMENT for occupation and use within the time stipulated by the DEVELOPER or failure to pay the Holding Charges as stated herein.

- d) Failure to execute the conveyance deed within the time stipulated by the DEVELOPER or the relevant authorities.*
- e) Failure to execute Maintenance Agreement and/or to pay on or before its due date the maintenance charges, maintenance security or any increases in respect thereof, as demanded by the DEVELOPER and/or its nominee and/or other Body or Association of APARTMENT ALLOTTEE(S).*
- f) Failure, pursuant to a request by the DEVELOPER, to become a member of the Association of APARTMENT ALLOTTEE(S) or to pay subscription charges etc. as may be required by the DEVELOPER or Association of APARTMENT ALLOTTEE(S), as the case may be.*
- g) Assignment of this Agreement or any interest of the APARTMENT ALLOTTEE(S) in this Agreement without prior written consent of the DEVELOPER or without payment of Transfer Charges or not executing documents as asked by the DEVELOPER for transfer, as may be settled by the DEVELOPER from time to time.*
- h) Dishonour/stoppage of payment of any cheque(s) including post dated cheques given by APARTMENT ALLOTTEE(S) for any reason whatsoever.*
- i) Sale/transfer/disposal of/dealing with, in any manner, the reserved parking space independent of the APARTMENT.*
- j) Failure to abide by conditions incorporated in the policy applicable to Low Cost/Affordable Group Housing Project or to adhere to any other guideline/departmental instruction.*
- k) Any other acts, deeds or things which the APARTMENT ALLOTTEE(S) may commit, omit or fail to perform in breach of terms of this Agreement, undertaking, deed etc. or as otherwise as may be demanded by the DEVELOPER which in the opinion of the DEVELOPER amounts to an event of default and the APARTMENT ALLOTTEE(S) agrees and confirms that the decision of the DEVELOPER in this regard shall be final and binding on the APARTMENT ALLOTTEE(S).*
- l) Any breach of any of the APARTMENT ALLOTTEE(S) obligations and duties under the*

Maintenance Agreement and any House Rules as may be prescribed by the Association/DEVELOPER/MAINTENANCE AGENCY in respect of the use and occupation of the APARTMENT.

ii) *Upon the occurrence of any of event(s) of default in respect of covenants and obligations under this Agreement or Maintenance Agreement, or any violation of house rules as may be prescribed the DEVELOPER may:*

a) *In case the possession has not been handed over to the APARTMENT ALLOTTEE(S); The DEVELOPER may at its sole discretion decide, by notice to the APARTMENT ALLOTTEE(S), to cancel the allotment and terminate this Agreement. If the DEVELOPER elects to cancel the allotment and terminate this Agreement, the APARTMENT ALLOTTEE(S) shall have thirty (30) days from the date of issue of notice of cancellation by the DEVELOPER to cure/rectify the default as specified in that notice. Unless and until the APARTMENT ALLOTTEE(S) rectifies the event of default, the DEVELOPER shall not be obliged to execute the Conveyance Deed and that the APARTMENT ALLOTTEE(S) shall be liable to pay Holding Charges as provided herein this Agreement. The APARTMENT ALLOTTEE(S) agrees that if the default is not cured/rectified within such thirty (30) days, this Agreement shall be automatically cancelled without any further notice and the DEVELOPER shall be entitled to retain the entire Earnest Money as specified in this Agreement along with the processing fee, interest on delayed payments, any interest paid, due or payable, any other amount of a non-refundable nature.*

The APARTMENT ALLOTTEE(S) agrees that upon such cancellation of this Agreement, the DEVELOPER will be released and discharged of all liabilities and obligations under this Agreement and the APARTMENT ALLOTTEE(S) hereby authorises the DEVELOPER that the said APARTMENT and the car parking space may be sold to any other party by the DEVELOPER or dealt in any other manner as the DEVELOPER may in its sole discretion deem fit as if this Agreement had never been executed and without accounting to the APARTMENT ALLOTTEE(S) for any of the proceeds of such sale. In the event of the DEVELOPER electing to cancel this Agreement, the DEVELOPER will refund, without any interest

or penalty, the amount received from the APARTMENT ALLOTTEE(S) after deducting earnest money, outstanding interest, penalties etc. from the payments made by the APARTMENT ALLOTTEE(S), but only after realising such refundable amount on further sale/resale to any other party. It is clarified here that after refund of the amount, the APARTMENT ALLOTTEE(S) shall be left with no right, title, interest or lien over the said APARTMENT and the parking space in any manner whatsoever.

Without prejudice to the Developer's aforesaid right, the Developer may at its sole discretion waive the breach by the Apartment Allottee(s) in not making timely payments as per the payment plan but on the condition that the Apartment Allottee(s) shall pay to the Developer, interest on, the delayed payments which shall be charged for the first 60 (sixty) days from the due date @ 18% per annum and for all periods exceeding first 60 (sixty) days after the due date @ 24% per annum. Provided that the Developer may in its sole discretion, waive its right to terminate the allotment and this Agreement and recover all the payments and seek specific performance of this Agreement.

- b) *In case the possession has been handed over to the APARTMENT ALLOTTEE(S):* *The DEVELOPER/maintenance agency may send a notice to the APARTMENT ALLOTTEE(S) to cure/rectify the default as specified in that notice within a period of seven (7) days. In case the default as stated in the notice is not cured/rectified by the APARTMENT ALLOTTEE(S), within seven (7) days, the APARTMENT ALLOTTEE(S) shall be required to pay penalty @ Rs.2/- (Rupees Two Only) per square ft. (for the super area of the Apartment) per day to the DEVELOPER till the default is not cured/rectified. The DEVELOPER/maintenance agency will also be entitled to disconnect the electricity connection of the defaulting APARTMENTALLOTTEE(S) in case the default is not cured by the APARTMENT ALLOTTEE(S) within 15 days. The APARTMENT ALLOTTEE(S) also agrees and understands that the DEVELOPER/maintenance agency shall have first charge/lien on the said APARTMENT in respect of any such non-payment of penalty/damages as stated above.*

The exercise of above remedies is without prejudice to the other rights of the DEVELOPER

available to it under this Agreement or in law.

As per Clause 7(ii)(a), the allottee is liable to pay the interest at the rate of 18% per annum on the delayed payment for a period of first 60 days of default and thereafter at the rate of 24% per annum. On the other hand, as per Clause 3(c)(iv), the allottee is entitled to receive compensation at the rate of Rs.10/- per square feet per month on the carpet area of the apartment for the delay in delivery of possession, which comes to abysmal 0.37% per annum, approximately.

There was a delay in completion of the project. It was an ongoing project on the date of enforcement of the 2016 Act. Neither the occupation certificate nor the completion certificate was issued when the 2016 Act came into force. On the application of the appellant, the project was registered in accordance with the provisions of Section 3 of the 2016 Act as it fell within the expression 'ongoing project' on the date of commencement of the Act.

The licence in favour of the appellant expired on 21.02.2016. The application submitted by the appellant for renewal was received in the office of Director, Town Planning, on 14.03.2016. It is also evident from the judgment of the Appellate Tribunal that the promoter neither deposited the External Development Charges (hereinafter referred to as EDC) nor renewed the bank guarantee. The promoter sought permission of the Department for transfer of school site to M/s Namo Educational Society, which on examination was rejected as the appellant failed to deposit the EDC and renew the bank guarantee. Ultimately, the request for transfer of the school site was approved on 29.12.2016, subject to certain conditions.

Thus, approximately a period of 9 months was lost in this process. On a

commission of certain illegalities, the appellant was granted 15 days' time vide letter dated 20.06.2017, to remove the various deficiencies as pointed out in the application for renewal of licence. On account of non-compliance, a show cause notice, dated 14.07.2017, was issued to the appellant. It was pointed out that an amount of Rs.1,951.28 lakhs on account of external development charges was outstanding against the appellant as on 30.04.2017. Another opportunity was given to remove the shortcomings. Again, the appellant failed to comply with the same resulting in issuance of yet another show cause notice dated 24.08.2017. The appellant supplied certain documents and requested for renewal. The appellant was granted yet another opportunity vide show cause notice dated 04.10.2016, to show as to why the licence should not be treated as lapsed. On account of failure to get any response from the appellant within the prescribed period of 30 days, yet another show cause notice, dated 22.10.2018, was issued calling upon the promoter to appear. Again, a show cause notice was issued on 30.11.2018, while permitting the appellant to appear before the Authority on 04.01.2019. Thereafter, the appellant deposited the renewal fee of Rs.2 Crore. The Directorate of Town and Country Planning, Haryana, wrote a letter to the appellant on 18.01.2019, while drawing the attention of the appellant to seven deficiencies in the application submitted for renewal of the licence by the appellant. Thereafter, the appellant was directed to appear on 08.02.2019. Ultimately, the licence was renewed only on 01.04.2019. Both the Authorities have found that the licence was not renewed due to the various deficiencies in the application submitted by the appellant for renewal. Not only a huge amount of external development charges were not deposited but even the renewal fee was not deposited in full. The various

deficiencies were made good only on 28.12.2018.

Keeping in view the aforesaid facts, both the Authorities have allowed the application filed by the allottee while directing the appellant to pay interest at the rate of 10.75% per annum for the period of delayed possession with effect from 02.06.2017 till the date of offer of possession.

This Bench, now, proceeds to analyze the arguments of the learned Senior counsel. With reference to the first argument on the question of delay imputed to the developer, it is evident that the appellant has not only been thoroughly negligent but has also committed willful default of the ABA. The facts have already been noticed in detail, therefore, it would not be appropriate to repeat the same. It is evident that the appellant has not pursued his application for renewal of the licence for a long time and despite the complaint in the year 2017, against the promoter, the appellant failed to take any justifiable steps. The appellant not only defaulted in the payment of external development charges which on 14.02.2017, were Rs.1,951.28 lakh, but also did not renew the bank guarantee. The appellant also failed to deposit the appropriate renewal fee and further failed to comply with the requirements of the Act. In essence, the learned counsel representing the appellant, in the given circumstances, is trying to invoke the doctrine of Force Majeure. Insofar as the doctrine relates to an express/implied provision in a contract, it is governed by Section 32 of the Indian Contract Act, 1872 (hereinafter referred to as 'the 1872 Act'), and insofar as it relates to cases where force majeure events occur beyond the contract, it is dealt by rule of positive law under Section 56 of the 1872 Act.

Section 32 and 56 of the 1872 Act are extracted as under:-

“32. Enforcement of contracts contingent on an event happening.—Contingent contracts to do or not to do

anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

Illustrations

(a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.

(b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.

(c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

56. Agreement to do impossible act.—An agreement to do an act impossible in itself is void.

Contract to do an act afterwards becoming impossible or unlawful.—A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.—Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustrations

(a) A agrees with B to discover treasure by magic. The agreement is void:

(b) A and B contract to marry each other. Before the time fixed for the marriage,. A goes mad. The contract becomes void.

(c) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy, A must make compensation to B for the loss caused to her by the non-performance of his promise.

(d) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract

becomes void when war is declared.

(e) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.”

On a careful reading of Section 32, it is evident that where a contract is contingent on the happening of an uncertain event, the contract cannot be enforced unless and until the uncertain event happens. In the present case, the appellant has failed to bring its case within the four corners of Section 32 of the 1872 Act. From the beginning, the appellant knew that his licence is going to expire in February, 2016. He ought to have taken timely steps in order to maintain continuity. Further, Section 32 of the 1872 Act does not come to the rescue of the appellant particularly when the delay in renewal of licence is attributable to the appellant, itself and not to any uncertain event beyond its control.

Section 56 of the 1872 Act is in two parts. The 1st part deals with the initial impossibility. In such an event, the agreement is void ab initio. The 2nd part deals with subsequent impossibility and provides that where the act to be performed under the contract, subsequent to entering into the contract, becomes unlawful or illegal, the contract becomes void. Further, Section 56, also, provides for compensation to the innocent party if the impossibility was in the knowledge of the other party. From the facts noticed above, it is apparent that the the appellant has failed to make out a case for applicability of Section 56. In the considered opinion of the Court, in the facts of the present case, the aforesaid doctrine cannot be invoked. It is evident from the before-mentioned facts that the apartment buyers have suffered due to the act and conduct of the appellant, itself and not due to an act not in contemplation of either of the parties. Further, till the filing of the

complaint, the promoter, even after a passage of nearly 5 years, failed to complete the project which indicates willful default, at his end. The learned Senior counsel in order to press upon his argument has relied upon a judgment passed by the Supreme Court in **S. Sundaram Pillai and others Vs. R. Pattabiraman and others 1985(1) SCC 591**. In the aforesaid judgment, the expression 'wilful default' under Tamil Nadu Building (Lease and Rent Control) Act, 1960, came up for interpretation. By a different opinion, the Supreme Court decided the case. The aforesaid judgment has interpreted the expression 'wilful default' in an entirely different context in the peculiar facts of that case. Hence, the aforesaid judgment is not applicable.

This argument of the learned Senior counsel can be examined from yet another perspective. The promoter cannot claim exclusion of the period which was spent in renewal of the licence in a case where delay is wholly or partially attributable to him. In the facts of the case, the aforesaid plea is also not available to the promoter. To recapitulate the facts, the promoter was granted licence in the year 2012. The ABA was executed on 12.07.2013. As per the contract, the possession was to be delivered within the period of 36 months i.e. 3 years. The aforesaid three year period expired during the period of validity of the licence. No doubt, there was a grace period of 6 months, however, the material on record clearly shows that due to the expiry of the licence, the construction work was never stopped. Rather, there is a finding by the Authority-HRERA that the appellant continued with the construction. Thus, the appellant is not entitled to the benefit of exclusion of the period spent in renewal of the licence. Further, the appellant being a promoter could very well visualize the usual delay in

renewal of the licence which takes place in a routine manner. The appellant should have been vigilant enough to take steps before in hand in order to prevent the disruption of work and ensure continuity. The appellant applied for renewal only after its expiry and thereafter, did not pursue the same for quite some time. The appellant also did not pay the EDC, failed to renew the bank guarantee, did not deposit the complete renewal fee and failed to remove deficiencies as were pointed out in the application. Despite repeated opportunities being given by the Director, Town and Country Planning, the appellant did not take steps as required, in a timely manner.

As regard the question of correctness of interest awarded by the authority which has been confirmed by the Appellate Tribunal, it may be noticed that Section 18 of the 2016 Act enables the Authority to order interest for every month of delay till the handing over of the possession at such rate as may be prescribed.

Section 18 of the 2016 Act is extracted as under:-

“18. Return of amount and compensation.—(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

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

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

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

The present case falls in proviso to Sub-Section 1 of Section 18 of the 2016 Act. As per Section 2(z)(a), 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. Section 2(za) is extracted as under:-

“(za) “interest” means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation.—For the purpose of this clause—

(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;

(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;”

Thus, it is evident that the clause providing for different rates of interest between the promoter and the allottee is against the statutory provision. The rate of interest has been prescribed in Rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred to as 'the 2017 Rules'), which is extracted as under:-

“15. An allottee shall be compensated by the promoter for loss or damage sustained due to incorrect or false statement in the notice, advertisement, prospectus or

brochure in the terms of section 12. In case, allottee wishes to withdraw from the project due to discontinuance of promoter's business as developers on account of suspension or revocation of the registration or any other reason(s) in terms of clause (b) sub-section (I) of Section 18 or the promoter fails to give possession of the apartment/ plot in accordance with terms and conditions of agreement for sale in terms of sub-section (4) of section 19. The promoter shall return the entire amount with interest as well as the compensation payable. The rate of interest payable by the promoter to the allottee or by the allottee to the promoter, as the case may be, shall be the State Bank of India highest marginal cost of lending rate plus two percent. In case, the allottee fails to pay to the promoter as per agreed terms and conditions, then in such case, the allottee shall also be liable to pay in terms of sub-section (7) of section 19:

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public."

Thus, the authority as well as the Tribunal has ordered the interest on the deposit made by the allottee, for every month of delay till the handing over of the possession, at State Bank of India Highest Marginal Cost of Lending Rate + 2%.

The learned counsel submits that once there was an agreement between the parties providing for grant of interest at the rate of Rs.10/- per square feet per month, then, the authority as well as the Appellate Tribunal erred in ordering a higher rate of interest on account of delay in delivery of possession of the flat. In this regard, it may be noticed that the promoter and the flat buyer do not negotiate on same platform and also do not have equal bargaining power. The purchasers are often forced to enter into standard form contracts with unjustified terms and conditions. In the present case, on the one hand, under Clause 7(ii)(a), the flat buyer was liable to pay the defaulted installment along with an interest at the rate of 18% per annum for the period of first 60 days and thereafter, at the rate of 24% per annum, at

the same time, on the other hand, the home buyer was held entitled to receive compensation at the rate of merely Rs.10/- per square feet per month, on the carpet area of the apartment for the delay in delivery of possession which comes to lamentable, 0.37% per annum, approximately. The aforesaid term is not only one sided but also unfair and unreasonable. It constitutes an unfair practice on the part of the promoter who was in a dominant position while making the contract. This type of dominant terms and conditions of the agreement are liable to be ignored as held by the Supreme Court in a recent judgment in **Pioneer Urban Land and Infrastructure Ltd. Vs. Govindan Raghavan 2019(5) SCC 725**. Even in **NBCC (India) Vs. Shri Ram Trivedi 2021(5) SCC 273**, the Court held that the agreement for payment of significantly high and unreasonable rate of interest payable for the default by the flat buyer constitutes an unfair trade practice and the Court can award appropriate interest in such a case. The same view has been expressed in **IREO Grace Realtech Pvt. Ltd. Vs. Abhishek Khanna and others 2021(3) SCC 241**. It has been held in all these judgments that the Court is not bound to award the same interest as stipulated in the agreement, once it forms an opinion that the contract has been concluded between two unequal parties which, prima facie, appears to be one sided in its terms. The Court, in such cases, is required to take a holistic view of the matter. As per Section 23 of the Contract Act, 1872, the Court in such a situation is well within its jurisdiction to ignore the unconscionable terms of the contract being against the public policy and thus, void. In the considered view of the Court, such a term of the agreement being opposed to the public policy is required to be ignored and the remaining contract can be enforced by virtue of Section 57 of the 1872

Act. Further, the learned counsel representing the appellant relies upon the judgment passed in **DLF Homes Panchkula Pvt. Ltd. Vs. D.S. Dhanda, 2020(16) SCC 318**. The aforesaid judgment has, subsequently, been explained by the Supreme Court in **Wing Commander Arifur Rahman Khan Vs. DLF Southern Homes Pvt. Ltd. 2020(16) SCC 512**. In para 25, the Court explained the judgment in **D.S. Dhanda's case (supra)**. In this case, the Consumer Forum had dismissed the complaint. The Supreme Court was hearing the matter arising from the order of National Consumer Disputes Redressal Commission. While accepting the appeal, the Supreme Court held that the flat buyers are entitled to simple interest at the rate of 6%. In the present case, the apartment buyer has been held entitled to interest as per the 2017 Rules.

This Bench now proceeds to analyze the questions of law referred to by the learned counsel. With regard to the first question, it may be noted that the extension granted by the authorities to complete the project does not absolve the promoter from its liability to pay interest for the delayed delivery of possession. This matter is no longer *res-integra* in view of the judgment passed in **Imperia Structures Ltd. Vs. Anil Patni, 2020(10) SCC 783**. In para 37, the Supreme Court has held as under:-

“37. We may now consider the effect of the registration of the Project under the RERA Act. In the present case the apartments were booked by the Complainants in 2011-2012 and the Builder Buyer Agreements were entered into in November, 2013. As promised, the construction should have been completed in 42 months. The period had expired well before the Project was registered under the provisions of the RERA Act. Merely because the registration under the RERA Act is valid till 31.12.2020 does not mean that the entitlement of the concerned allottees to maintain an action stands deferred. It is relevant to note that even for the purposes of Section 18, the period has to be reckoned in terms of the agreement and not the registration. Condition no. (x)

of the letter dated 17.11.2017 also entitles an allottee in same fashion. Therefore, the entitlement of the Complainants must be considered in the light of the terms of the Builder Buyer Agreements and was rightly dealt with by the Commission.”

Furthermore, as per Section 3 of the 2016 Act, the Act is applicable to the ongoing projects. The Act makes it mandatory for the promoters to register the ongoing projects under the 2016 Act and appellant did get its project registered. Furthermore, it has been held in **Newtech Promoters and Developer Pvt. Ltd. Vs. State of Uttar Pradesh, 2021 SCC (online) SC 1044**, that the provisions of the Act are retroactive. The Supreme Court, after relying upon **Jai Mahakali Rolling Mills Vs. Union of India, 2007(12) SCC 198**, and **Shanti Conductors Pvt. Ltd. Vs. Assam State Electricity Board, 2019(19) SCC 529**, has held that the provisions of the Act are applicable to the projects pending on the date of enforcement of the 2016 Act. It has also been held in **Imperia Structure's case (supra)**, that extension of time granted by the Authority shall not affect the rights of the apartment buyer.

With regard to the next question, it may be noticed that the Supreme Court has, again, in **Newtech Promoters and Developers case (supra)**, examined the matter in detail and found that since the Act is retroactive in operation, therefore, it governs the ongoing projects, even if the agreements were entered into prior to the coming into force of the 2016 Act.

As regards the question No.8, it may be noted that the Act does not provide for any particular rate of interest. Section 18 provides that the Authority shall award the interest at such rate as may be prescribed. Rule 15 of the 2017 Rules, prescribes the rate of interest for the period of delay in

not amount to over-riding the provisions of the Act, particularly when no rate has been prescribed in the Act, itself.

The last question referred to by the learned counsel is also no longer *res-integra* in view of the judgment passed in **Newtech Promoters and Developers case (supra)**.

Consequently, finding no merit, the appeals are dismissed.

All the pending miscellaneous applications, if any, are also disposed of.

26th April, 2022

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**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned : *Yes/No*

Whether reportable : *Yes/No*