IREO GRACE REALTECH PVT. LTD. A

v.

ABHISHEK KHANNA & OTHERS

(Civil Appeal No. 5785 of 2019)

JANUARY 11, 2021 B

[DR. DHANANJAYA Y CHANDRACHUD, INDU MALHOTRA AND INDIRA BANERJEE, JJ.]

Consumer Protection – Apartment Buyer's Agreement – Unfair trade practice – Oppressive and one sided contractual terms – Held: The Developer cannot compel the apartment buyers to be bound by the one-sided contractual terms contained in the Apartment Buyer's Agreement – Incorporation of one-sided and unreasonable clauses in the Apartment Buyer's Agreement constitutes an unfair trade practice u/s.2(1)(r) of CP Act, 1986 – Even under the CP Act of 1986, the powers of the consumer fora were in no manner constrained to declare a contractual term as unfair or one-sided as an incident of the power to discontinue unfair or restrictive trade practices – An "unfair contract" has been defined under the Consumer Protection Act, 2019, and powers have been conferred on the State Consumer Fora and the National Commission to declare contractual terms which are unfair, as null and void – This is a statutory recognition of a power which was implicit under the Consumer Protection Act, 1986. C D E

Consumer Protection – Applicability of provisions of Consumer Protection Act as an additional remedy, despite existence of remedies under special statutes – Whether primacy to be given to RERA Act over the Consumer Protection Act – Held: Remedies under the Consumer Protection Act are in addition to remedies available under special statutes – Absence of a bar u/s.79 of RERA Act to initiation of proceedings before a fora which is not a civil court, read with s.88 of the RERA Act makes the position clear – s.18 of the RERA Act specifies that remedies are "without prejudice to any other remedy available" – Real Estate (Regulation & Development) Act, 2016 (RERA Act) F G

Consumer Protection – Apartment Buyer's Agreement – Determination of the date for handing over Possession – Discussed, with reference to the facts and circumstances of the case. H

A *Consumer Protection – Apartment Buyer's Agreement – Entitlement of the Apartment Buyers to refund of the amount deposited with Delay Compensation – Discussed, with reference to the facts and circumstances of the case.*

Disposing of the appeals, the Court

B **HELD: 1.1 The first issue which has been raised by the Appellant-Developer as also the Apartment Buyers, is the relevant date from which the 42 months' period is to be calculated for handing over possession. Clause 13.3 of the Agreement states that the Developer proposed to offer possession of the apartment** C **to the allottee within a period of 42 months from the date of approval of the Building Plans and/or fulfilment of the pre-conditions imposed thereunder, referred to as the "Commitment Period". The Company would be entitled to a further "Grace Period" of 180 days' after the expiry of the Commitment Period for unforeseen delays beyond the reasonable control of the** D **Company. This would work out to 42+6 months i.e. 48 months. [Para 18][29-C-E]**

1.2 The point of controversy is whether the 42 months' period is to be calculated from the date when the Fire NOC was granted by the concerned authority, as contended by the E **Developer; or, the date on which the Building Plans were approved, as contended by the Apartment Buyers. Section 15 of the Haryana Fire Safety Act, 2009 makes it mandatory for a Builder/Developer to obtain the approval of the Fire Fighting Scheme conforming to the National Building Code of India, and** F **obtain a No Objection Certificate before the commencement of construction. Clause 13.3 of the Apartment Buyer's Agreement provides that the 42 months' period has to be calculated from the date of approval of the Building Plans and/or fulfilment of the pre-conditions imposed thereunder. The Building Plans sanctioned by the Directorate of Town and Country Planning,** G **Haryana contained the Terms & Conditions of Approval, which included a provision for Fire Safety contained in Clause (3). The Developer was directed to submit Fire Safety Plans indicating the complete Fire Protection Arrangements, and means of escape/**

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access for the proposed building with suitable legend and standard signs. On receipt of the Fire Plans, the Commissioner, Municipal Corporation, Gurgaon, after satisfying himself with the entire fire protection measures as in conformity with the National Building Code, 2005 and the Fire Safety Bye-Laws, would issue an NOC for Fire Safety. This NOC/Clearance was required to be submitted before the Municipal Corporation, within a period of 90 days' from the issuance of the sanctioned Building Plans. Clause 17(iv) of the sanctioned Plan stipulated that the Developer shall obtain an NOC from the Ministry of Environment & Forests, before starting the construction/execution of development works at site. The Environmental Clearance granted by the Ministry of Environment & Forest Government of Haryana on 12.12.2013 required the Developer to submit a copy of the Fire Safety Plan approved by the Fire Department, before commencing construction of the project. General Condition (vi) under Part B of the Environmental Clearance stipulated that the Developer shall obtain all other statutory clearances, including the approval from the Fire Department, prior to construction of the project. Thus, it was a mandatory requirement under the Haryana Fire Safety Act, 2009 to obtain the Fire NOC before commencement of construction activity. This requirement is stipulated in the sanctioned Building Plans, as also in the Environment Clearance. The 42 months' period in Clause 13.3 of the Agreement for handing over possession of the apartments would be required to be computed from the date on which Fire NOC was issued, and not from the date of the Building Plans being sanctioned. In the present case, the Developer obtained approval of the Building Plans from the Directorate, Town and Country Planning, Haryana, on 23.07.2013. The Developer applied for issuance of Fire NOC for the Fire Fighting Scheme of the Group Housing Colony within the 90 days period before the Director, Fire Service, Panchkula. [Paras 18.1-18.10][29-E-G; 30-G-H; 31-A-H; 32-A-H]

1.3 The Commissioner vide letter dated 30.12.2013 raised 16 objections with respect to the proposed Fire Fighting Plan. The Developer vide letter dated 22.01.2014 responded to the objections, submitting that the objections had been cured, and

requested that the approval of the Fire Fighting Scheme be granted on a priority basis. The Fire Department informed the Developer vide letter dated 28.03.2014 that the deficiencies in the application for Fire NOC had not been cured. The Developer was granted a further period of 15 days' to cure the defects, failing which, its application would be deemed to be rejected. The Developer submitted revised drawings as per the NBC Fire Scheme alongwith its letter dated 18.08.2014. This letter was received in the office of the Municipal Corporation on 13.10.2014, as per endorsement on the said letter. [Para 18.10][33-A-D]

1.4 On 27.11.2014, the Director, Haryana Fire Service granted approval to the Fire Fighting Scheme subject to the conditions mentioned therein. The computation of the period for handing over possession would be computed from this date. The Commitment Period of 42 months plus the Grace Period of 6 months from 27.11.2014, would be 27.11.2018, as being the relevant date for offer of possession. The aforesaid chronology for obtaining Fire NOC would indicate a delay of approximately 7 months in obtaining the Fire NOC by the Developer. [Para 18.11][33-D-F]

2.1 Under the construction-linked plan, Clause 6 provided that the apartment buyers would be required to deposit 20% of the sale consideration within 45 days of booking of the apartment. Clause 7.4 of the Agreement provides that if there is a delay in payment of an instalment, the apartment buyer would be required to pay Interest on every delayed payment of such instalment @ 20% S.I. p.a. Clause 13.2 of the Agreement provides that if the allottee fails, ignores or neglects to take possession of the said Apartment in accordance with the Notice of Possession, the allottee shall be liable to pay "Holding Charges" on the super area @ Rs.7.5 per sq. ft. per month. In contrast, Clause 13.3 of the Agreement provides that if the Company fails to offer possession by the end of the Grace Period i.e. 42+6 months, it would be liable to pay Delay Compensation@ Rs.7.5 per sq. ft. of the super area for every month of delay. [Para 19.1][33-G-H; 34-B-D]

2.2 Delay compensation at Rs. 7.5 per sq. ft. works out to approximately 0.9% to 1 % Interest per annum.The price per

sq. ft of an apartment under the Apartment Buyer's Agreement was Rs. 10,350/- per sq. ft. Clause 13.5 provides that the allottee may opt for termination, only after 42 months from the date of issuance of Fire NOC + 6 months' Grace Period, plus a further period of 12 months. The Delay Compensation would be payable to the allottee only if the termination was "validly opted". The compensation was limited to a fixed period of 12 months only, and that no other claim whatsoever, whether monetary or otherwise, was payable by the Developer. Clause 13.8 of the Agreement provides that the allottee shall be deemed to have waived all its claims in respect of the area, specifications, quality, construction, any other provision in the apartment against the Developer upon taking possession of the apartment. Clause 21 provides for termination of the Agreement and forfeiture of earnest money by the Developer, if the allottee neglects or fails to make timely payments as stipulated in the Agreement, or fails to exercise the options offered by the Developer. [Para 19.1] [34-D-H; 35-A-B]

2.3 Clause 21.3 provides that upon such termination, the Appellant Company shall be under no obligation, except to refund the amounts already paid by the allottee, without any interest, and after forfeiting and deducting the earnest money, interest on delayed payments, brokerage / commission / charges, service tax and other amounts due and payable to it. The principal amount after the aforesaid deductions are made, would be refunded at an uncertain future date i.e. after the Developer had sold the apartment allotted to the complainant. In contrast, the allottee is given a very limited right to cancel the Agreement solely in the event of the clear and unambiguous failure of the warranties of the Company, which leads to frustration of the Agreement on that account. In such case, the allottee will be entitled to a refund of the instalments actually paid, along with interest @ 8% p.a. within a period of 90 days from the date of determination to this effect. No other claim, whatsoever, monetary or otherwise shall lie against the Company. [Para 19.1][35-B-E]

2.4 The aforesaid clauses reflect the wholly one-sided terms of the Apartment Buyer's Agreement, which are entirely loaded

in favour of the Developer, and against the allottee at every step. The terms of the Apartment Buyer's Agreement are oppressive and wholly one-sided, and would constitute an unfair trade practice under the Consumer Protection Act, 1986. Section 2(1)(g) of the Act defines the expression "deficiency" to include any fault, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained under law, or in pursuance of a contract, or in relation to a 'service'. The term "service" has been defined by S. 2(1)(o) to include a service of any description which is made available to potential users. S. 2(1)(o) was amended by Act 50 of 1993 w.e.f. from 18.06.1993 to include "housing construction" within the purview of "service". [Paras 19.2, 19.3][35-E-H; 36-A-D]

Lucknow Development Authority v. *M.K. Gupta* **(1994) 1 SCC 243 : [1993] 3 Suppl. SCR 615;** *Pioneer Urban Land and Infrastructure Ltd* v. *Govindan Raghavan* **(2019) 5 SCC 725 : [2019] 5 SCR 1169;** *Wg. Cdr. Arifur Rahman Khan* & Others v. *DLF Southern Homes Pvt. Ltd.*, **2020 SCC Online SC 667 – relied on**

2.5 Section 14 of the 1986 Act empowers the Consumer Fora to redress the deficiency of service by issuing directions to the Builder, and compensate the consumer for the loss or injury caused by the opposite party, or discontinue the unfair or restrictive trade practices. The incorporation of such one-sided and unreasonable clauses in the Apartment Buyer's Agreement constitutes an unfair trade practice under Section 2(1)(r) of the Consumer Protection Act. Even under the 1986 Act, the powers of the consumer fora were in no manner constrained to declare a contractual term as unfair or one-sided as an incident of the power to discontinue unfair or restrictive trade practices. An "unfair contract" has been defined under the 2019 Act, and powers have been conferred on the State Consumer Fora and the National Commission to declare contractual terms which are unfair, as null and void. This is a statutory recognition of a power which was implicit under the 1986 Act. The Developer cannot compel the apartment buyers to be bound by the one-sided contractual terms contained in the Apartment Buyer's Agreement. [Paras 19.6, 19.7][40-B-F]

3.1 The Consumer Protection Act, 1986 was enacted to protect the interests of consumers, and provide a remedy for better protection of the interests of consumers, including the right to seek redressal against unfair trade practices or unscrupulous exploitation. Section 3 of the Consumer Act provides that the remedies under the Act are in addition to, and not in derogation of any other law applicable. [Paras 20.1, 20.2] [40-F-G; 41-G-H]

Secretary, Thirumurugan Cooperative Agricultural Credit Society v. *M. Lalitha (dead) through LRs and others* **(2004) 1 SCC 305 : [2003] 6 Suppl. SCR 659 – referred to**

National Seeds Corporation Limited v. *M. Madhusudhan Reddy* **(2012) 2 SCC 506 : [2012] 2 SCR 1065;** *Virender Jain* v. *Alaknanda Cooperative Group Housing Society Limited and others* **(2013) 9 SCC 383 : [2013] 2 SCR 1058;** *Emaar MGF Land Ltd.* v. *Aftab Singh,* **(2019) 12 SCC 751 : [2018] 14 SCR 791 – relied on.**

3.2 Section 18 of the RERA Act, 2016 provides the remedy of refund with interest and compensation to allottees, when a Developer fails to complete the construction or give possession as per the Agreement of Sale. The remedies under Section 18 are "*without prejudice to any other remedy available*". Section 71 of the RERA Act empowers the RERA Authority to determine compensation payable under Sections 12, 14, 18 and 19 of the Act. The proviso to Section 71 provides that a consumer has the right to withdraw its complaint before the consumer fora in respect of matters covered under Sections 12, 14, 18 and 19 of the Act, and file the same before the RERA. [Paras 20.5, 20.6][45-E-G]

3.2 Section 79 of the RERA Act bars the jurisdiction only of civil courts in respect of matters which an authority constituted under the RERA Act is empowered to adjudicate on. Section 88 of the RERA Actis akin to Section 3 of the Consumer Protection Act, and provides that the provisions of the RERA Act shall apply in addition to and not in derogation of other applicable laws. [Paras 20.7, 20.8][46-D-F]

3.3 An allottee may elect or opt for one out of the remedies provided by law for redressal of its injury or grievance. An election of remedies arises when two concurrent remedies are available, and the aggrieved party chooses to exercise one, in which event he loses the right to simultaneously exercise the other for the same cause of action. [Para 20.9][46-G-H]

A.P. State Financial Corporation v. *M/s GAR Re-rolling Corporation* **(1994) 2 SCC 647 : [1994] 1 SCR 857;** *P.R. Deshpande* v. *Maruti Balaram Haibatti* (1998) 6 **SCC 507 : [1998] 3 SCR 1079;** *National Insurance Co. Ltd.* v. *Mastan & Ors.* **(2006) 2 SCC 641 : [2005] 5 Suppl. SCR 704 – referred to**

Transcore v. *Union of India* **(2008) 1 SCC 125 : [2006] 9 Suppl. SCR 785;** *Mathew Varghese* v. *M. Amritha Kumar* **(2014) 5 SCC 610 : [2014] 2 SCR 736;** *M/s Imperia Structures Ltd.* v. *Anil Patni and Anr* **(2020) 10 SCC 783 – relied on**

3.4 The absence of a bar under Section 79 of the RERA Act to the initiation of proceedings before a fora which is not a civil court, read with Section 88 of the RERA Act makes the position clear. Section 18 of the RERA Act specifies that the remedies are "without prejudice to any other remedy available". [Para 20.11][51-D-E]

4.1 The Apartment Buyers in their Complaint filed before the National Commission made a prayer for refund of the amount deposited alongwith Interest @ 20% p.a. compounding quarterly till its realisation. The Apartment Buyers, in their submissions have stated that they have obtained home loans on which Interest @ 7.90% p.a. is being paid, even as on date. The Delay Compensation specified in the Apartment Buyer's Agreement of Rs. 7.5 per sq. ft. which translates to 0.9% to 1% p.a. on the amount deposited by the Apartment Buyer cannot be accepted as adequate compensation for the delay in the construction of the project. At the same time, the claim of the Apartment Buyers for payment of compound interest @ 20% p.a., cannot be accepted

as it has no nexus with the commercial realities of the prevailing market. [Para 21.2][57-E-G]

4.2 Covid–19 Pandemic has greatly impacted the construction industry. In these circumstances, it is necessary to balance the competing interest of both parties. In the interests of justice and fairplay, the amounts deposited by the Apartment Buyers is refunded with Interest @ 9% S.I. per annum from 27.11.2018 till the date of payment of the entire amount. The refund will be paid within a period of three months from the date of this judgment. If there is any further delay, the Developer will be liable to pay default interest @ 12% S.I. p.a. The Developer shall not deduct the Earnest Money of 20% from the principal amount, or any other amount as mentioned in Clause 21.3 of the Agreement, on account of the various defaults committed by the Developer, including the delay of over 7 months in obtaining the Fire NOC. [Para 21.2][58-A-D]

Case Law Reference

[2019] 5 SCR 1169	**relied on**	**Para 17**
[1993] 3 Suppl. SCR 615	**relied on**	**Para 19.3**
[2003] 6 Suppl. SCR 659	**relied on**	**Para 20.2**
[2012] 2 SCR 1065	**relied on**	**Para 20.2**
[2013] 2 SCR 1058	**relied on**	**Para 20.2**
[2018] 14 SCR 791	**relied on**	**Para 20.3**
[1994] 1 SCR 857	**relied on**	**Para 20.10**
[1998] 3 SCR 1079	**referred to**	**Para 20.10**
[2005] 5 Suppl. SCR 704	**referred to**	**Para 20.10**
[2006] 9 Suppl. SCR 785	**relied on**	**Para 20.10**
[2014] 2 SCR 736	**relied on**	**Para 20.10**
(2020) 10 SCC 783	**relied on**	**Para 20.11**

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5785 of 2019.

From the Judgment and Order dated 28.03.2019 of the National Consumer Disputes Redressal Commission, New Delhi in Consumer Complaint No. 3873 of 2017.

B With

Civil Appeal NoS. 7615, 7975, 8454, 8480, 8482, 8785-94, 9139, 9216, 9638 of 2019 and Civil Appeal No. 3064 of 2020.

Anil Grover ,Sr. AAG Haryana, Chander Uday Singh, Sr. Adv., Mahesh Agarwal, Rishi Agrawala, Abhimanyu Bhandari, Anshuman Srivastava, Sameer Chaudhary, Divyang Chandiramani, Shaishir Divatia, Aarush Bhatia for Mr. E. C. Agrawala, Piyush Singh, Aditya Parolia, Akshay Srivastava, Nithin Chandran, Prateek Vats, Rajesh Kumar, Gaurav Goel, A.R.Takkar, Amarjeet Kumar, Ms. Shriya Takkar, A. Venayagam Balan, Deepak Kumar Khushalani, Santosh Kumar Pandey, Yashraj Singh Deora, Ms. Sonal Mashankar, Ms. Shivangi Sud, Shyam Agarwal, Abhishek Birthray, Adeem Ahmed, Sumit R Sharma, Rajiv Raheja, Gopal Jha, Ms. Noopur Singhal, Rahul Khurana, Satish Kumar, Subas Ray, Sanjay Kumar Visen, Advs. for the appearing parties.

The Judgment of the Court was delivered by

E **INDU MALHOTRA, J.**

1. The present batch of Appeals has been filed by the Appellant-Developer, to challenge the judgment passed by the National Consumer Disputes Redressal Commission ("National Commission") directing refund of the amounts deposited by the Apartment Buyers in the project "The Corridors" developed in Sector 67-A, Gurgaon, Haryana, on account of the inordinate delay in completing the construction and obtaining the Occupation Certificate. Aggrieved by the said Judgment, the Appellant-Developer has filed the present batch of Appeals under Section 23 of the Consumer Protection Act, 1986 ("Consumer Protection Act").

G Since common issues have arisen for consideration, they are being decided by a common Judgment.

For the sake of brevity, the facts in Civil Appeal No. 5785 of 2019 are being referred to as the lead matter.

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2. The Department of Town and Country Planning granted a license to Respondent No.3 – Precision Realtors Pvt. Ltd. and Respondent No.4 – Blue Planet Infra Developers and Madeira Conbuild Pvt. Ltd. for developing a group housing colony on a vast tract of land admeasuring about 37.5125 acres where multiple towers comprising of 1356 apartments were to be constructed. Subsequently, the license for construction was transferred to the Appellant- Developer.

3. On 23.07.2013, the Building Plans of the project were sanctioned by the Directorate of Town and Country Planning, Haryana. Clause 3 of the sanctioned Plan stipulated that NOC/ Clearance from the Fire Authority shall be submitted within 90 days from the date of issuance of the sanctioned Building Plans.

4.The Developeropened booking for the apartments in 2013. On 07.08.2013, the Respondent No.1- Apartment Buyer was allotted a 2 BHK apartment in Tower-C of the project. Similar allotment letters were issued to various other Apartment Buyers in the housing project.

5. On 23/24.10.2013, the Developer applied for issuance of an NOC for the Fire Fighting Scheme of the group housing colony to the Commissioner, Municipal Corporation, Gurgaon.

The Commissioner, Municipal Corporation vide letter dated 30.12.2013 raised 16 objections with respect to the proposed Fire Fighting Scheme submitted by the Developer.

The Developer replied to the said objections vide letter dated 22.01.2014, stating that the objections raised by the Commissioner had been rectified. The Developer sought approval of the Fire Fighting Scheme on priority.

The Municipal Corporation vide letter dated 28.03.2014 informed the Developer that the deficiencies in the application for Fire NOC had not been cured.The Developer was granted 15 days' time to cure the defects, failing which, the application would be deemed to be rejected.

Ultimately, on 27.11.2014, the Director, Haryana Fire Service granted approval to the Fire Fighting Scheme subject to the conditions mentioned therein.

6. On 12.12.2013, Respondent No.3 obtained environmental clearance for setting up the group housing project from the State

A Environment Impact Assessment Authority. Clause 39 of the said clearance stipulated that the project proponent shall submit a copy of the Fire Safety Plan duly approved by the Fire Department before the start of construction.

Under Part-B of the General Conditions in Clause (vi), it was
B stipulated that the project proponent would obtain all other statutory clearances, such as the approval for storage of diesel from the Chief Controller of Explosives, Fire Department, Civil Aviation Department, Forest Conservation Act, 1980 and Wildlife (Protection) Act, 1972, Forest Act, 1927, PLPA 1900 etc. from the concerned authorities, prior to the
C construction of the project.

7. The Apartment Buyers vide letter dated 25.03.2014 received a copy of the Apartment Buyer's Agreement with a construction linked payment plan, which is extracted hereunder :

INSTALLMENT PAYMENT PLAN			
S. No.	LINKED STAGES	%	TOTAL
1	AT THE TIME OF BOOKING	10% OF BASIC	1727851.60
2	WITHIN 45 DAYS OF BOOKING	10% OF BASIC	1727851.60
3	COMMENCEMENT OF EXCAVATION	10% OF BASIC+50% OF DEVELOPMENT CHARGES	2029223.85
4	CASTING OF LOWER BASEMENT ROOF SLAB	10% OF BASIC+50% OF DEVELOPMENT CHARGES	2029223.85
5	CASTING OF 2ND FLOOR ROOF SLAB	10% OF BASIC	1727851.60
6	CASTING OF 5TH FLOOR ROOF SLAB	10% OF BASIC	1727851.60
7	CASTING OF 8TH FLOOR ROOF SLAB	10% OF BASIC+50% OF CLUB MEMBERSHIP	1852851.60
8	CASTING OF 11TH FLOOR ROOF SLAB	10% OF BASIC	1727851.60
9	CASTING OF TOP FLOOR ROOF SLAB	10% OF BASIC	1727851.60
10	ON COMPLETION OF STONE/TILE FLOORING IN APARTMENT	50% OF BASIC+50% OF CLUB MEMBERSHIP	988925.80
11	ON OFFER OF POSSESSION	50% OF BASIC+100% OF IFMS+100% OF IBRF	1139646.80
	TOTAL		18406981.50

8. On 12.05.2014, the Developer executed the Apartment Buyer's Agreement in favour of Respondent No.1 – Apartment Buyer for a total consideration of Rs.1,45,22,006/-.

The relevant terms of the Apartment Buyer's Agreement are set-out hereinbelow :

Clause 6 pertains to payment of Earnest Money, and reads as :

"6. EARNEST MONEY

The Company and the Allottee hereby agree that 20% (Twenty percent) of the Sale Consideration of the Apartment shall be deemed to constitute the "Earnest Money"."

(emphasis supplied)

Clause 7 pertains to payment of instalments, and provides that :

"7. PAYMENT OF INSTALLMENTS

7.1 The Allottee has opted for the Payment Plan annexed herewith as Annexure-IV. The Allottee understands that it shall always remain responsible for making timely payments in accordance with the Payment Plan Annexure-IV. Only in the case of a construction linked Payment Plan, the Company shall be obliged to send demand notices for installments on or about the completion of the respective stages of construction. The demand notices shall be sent by registered post/courier and shall be deemed to have been received by the Allottee within 05 (five) days of dispatch by the Company or receipt thereof, whichever is earlier.

7.2 It shall not be obligatory on the part of the Company to send any reminders for any payments whatsoever. Although the Company shall not be obliged to send demand notices other than for the construction linked Payment Plan, or any reminders whatsoever for payments of the instalment, in the event that any such notices or reminders are sent by the Company to the Allottee, as a gesture of courtesy, these shall not, under any circumstances, be construed or deemed to be a waiver of the obligations and responsibility of the Allottee to itself make timely payments in accordance with the Payment Plan or in response to such demand notices in the case of a construction linked Payment Plan.

A 7.3 If the Allottee prepays any installments(s) or part thereof to the Company before it falls due for payment, the Allottee shall be entitled to pre-payment rebate on such prepaid amounts at the interest rate declared by the Company for this purpose from time to time. The interest on such prepaid installment(s) shall be calculated from the date of prepayment uptill the date when such amount would actually have become due. The credit due to the Allottee on account of such pre-payment rebate shall however be adjusted/paid only at the time of final instalment for the said Apartment.

C 7.4 The Allottee shall be liable to pay simple interest on every delayed payment, at the rate of 20% per annum from the date that it is due for payment till the date of actual payment thereof.In case the Allottee defaults in making payment of the due installment (including partial default) beyond a period of 90 days from the due date, the Company shall be entitled, though not obliged, to D cancel the Allotment and terminate this Agreement at any time thereafter in accordance herewith. However, the Company may alternatively, in its sole discretion, instead decide to enforce the payment of all its dues from the Allottee by seeking Specific Performance of this Agreement. Further, in every such case of delayed payment, irrespective of the type of Payment Plan, the E subsequent credit of such delayed installments(s)/payments along with delayed interest in the account of the Company shall not however constitute waiver of the right of termination reserved herein and shall always be without prejudice to the rights of the Company to terminate this Agreement in the manner provided F herein.

7.5 Save and except in the case of any bank, financial institution or company with whom a tripartite agreement has been separately executed for financing the said Apartment, or where the Company has given its permission to mortgage to any bank, financial institution G or company for extending a loan to the Allottee against the said Apartment, the Company shall not be responsible towards any other third party, who has made payments or remittances to the Company on behalf of the Allottee and any such third party shall not have any right against the said Apartment or under this Agreement whatsoever. The Company shall issue the payment H

receipts only in favour of the Allottee. Notwithstanding the above, the Allottee is and shall remain solely and absolutely responsible for ensuring and making all the payments due under this Agreement on time.

7.6 The Allottee may obtain finance/loan from any financial institution, bank or any other source, but the Allottee's obligation to purchase the said Apartment pursuant to this Agreement shall not be contingent on the Allottee's ability or competency to obtain such finance. The Allottee would remain bound under this Agreement whether or not it has been able to obtain finance for the purchase of the said Apartment. The Allottee agrees and has fully understood that the Company shall not be under any obligation whatsoever to make any arrangement for the finance/loan facilities to the Allottee from any bank/financial institution. The Allottee shall not omit, ignore, delay, withhold, or fail to make timely payments due to the Company in accordance with the Payment Plan opted by the Allottee in terms of this Agreement on the grounds of the non-availability of bank loan or finance from any bank/ financial institution for any reason whatsoever and if the Allottee fails to make the due payment to the Company within the time agreed herein, then the Company shall have right to terminate this Agreement in accordance herewith.

7.7 Furthermore, in every case where the Allottee has obtained a loan/finance from a bank, financial institution or any other source and for which a tripartite agreement has also been executed by the Company, it is agreed by the Allottee that any default by the Allottee of the terms and conditions of such loan/finance, shall also be deemed to constitute a default by the Allottee of this Agreement, whereupon or at the written request of such bank, financial institution or person from whom such loan has been obtained the Company shall be entitled to terminate this Agreement."

(emphasis supplied)

Clause 13 of the Agreement provides for handing over possession of the Apartments and reads as :

"13. POSSESSION AND HOLDING CHARGES

A 13.1. Upon receipt of the Occupation Certificate under the Act pertaining to the said Apartment, the Company shall notify the Allotee in writing to come and take over the possession of the said Apartment ("Notice of Possession"). In the event the Allottee fails to accept and take the possession of the said Apartment within the time indicated in the said Notice of Possession, the Allottee shall be deemed to have become the custodian of the said Apartment from the date indicated in the Notice of Possession and the said Apartment shall thenceforth remain at the sole risk and cost of the Allottee itself.

C 13.2. Notwithstanding any other provisions of this Agreement, the Allottee agrees that if it fails, ignores or neglects to take the possession of the said Apartment in accordance with the Notice of Possession sent by the Company, the Allottee shall be liable to pay additional charges equivalent to Rs.7.5 (Rupees Seven & Half only) per sq. ft. on the Super Area per month of the said D Apartment ("Holding Charges"). The Holding Charges shall be a distinct charge in addition to the maintenance charges and not related to any other charges/consideration as provided in this Agreement.

E 13.3 Subject to Force Majeure, as defined herein and further subject to the Allottee having complied with all its obligations under the terms and conditions of this Agreement and not having defaulted under any provision(s) of this Agreement including but not limited to the timely payment of all dues and charges including the total Sale Consideration, registration charges, stamp duty and other charges and also subject to the Allottee having complied F with all formalities or documentation as prescribed by the Company, the Company proposes to offer the possession of the said Apartment to the Allottee within a period of 42 (Forty Two) months from the date of approval of the Building Plans and/or fulfilment of the preconditions imposed thereunder ("Commitment Period"). G The Allottee further agrees and understands that the Company shall additionally be entitled to a period of 180 days ("Grace Period"), after the expiry of the said Commitment Period to allow for unforeseen delays beyond the reasonable control of the Company.

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13.4. Subject to Clause 13.3, if the Company fails to offer possession of the said Apartment to the Allottee by the end of the Grace Period, it shall be liable to pay to the Allottee compensation calculated at the rate of Rs.7.5 (Rupees Seven & Half only) per sq. ft. of the Super Area ("Delay Compensation") for every month of delay until the actual date fixed by the Company for offering possession of the said Apartment to the Allottee. The Allottee shall be entitled to payment/adjustment against such 'Delay Compensation' only at the time of 'Notice of Possession' or at the time of payment of the final installment, whichever is earlier.

13.5. Subject to Clause 13.3, in the event of delay by the Company in offering the possession of the said Apartment beyond a period of 12 months from the end of the Grace Period (such 12 month period hereinafter referred to as the "Extended Delay Period"), then the Allottee shall become entitled to opt for termination of the Allotment/Agreement and refund of the actual paid up installment(s) paid by it against the said Apartment after adjusting the interest on delayed payments along with Delay Compensation for 12 months. Such refund shall be made by the Company within 90 days of receipt of intimation to this effect from the Allottee, without any interest thereon. For the removal of doubt, it is clarified that the Delay Compensation payable to the Allotee who is validly opting for termination, shall be limited to and calculated for the fixed period of 12 months only irrespective of the date on which the Allottee actually exercised the option for termination. This option may be exercised by the Allottee only up till dispatch of the Notice of Possession by the Company to the Allottee whereupon the said option shall be deemed to have irrevocably lapsed. No other claim, whatsoever, monetary or otherwise shall lie against the Company and/or the Confirming Parties nor be raised otherwise or in any other manner by the Allottee.

13.6. If, however, the completion of the said Apartment is delayed due to Force Majeure as defined herein, the Commitment Period and/or the Grace Period and/or the Extended Delay Period, as the case may be, shall stand extended automatically to the extent of the delay caused under the Force Majeure circumstances. The Allottee shall not be entitled to any compensation whatsoever, including Delay Compensation for the period of such delay.

13.7. Under no circumstances shall the possession of the said Apartment be given to the Allottee and the Allottee shall not be entitled to the possession of the said Apartment unless and until the full payment of the Sale Consideration and any other dues payable under the Agreement have been remitted to the Company and all other obligations imposed under this Agreement have been fulfilled by the Allottee to the complete satisfaction of the Company.

13.8. The Allottee hereby agrees and affirms that upon taking possession of the said Apartment, the Allottee shall be deemed to have waived all claims against the Company/Confirming Parties, if any, in respect of the area, specifications, quality, construction and/or any item, amenity or provision in the said Apartment or The Corridors Project."

(emphasis supplied)

Clause 21.3 reads as under:

"21. TIME IS OF ESSENCE; TERMINATION AND FORFEITURE OF EARNEST MONEY

21.1 Not with standing anything contained in this Agreement, timely performance by the Allottee of all its obligations under this Agreement or exercise of any options wherever and wherever and whenever indicated herein this Agreement including without limitation its obligations to make timely payments of the Sale Consideration, maintenance charges and other deposits and amounts, including any interest, in accordance with this Agreement shall be of essence under this Agreement. If the Allottee neglects, omits, ignores, or fails in the timely performance of its obligations agreed or stipulated herein for any reason whatsoever or acts in any manner contrary to any undertaking assured herein or fails to exercise the options offered by the Company within the stipulated period or to pay in time to the Company any of the instalments or other amounts and charges due and payable by the Allottee as described in Clause 7.7 herein, the Company shall be entitled to cancel the allotment and terminate this Agreement in the manner described hereunder.

21.1.1 In case any failure or breach committed by the Allotee is incapable or rectification or is in the opinion of the Company

unlikely to be rectified by the Allottee or where the Allottee is a repetitive defaulter or such failure or default is continuing despite the Allottee being given an opportunity to rectify the same, then this Agreement may be cancelled by the Company with immediate effect at its sole option by written notice ("Notice of Termination") to the Allottee intimating to the Allottee the decision of the Company to terminate the Agreement and the grounds on which such action has been taken.

.....

21.3 The Allottee understands, agrees and consents that upon such termination, the Company shall be under no obligation save and except to refund the amounts already paid by the Allottee to the Company, without any interest, and after forfeiting and deducting the Earnest Money, interest on delayed payments, brokerage/ commission/charges, service tax and other amounts due and payable to it, only after resale of the said Apartment. Upon termination of this Agreement by the Company, save for the right to refund, if any to the extent agreed hereinabove, the Allottee shall have no further right or claim against the Company and/or the Confirming Parties which, if any, shall be deemed to have been waived off by the Allottee and the Allottee hereby expressly consents thereto. The Company shall thenceforth be free to deal with the said Apartment in any manner whatsoever, in its sole and absolute discretion and in the event that the Allottee has taken possession of the said Apartment and everything whatsoever contained therein and in such event, the Allottee and/or any other person/occupant of the said Apartment shall immediately vacate the said Apartment and otherwise be liable to immediate ejectment as an unlawful occupant/trespasser. This is without prejudice to any other rights available to the Company against the Allottee."

(emphasis supplied)

9. On 27.12.2017, Respondent No.1 filed a Consumer Complaint being Consumer Case No.3823 of 2017 before the National Commission, wherein it was *inter alia* prayed that the Developer be directed to refund the amount of Rs.1,44,72,364/- paid by the Apartment Buyer alongwith interest @ 20% per annum compounded quarterly till realization, and compensation towards damages on account of harassment, mental agony and litigation charges.

A The Apartment Buyer *inter alia* submitted that the Developer had invited applications from the public for booking flats in the housing complex "The Corridors", by misrepresenting that all necessary approvals/pre-clearances with respect to the and constructions had already been obtained from the office of the Director, Town and Country Planning, Haryana, and other civil authorities. The Developer had misrepresented at the time of booking that the project would have a 90-meters motorable access road approaching the project from Junction 63A to 67A which was shown in the Apartment Buyer's Agreement in the layout plan. However, there was no access road of 90-meters to the project, and/or 24-meters in the revised plans. The Apartment Buyerswere induced to book apartments on false representations made by the Developer that construction of the project would be completed the project within 42 months from the collection of the initial booking amount.

As per Clause 13.3 of the Agreement, possession was to be handed over within a period of 42 months from the date of approval of the Building Plans, with a GracePeriod of 180 days. Despite the aforesaid terms, the Developer had not offered possession to the Apartment Buyers till the date of filing the complaint, even though the "Commitment Period"for handing over possession had expired on 22.01.2017, and also the Grace Period had lapsed on 22.07.2017.TheApartment Buyers had regularly paid instalments as per the demands raised by the Developer. As on December 2016, a total sum of Rs.1,44,72,364/- had been paid by the Respondent No. 1 to the Developer. To date, no offer of possession has been made to Apartment Buyers.

The Apartment Buyerssubmitted that the Building Planswere revised in 2017, when the entire layout was changed whichled to the scrapping of some of the residential towers, so that the same could be converted to commercial towers in the project. It was further mentioned that the office of the District Town Planner (Enforcement), Gurgaon, Haryana, vide a restraint order dated 20.02.2017 issued Memo No.525-526 to the Developer to immediately stop the construction with respect to Tower-A and Tower-B for causing harassment to the buyers.

10. The Developer filed its reply to the Consumer Complaint submitting that there was no delay in offering possession of the flats, since as per Clause 13.3 of the Agreement, possession was to be handed over to the allottees within 42 months from the date of approval of the

Building Plans, which included fulfilment of the conditions imposed thereunder. The Building Plan approval had been granted on 23.07.2013, which stipulatedcompliance with several pre-conditions, including obtaining Fire Safety Scheme approval. This approval was granted only on 27.11.2014. Consequently, the 48 months' time period for delivery of possession of the apartment would commence only on 27.11.2014,and expire on 27.11.2018. Consequently, there was no delay in offering possession of the apartments. Hence, the complaint was premature and liable to be dismissed.

11. The National Commission in another case titled as *"IREO Grace Realtech Pvt. Ltd.* v. *Ritu Hasija"* being CC No.190 of 2017 and connected matters, decided on 18.09.2018, held that clause 44 of that Agreement was wholly unfair and one-sided, which gave only a limited right to the Apartment Buyers to terminate the agreement, and seek refund of the amount paid by them.Clause 21.3 of the Flat Buyers Agreement read in conjunction with the other Clauses of the Agreement would result in a situation where a flat buyer, despite the failure of the builder to offer possession within the time stipulated, would be practically left remediless for 1½ years from the date of default, with no interest or compensation payable to him, even though the money was utilized by the builder. Even the principal amount would be refunded at an uncertain future point, after the builder had sold the apartment allotted to the complainant. Such a term was wholly unfair and unjust since the Developer had the right to terminate the agreement even if a single default occurred on the part of the Buyers, and forfeit the earnest money, and deduct other charges specified in Clause 21.3 of the Buyers Agreement. Clause 44 postponed the right of the flat buyer to terminate the agreement and seek compensation even after the Grace Period had expired, which was wholly unfair and one-sided. The contract could be terminated after a delay of 12 months, and would be entitled to only delay compensation, without interest.

The Commission held that since the Developer had failed to deliver possession of the allotted flats to the Apartment Buyers, it amounted to deficiency in service, and the complainants were entitled to refund of the amount alongwith appropriate compensation.

The Developer has filed SLP (C) No.40286 of 2019 against this judgment, which has been tagged to the present batch of appeals.

A 12. This judgment was followed by the National Commission in the case of *Subodh Pawar* v. *IREO Grace Realtech Pvt. Ltd. & Others*, decided on 24.09.2018.The SLP filed by the Developer against this judgment,was dismissed by the Supreme Court vide order dated 28.01.2019, on the statement made by the Counsel for the Developer that the amount due and payable as per the order of the National
B Commission, shall be refunded within a period of four weeks withinterest @ 10% p.a. w.e.f. 27.05.2018 till the date of payment.

A similar order was passed by this Court in *IREO v. Surendra Arora* Civil Appeal (Diary) No. 48101 of 2018 on 28.01.2019.

C 13. With respect to the same project, an Apartment Buyer filed a complaint under Section 31 of the Real Estate (Regulation & Development) Act, 2016 ("RERA Act") read with Rule 28 of the Haryana Real Estate (Regulation & Development) Rules, 2017 before the Haryana Real Estate Regulatory Authority, Gurugram ("RERA"). In this case, the Authority vide order dated 12.03.2019 held thatsince the
D environment clearance for the project contained a pre-condition for obtaining Fire Safety Plan duly approved by the Fire Department before starting construction, the due date for possession would be required to be computed from the date of Fire Approval granted on 27.11.2014, which would come to 27.11.2018. Since the Developer had failed to
E fulfil the obligation under Section 11(4)(a) of this Act, the Developer was liable under the proviso to Section 18 to pay interest at the prescribed rate of 10.75% p.a. on the amount deposited by the complainant, upto the date when the possession was offered. However, keeping in view the status of the project, and the interest of other allottees, the Authority
F was of the view that refund cannot be allowed at this stage. The Developer was directed to handover possession of the apartment by 30.06.2020, as per the Registration Certificate for the project.

14. The present batch of consumer complaints was decided by the National Commission vide judgment and order dated 28.03.2019, which has been impugned herein. The National Commission has allowed
G the consumer complaints in terms of the earlier order passed in the *Subodh Pawar case (supra).* The National Commission recorded the statement of the counsel for the complainants that in order to avoid any further litigation, the complainants were restricting their claim for refund of the principal amount paid to the Developer, alongwith compensation
H @ 10% S.I. p.a. w.e.f. from 10.07.2017, which was awarded by this

Court to another allottee in the same project as per Consent Order dated 28.01.2019 passed in Civil Appeal Diary No.48101 of 2018.

15. We have heard the learned Counsel for the parties. The issues which have arisen for consideration are:

(i) Determination of the date from which the 42 months period for handing over possession is to be calculated under Clause 13.3, whether it would be from the date of issuance of the Fire NOC as contended by the Developer; or, from the date of sanction of the Building Plans, as contended by the Apartment Buyers;

(ii) Whether the terms of the Apartment Buyer's Agreement were one-sided, and the Apartment Buyers would not be bound by the same;

(iii) Whether the provisions ofthe Real Estate (Regulation and Development) Act, 2016 must be given primacy over the Consumer Protection Act, 1986;

(iv) Whether on account of the inordinate delay in handing over possession, the Apartment Buyers were entitled to terminate the agreement, and claim refund of the amounts deposited with interest.

16. The counsel for the Appellant – Developer *inter alia* submitted that :

(a) On the first issue, it was submitted that the period of 42 months for handing over possession would commence only after the conditions mentioned in the Building Plans were fulfilled. The ApartmentBuyer'sAgreement in Clause 13.3 provides that the 42 months period would commence from "the date of approval of the Buildings plans and/or fulfilment of the pre-conditions imposed thereunder".

Clause 17(iv) of the Building Plans duly sanctioned on 23.07.2013 issued by the Directorate of Town and Country Planning, stipulated that:-

"17(iv). That the Coloniser shall obtain the clearance/NOC as per the provisions of the Notification No.SO 1533(E) dated 14.09.2006 issued by the Ministry of Environment & Forests,

A Government of India before starting the construction/execution of development works at site."

(emphasis supplied)

This stipulation has been affirmed by the RERA, a specialised fact-finding authority in respect of real estate projects, while interpreting
B the starting point of the 42 months period from the date of fire safety approval.Since the fire safety approval was obtained on 27.11.2014, the period of 42 months would commence from this date.

The due date for handing over possession of apartments must be taken to be 27.11.2018 i.e. 42 months from the date of obtaining the Fire
C Safety NOC on 27.11.2014, and a Grace Period of 6 months. In this view of the matter, the complaint filed before the National Commission was premature and liable to rejected.

(b) The Apartment Buyers were bound by the terms of the Apartment Buyer's Agreement, which clearly states that
D the "Commitment Period" would start only after fulfilment of the pre-conditions under the Building Plan, and must be given effect to by any adjudicatory body.

(c) Under Sections 15(2) and (3) of the Haryana Fire Service Act, 2009, it is the duty of the Authority to grant a provisional
E NOC within a period of 60 days from the date of submission of the application. The delay/failure of the Authority to grant a provisional NOC cannot be attributed to the Developer.

(d) The Apartment Buyers was not required to pay the entire consideration amount at the commencement of the
F agreement, in a lump sum amount, since the consideration was linked to the construction plan, and was payable in instalments at various stages of the construction.

The Developer had not taken any instalment prior to 27.11.2014, when the Fire Safety NOC was granted. The
G first instalment was taken on 27.01.2015, when a demand for casting the lower roof slab was made from the allottees. All substantial payments of the project were based on milestones linked to construction.

(e) It was submitted that in large development projects, where
H multiple towers are being constructed, delays are inevitable.

The Agreement contemplated a reasonable Grace Period of 180 days, which is a standard clause in the construction industry. The Apartment Buyer is not entitled to seek refund unless the Extended Delay Period is over. In any event, the Apartment Buyer is being paid Delay Compensation for the period of delay which has occurred during the course of construction.

(f) The finding recorded by the National Commission that the clauses of the Apartment Buyer's Agreement were one-sided and unfair was illegal and without jurisdiction, under the Consumer Protection Act, 1986. It was only under the Consumer Protection Act, 2019, which came into effect from 20.07.2020, that the State Consumer Forum and the National Commission were conferred with the power to declare contractual terms that were as unfair to consumers as null and void. Such power did not exist under the 1986 Act.

(g) It was further submitted that the National Commission was not justified in passing the impugned order by directing a full refund of the principal amount with interest @10% S.I. p.a. as compensation from 10.07.2017 till the refund was made within four weeks, failing which, interest would be payable from the date of each deposit to the Developer, till the entire amount was refunded.

(h) It was submitted that the Respondents in Civil Appeals No.7615, 7975, 8454, 8480, 8482, 8785-8794, 9139, 9216 and 9638 of 2019; and the Appellant in Civil Appeal No.3064 of 2020, are defaulters since they had paid only between 30 to 40% of the total consideration. These buyers had breached their obligation to make payments as per the construction linked payment plan. Despite this, the Developer had made an alternate offer of similar units in the completed towers in Phase 1 of the project where the Occupation Certificate had been granted, before the expiry of the Extended Delay Period.

(i) It was contended that the decision of the RERA must be given primacy over the National Commission. The impugned

judgment passed by the National Commission was in direct conflict with the judgment passed by the RERA, Haryana since the National Commission had assumed the due date for offer of possession as 23.01.2017.The RERA had correctly held that the due date for delivery of possession of apartments under the Agreement was 27.11.2018. RERA had directed the Developer to hand over possession by 30.06.2020, as mentioned in the Registration Certificate filed before the RERA. In view of the conflicting views taken by the two Fora which exercise original jurisdiction, it is the order of RERA which ought to be upheld. Particularly, since RERA is a specialized fact-finding authority with respect toreal estate projects, it is the special law which must prevail over the general law. RERA has been established under the Real Estate (Regulation & Development) Act, 2016 ("RERA Act"), for regulation and promotion of the real estate sector.

(j) It was submitted that by 21.07.2017, the construction of Phase I of the project had been completed, which comprised of Towers A6 – A10, B1 – B4, and C3 – C7, for which the Occupation Certificate was issued on 31.05.2019, and an offer of possession was made to the apartment buyers.

With respect to the remaining Towers in Cluster-A comprising of buildings A1 to A5; Cluster-B comprising of buildings B5 to B8; and, Cluster-C comprising of buildings C8 to C11, the application for grant of part Occupation Certificate was submitted on 10.09.2019, which is pending approval.

The Developer made an alternate offer to the apartment buyers whose allotments were in Phase-II of the project, where the Occupancy Certificate has yet to be obtained, to transfer their allotment to a ready to move-in apartment in Phase-I of the project,wherethe Occupation Certificate hadbeen issued.

The construction and development of "The Corridors" group housing project has now been completed, with Occupation Certificate having been issued with respect to 700

apartments, out of a total of 1356 apartments in Towers A6 to A10, B1 to B4, and C3 to C7.

(k) The Consent Order passed in *IREO Grace Realtech Pvt. Ltd.* v. *Surendra Arora* could not be relied upon to grant relief in this batch of cases, since it was a Consent Order passed by the Court, and couldnot be treated as a precedent.

17. In response, the Apartment Buyers have *inter alia* submitted as under :-

(a) The building plans were approved on 23.07.2013, and the Developer wasrequired to hand over possession of the apartments within a period of 42 months from the date of approval, which expired on 22.01.2017. If the Grace Period of 6 months under Clause 13.3 was added, the Developer was required to give possession by 22.07.2017. The Developer received the Occupation Certificate for certain Towers of the Project on 31.05.2019. Possession was offered to the Apartment Buyers in Phase I of the project in 2019, after a delay of 1½ years.

Assuming that the date for possession would begin from the date of issuance of the Fire NOC i.e. 27.11.2014, the Developer was required to offer possession by 27.11.2018. The Developer offered possession in Phase I of the Project to certain Apartment Buyers only after it received the Occupation Certificate in 2019.

With respect to the majority of the apartment buyers before this Court, their allotments were in Towers which were in Phase II of the project, where O.C. is yet to be obtained even as on date. Consequently, there has been a delay of over 3 ½ years.

(b) The grant of Fire NOC was not apre-condition for commencement of construction work. In fact, the Developer had started the construction before the grant of Fire NOC. Therefore, it could not becontended that the delay in issuance of the Fire Safety clearance had impeded the construction of the units allotted to the respondents.

(c) The Developer had sought payment of the first three instalments prior to receiving the Fire NOC.The third instalment was paid on 18.03.2014, before the grant of Fire NOC.

(d) It was further submitted that neither the Building Plan Approval nor Section 15 of the Haryana Safety Act, 2009 places any restriction on the commencement of construction, which wouldbe evident from the fact that the Developer had started theconstruction before the grant of the Fire NOC.

(e) The sanctioned Building Plans stipulated thatthe NOC for Fire Safety (Provisional) was required to be obtained within a period of 90 days from the date of approval of the Building Plans, which expired on 21.10.2013. The Developer applied for the Provisional Fire Approval on 24.10.2013 after the expiry of the mandatory 90 days' period got over. The application filed was deficient and casual and did not provide the requisite details. The appellant submitted the corrected sets of drawings as per the NBC-2005 Fire Scheme only on 13.10.2014, which reflected the laxity of the Developer in obtaining the Fire NOC.

The approval of the Fire Safety Scheme took more than 16 months from the date of the Building Plan approval i.e. from 23.07.2013 to 27.11.2014. The Builder failed to give any explanation for the inordinate delay in obtaining the Fire NOC.

(f) The Respondents placed reliance on the order passed in the case of *IREO Victory Valley Pvt. Ltd.* v. *Shamshul Hoda Khan*,[1] wherein the National Commission held that the Fire NOC was not a pre-condition for commencement of the construction work. The Appeal of the Developer was rejected by this Court vide order dated 03.05.2019, and the Review Petition was dismissed on 15.10.2019.

(g) The Agreement contained one-sided clauses, which were not final and binding on the apartment buyers, and would constitute an unfair trade practice. Reliance was placed on

[1] Civil Appeal No.4801 of 2019 decided on 03.05.2019.

the judgment of this Court in *Pioneer Urban Land and Infrastructure Ltd* v. *Govindan Raghavan.*[2]

(h) The respondents submitted that they had availed of loans to pay the instalments, on which interest @ 7.90% was being paid. On account of the inordinate delay which had occurred, they were unable to pay further instalments, and insisted on refund of the amounts paid.

DISCUSSION & ANALYSIS

18. Determination of the date for handing over Possession

The first issue which has been raised by the Appellant-Developeras also the Apartment Buyers, is the relevant date from which the 42 months' period is to be calculated for handing over possession. Clause 13.3 of the Agreementstates that the Developer proposed to offer possession of the apartment to the allottee within a period of 42 months from the date of approval of the Building Plans and/or fulfilment of the pre-conditions imposed thereunder, referred to as the "Commitment Period". The Company would be entitled to a further "Grace Period"of 180 days' after the expiry of the Commitment Period for unforeseen delays beyond the reasonable control of the Company.This would work out to 42+6 months i.e. 48 months.

18.1 The point of controversy is whether the 42 months' period is to be calculated from the date when the Fire NOC was granted by the concerned authority, as contended by the Developer; or, the date on which the Building Plans were approved, as contended by the Apartment Buyers.

18.2 Section 15 of the Haryana Fire Safety Act, 2009 makes it mandatory for a Builder/Developer to obtain the approval of the Fire Fighting Scheme conforming to the National Building Code of India, and obtain a No Objection Certificate before the commencement of construction. Section 15 is extracted hereinbelow for ready reference:

"15. **Approval of Fire Fighting Scheme and issue of no objection certificate.**—(1) Any person proposing to construct a building to be used for any purpose other than residential purpose or a building proposed to be used for residential purpose of more than 15 meters in height, such as group housing, multi-storeyed

[2] (2019) 5 SCC 725.

A flats, walk-up apartments, etc. **before the commencement of the construction, shall apply for the approval of Fire Fighting Scheme conforming to National Building Code of India**, the Disaster Management Act, 2005 (53 of 2005), the Factories Act, 1948 (Act 63 of 1948) and the Punjab Factory Rules, 1952, and issue of no objection certificate on such form, alongwith such field as may be prescribed.

B

(2) The Director or any officer duly authorised by him in this behalf, may take cognizance of any application and issue such instructions and orders regarding the building plan and for construction by issuing a provisional no objection certificate before the construction is taken up.

C

Explanation. –In case any person proposes to increase the number of floors on any building already constructed in such a manner that it shall qualify for being termed as a high rise building, shall before construction, apply for no objection certificate.

D

(3) The provisional no objection certificate shall be issued within 60 days of submission of application along with such fee, as may be prescribed, giving all the details of the construction being undertaken as well as the rescue, fire prevention and fire safety details required to be incorporated during the period of construction.

E

(4) During the process of construction, the inspection of the construction may be conducted and the advice about any additions, deviations, modifications that are required to be carried out from the precaution and prevention point of view, may be tendered. Such advice shall be made on a prescribed proforma and handed over to the party concerned.

F

(5) On completion of the construction of the high-rise building, a no objection certificate shall be obtained. In the absence of such certificate, the owner shall not occupy, lease or sell the building."

G

(emphasis supplied)

18.3 Clause 13.3 of the Apartment Buyer's Agreement provides that the 42 months' period has to be calculated from the date of approval of the Building Plans and/or fulfilment of the pre-conditions imposed thereunder.

H

18.4 The Building Plans sanctioned by the Directorate of Town and Country Planning, Haryana contained the Terms & Conditions of Approval, which included a provision for Fire Safety contained in Clause (3). The Developer was directed to submit Fire Safety Plans indicating the complete Fire Protection Arrangements, and means of escape/access for the proposed building with suitable legend and standard signs.

Clause 3 of the Building Plans contained a provision for Fire Safety, which reads :

"3. FIRE SAFETY

On receipt of the above request the Commissioner, Municipal Corporation, Gurgaon after satisfying himself that the entire fire protection measures proposed for the above buildings are as per NBC and other Fire Safety Bye Laws, and would issue a NOC from Fire safety and means of escape/access point of view. This clearance/NOC from Fire Authority shall be submitted in this office along with a set of plans duty signed by the Commissioner, Municipal Corporation, Gurgaon within a period of 90 days from the date of issuance of sanction of building plans. Further, it is also made clear that no permission for occupancy of the building shall be issued by Commissioner, Municipal Corporation, Gurgaon unless he is satisfied that adequate fire fighting measures have been installed by you and suitable external fire fighting infrastructure has been created at Gurgaon, by Municipal Corporation, Gurgaon. A clearance to this effect shall be obtained from the Commissioner, Municipal Corporation, Gurgaon before grant of occupation certificate by the Director General."

18.5 On receipt of the Fire Plans, the Commissioner, Municipal Corporation, Gurgaon, after satisfying himself with the entire fire protection measures as in conformity with the National Building Code, 2005 ("NBC") and the Fire Safety Bye-Laws, would issue an NOC for Fire Safety.This NOC/Clearance was required to be submitted before the Municipal Corporation, within a period of 90 days' from the issuance of the sanctioned Building Plans.

18.6 Clause 17(iv) of the sanctioned Plan stipulated that the Developer shall obtain an NOC from the Ministry of Environment & Forests, before starting the construction/execution of development works at site.

A "17 (iv) That the Developer shall obtain the clearance/NOC as per the provisions of the Notification No. S.O. 1533(E) dated 14.09.2006 issued by Ministry of Environment and Forest, Government of India before starting the construction/execution of development works at site."

B (emphasis supplied)

18.7 The Environmental Clearance granted by the Ministry of Environment & Forest Government of Haryana on 12.12.2013 required the Developer to submit a copy of the Fire Safety Plan approved by the Fire Department, before commencing construction of the project.

C General Condition (vi) under Part B of the Environmental Clearance stipulated that the Developer shall obtain all other statutory clearances, including the approval from the Fire Department, prior to construction of the project.

Clause (vi) provides that :

D **"(vi)** All other statutory clearance such as the approvals for storage of diesel from Chief Controller of Explosive, Fire Department, Civil Aviation Department, Forest Conservation Act, 1980 and Wildlife (Protection) Act, 1972, Forest Act, 1927, PLPA 1900 etc. shall be obtained as applicable by project proponents from the E respective authorities prior to construction of the project."

(emphasis supplied)

18.8 We are of the view that it was a mandatory requirement under the Haryana Fire Safety Act, 2009 to obtain the Fire NOC before commencement of construction activity. This requirement is stipulated F in the sanctioned Building Plans, as also in the Environment Clearance.

18.9 The 42 months' period in Clause 13.3. of the Agreement for handing over possession of the apartments would be required to becomputed from the date on which Fire NOC was issued, and not from the date of the Building Plans being sanctioned.

G

18.10 In the present case, the Developer obtained approval of the Building Plans from the Directorate, Town and Country Planning, Haryana, on 23.07.2013.The Developer applied for issuance of Fire NOC for the Fire Fighting Scheme of the Group Housing Colony within the 90 days period before the Director, Fire Service, Panchkula.

H

The Commissioner vide letter dated 30.12.2013 raised 16 objections with respect to the proposed Fire Fighting Plan.

The Developer vide letter dated 22.01.2014 responded to the objections, submitting that the objections had been cured, and requested that the approval of the Fire Fighting Scheme be granted on a priority basis.

The Fire Department informed the Developer vide letter dated 28.03.2014 that the deficiencies in the application for Fire NOC had not been cured. The Developer was granted a further period of 15 days' to cure the defects, failing which, its application would be deemed to be rejected.

The Developer submitted revised drawings as per the NBC Fire Scheme alongwith its letter dated 18.08.2014. This letter was received in the office of the Municipal Corporation on 13.10.2014, as per endorsement on the said letter.

18.11 On 27.11.2014, the Director, Haryana Fire Service granted approval to the Fire Fighting Scheme subject to the conditions mentioned therein. The computation of the period for handing over possession would be computed from this date. The Commitment Period of 42 months plus the Grace Period of 6 months from 27.11.2014, would be 27.11.2018, as being the relevant date for offer of possession.

The aforesaid chronology for obtaining Fire NOC would indicate a delay of approximately 7 months in obtaining the Fire NOC by the Developer.

19. Whether the terms of the Apartment Buyer's Agreement are one-sided?

The second issue which has been raised by the Apartment Buyersis that the Agreement in this case, contains wholly one-sided clauses, and would not be bound by its terms.

19.1 We have carefully perused the terms of the Agreement, and an analysis of the same reveals that :

a) Under the construction-linked plan, Clause 6 provided that the apartment buyers would be required to deposit 20% of the sale consideration within 45 days of booking of the apartment.

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b) Clause 7.4 of the Agreement provides that if there is a delay in payment of an instalment, the apartment buyer would be required to pay Interest on every delayed payment of such instalment @ 20% S.I.p.a.

c) Clause 13.2 of the Agreement provides that if the allottee
B fails, ignores or neglects to take possession of the said Apartment in accordance with the Notice of Possession, the allottee shall be liable to pay "Holding Charges"on the super area @ Rs.7.5 per sq. ft. per month.

d) In contrast, Clause 13.3 of the Agreement provides that if
C the Company fails to offer possession by the end of the Grace Period i.e. 42+6 months, it would be liable to pay Delay Compensation@ Rs.7.5 per sq. ft. of the super area for every month of delay.

Delay compensation at Rs. 7.5 per sq. ft. works out to
D approximately 0.9% to 1 % Interest per annum.The price per sq. ft of an apartment under the Apartment Buyer's Agreement was Rs. 10,350/- per sq. ft. The compensation payable for delay was Rs. 7.5 per sq. ft. The compensation payable by the Developer for delay in offering possession works out to :

E

$$\frac{7.5}{10{,}350} \times 100 \times 12 = 0.9\ \%\ \text{to}\ 1\%\ \text{p.a.}$$

e) Clause 13.5 provides that the allottee may opt for termination, only after 42 months from the date of issuance
F of Fire NOC + 6 months' Grace Period, plusa further period of 12 months.

The Delay Compensation would be payable to the allottee only if the termination was "validly opted". The compensation was limited to a fixed period of 12 months
G only, and that no other claim whatsoever, whether monetary or otherwise, was payable by the Developer.

f) Clause 13.8 of the Agreement provides that the allottee shall be deemed to have waived all its claims in respect of the area, specifications, quality, construction, any other

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provision in the apartment against the Developer upon taking possession of the apartment.

g) Clause 21 provides for termination of the Agreement and forfeiture of earnest money by the Developer, if the allottee neglects or fails to make timely payments as stipulated in the Agreement, or fails to exercise the options offered by the Developer.

Clause 21.3 provides that upon such termination, the Appellant Company shall be under no obligation, except to refund the amounts already paid by the allottee, without any interest, and after forfeiting and deducting the earnest money, interest on delayed payments, brokerage / commission / charges, service tax and other amounts due and payable to it. The principal amount after the aforesaid deductions are made, would be refunded at an uncertain future date i.e. after the Developer had sold the apartment allotted to the complainant.

In contrast, the allottee is given a very limited right to cancel the Agreement solely in the event of the clear and unambiguous failure of the warranties of the Company, which leads to frustration of the Agreement on that account. In such case, the allottee will be entitled to a refund of the instalments actually paid, along with interest @ 8% p.a. within a period of 90 days from the date of determination to this effect. No other claim, whatsoever, monetary or otherwiseshall lie against the Company.

19.2 The aforesaid clauses reflect the wholly one-sided terms of the Apartment Buyer's Agreement, which are entirelyloaded in favour of the Developer, and against the allottee at every step.

The terms of the Apartment Buyer's Agreement are oppressive and wholly one-sided, and would constitute an unfair trade practice under the Consumer Protection Act, 1986.

19.3 Section 2(1)(c) of the Consumer Protection Act, 1986 defines a 'complaint' as :

"**2.(1)(c)** "complaint" means any allegation in writing made by a complainant that –

(i) <u>any unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider</u>;

A (ii) the goods bought by him or agreed to be bought by him suffer from one or more defects.

…."

(emphasis supplied)

B Section 2(1)(g) of the Act defines the expression "deficiency" to include any fault, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained under law, or in pursuance of a contract, or in relation to a 'service'.

The term "service" has been defined by S. 2(1)(o) to include a C service of any description which is made available to potential users.

S. 2(1)(o) was amended by Act 50 of 1993 w.e.f. from 18.06.1993 to include "housing construction" within the purview of "service". The amended Section 2(1)(o) reads as follows :-

"2(1)(o) "service" means service of any description which is made D avail-able to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, **housing construction**, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or E under a contract of personal service;"

(emphasis supplied)

In *Lucknow Development Authority* v. *M.K. Gupta*,[3] this Court discussed the legislative intent of including "housing construction" within F the ambit of 'service' as :

"**2**. …. A scrutiny of various definitions such as 'consumer', 'service', 'trader', 'unfair trade practice' indicates that legislature has attempted to widen the reach of the Act. Each of these definitions are in two parts, one, explanatory and the other G explanatory. The explanatory or the main part itself uses expressions of wide amplitude indicating clearly its wide sweep, then its ambit is widened to such things which otherwise would have been beyond its natural import. Manner of construing an inclusive clause and its widening effect has been explained in

H [3] (1994) 1 SCC 243.

Dilworth v. Commissioner of Stamps [1899 AC 99 : 15 TLR 61] as under:

> "'include' is very generally used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute, and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural, import, but also those things which the definition clause declares that they shall include."

It has been approved by this Court in Regional Director, Employees' State Insurance Corpn. v. High Land Coffee Works of P.F.X. Saldanha and Sons [(1991) 3 SCC 617] ; CIT v. Taj Mahal Hotel, Secunderabad [(1971) 3 SCC 550] and State of Bombay v. Hospital Mazdoor Sabha [AIR 1960 SC 610 : (1960) 2 SCR 866 : (1960) 1 LLJ 251] . The provisions of the Act thus have to be construed in favour of the consumer to achieve the purpose of enactment as it is a social benefit oriented legislation. The primary duty of the court while construing the provisions of such an Act is to adopt a constructive approach subject to that it should not do violence to the language of the provisions and is not contrary to the attempted objective of the enactment.

6….. As pointed out earlier the entire purpose of widening the definition is to include in it not only day to day buying and selling activity undertaken by a common man but even such activities which are otherwise not commercial in nature yet they partake of a character in which some benefit is conferred on the consumer. Construction of a house or flat is for the benefit of person for whom it is constructed. He may do it himself or hire services of a builder or contractor. The latter being for consideration is service as defined in the Act. Similarly when a statutory authority develops land or allots a site or constructs a house for the benefit of common man it is as much service as by a builder or contractor. The one is contractual service and other statutory service. If the service is defective or it is not what was represented then it would be unfair trade practice as defined in the Act. Any defect in construction activity would be denial of comfort and service to a consumer. When possession of property is not delivered within stipulated period the delay so caused is denial of service. Such disputes or

A claims are not in respect of immoveable property as argued but deficiency in rendering of service of particular standard, quality or grade. Such deficiencies or omissions are defined in sub-clause (ii) of clause (r) of Section 2 as unfair trade practice.

….

B A person who applies for allotment of a building site or for a flat constructed by the development authority or enters into an agreement with a builder or a contractor is a potential user and nature of transaction is covered in the expression 'service of any description'. It further indicates that the definition is not exhaustive.

C The inclusive clause succeeded in widening its scope but not exhausting the services which could be covered in earlier part. So any service except when it is free of charge or under a constraint of personal service is included in it. Since housing activity is a service it was covered in the clause as it stood before 1993."

D 19.4 Clause 2(1)(r) of the Consumer Protection Act, 1986 defines "unfair trade practice" as follows :-

"2(1)(r) "unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or <u>for the provision of any service, adopts any unfair method or unfair</u>

E <u>or deceptive practice including any of the following practices, namely</u>:-

… …. … ,,

(emphasis supplied)

F The said definition is an inclusive one, as held by this Court in *Pioneer Urban Land & Infrastructure Ltd.* v.*Govindan Raghavan,*[4] whereinthis Court speaking through one of us (J. Indu Malhotra) held :-

"**6.1** …. The inordinate delay in handing over possession of the flat clearly amounts to deficiency of service. In Fortune

G Infrastructure v. Trevor D'Lima [Fortune Infrastructure v. Trevor D'Lima, (2018) 5 SCC 442 : (2018) 3 SCC (Civ) 1] , this Court held that a person cannot be made to wait indefinitely for possession of the flat allotted to him, and is entitled to seek refund of the amount paid by him, along with compensation.

H [4] (2019) 5 SCC 725.

6.2. The respondent flat purchaser has made out a clear case of deficiency of service on the part of the appellant builder. The respondent flat purchaser was justified in terminating the apartment buyer's agreement by filing the consumer complaint, and cannot be compelled to accept the possession whenever it is offered by the builder. The respondent purchaser was legally entitled to seek refund of the money deposited by him along with appropriate compensation.

6.3 The National Commission in the impugned order dated 23-10-2018 [Geetu Gidwani Verma v. Pioneer Urban Land and Infrastructure Ltd., 2018 SCC OnLine NCDRC 1164] held that the clauses relied upon by the builder were wholly one-sided, unfair and unreasonable, and could not be relied upon. The Law Commission of India in its 199th Report, addressed the issue of "Unfair (Procedural & Substantive) Terms in Contract". The Law Commission inter alia recommended that a legislation be enacted to counter such unfair terms in contracts. In the draft legislation provided in the Report, it was stated that:

"… a contract or a term thereof is substantively unfair if such contract or the term thereof is in itself harsh, oppressive or unconscionable to one of the parties."

6.8. A term of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder. The contractual terms of the agreement dated 8-5-2012 are ex facie one-sided, unfair and unreasonable. The incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice as per Section 2(1)(*r*) of the Consumer Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling the flats by the builder."

19.5 In a similar case, this Court in *Wg. Cdr. Arifur Rahman Khan* & Others v. *DLF Southern Homes Pvt. Ltd.*,[5] affirmed the view taken in *Pioneer* (supra), and held that the terms 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

[5] 2020 SCC Online SC 667.

A 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.

19.6 Section 14 of the 1986 Act empowers the Consumer Fora to redress the deficiency of service by issuing directions to the Builder, and compensate the consumer for the loss or injury caused by the opposite party, or discontinue the unfair or restrictive trade practices.

19.7 We are of the view that the incorporation of such one-sided and unreasonable clauses in the Apartment Buyer's Agreement constitutes an unfair trade practice under Section 2(1)(r) of the Consumer Protection Act. Even under the 1986 Act, the powers of the consumer fora were in no manner constrained to declare a contractual term as unfair or one-sided as an incident of the power to discontinue unfair or restrictive trade practices. An "unfair contract" has been defined under the 2019 Act, and powers have been conferred on the State Consumer Fora and the National Commission to declare contractual terms which are unfair, as null and void. This is a statutory recognition of a power which was implicit under the 1986 Act.

In view of the above, we hold that the Developer cannot compel the apartment buyers to be bound by the one-sided contractual terms contained in the Apartment Buyer's Agreement.

20. Whether primacy to be given to RERAover the Consumer Protection Act

20.1 The Consumer Protection Act, 1986 was enacted to protect the interests of consumers, and provide a remedy for better protection of the interests of consumers, including the right to seek redressal against unfair trade practices or unscrupulous exploitation.

The Statement of Objects and Reasons of the Consumer Protection Bill, 1986 reads as :

"STATEMENT OF OBJECTS AND REASONS

The Consumer Protection Bill, 1986 seeks to provide for better protection of the interests of consumers and for the purpose, to make provision for the establishment of Consumer councils and other authorities for the settlement of consumer disputes and for matter connected therewith.

2. It seeks, inter alia, to promote and protect the rights of consumers such as:—

(a) the right to be protected against marketing of goods which are hazardous to life and property;

(b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices;

(c) the right to be assured, wherever possible, access to an authority of goods at competitive prices;

(d) the right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums;

(e) the right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers; and

(f) right to consumer education.

3. These objects are sought to be promoted and protected by the Consumer Protection Council to be established at the Central and State level.

4. To provide speedy and simple redressal to consumer disputes, a quasi-judicial machinery is sought to be set up at the district, State and Central levels. These quasi-judicial bodies will observe the principles of natural justice and have been empowered to give relief of a specific nature and to award, wherever appropriate, compensation to consumers. Penalties for non-compliance of the orders given by the quasi-judicial bodies have also been provided."

(emphasis supplied)

20.2 Section 3 of the Consumer Act provides that the remedies underthe Act are in addition to, and not in derogation of any other law applicable. Section 3 reads as :

A "**3. Act not in derogation of any other law.**—The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force."

In *Secretary, Thirumurugan Cooperative Agricultural Credit Society* v. *M. Lalitha (dead) through LRs and others*,[6] this Courtheld that:

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"**11**. From the Statement of Objects and Reasons and the scheme of the 1986 Act, it is apparent that the main objective of the Act is to provide for better protection of the interest of the consumer and for that purpose to provide for better redressal, mechanism through which cheaper, easier, expeditious and effective redressal is made available to consumers. To serve the purpose of the Act, various quasi-judicial forums are set up at the district, State and national level with wide range of powers vested in them. These quasi-judicial forums, observing the principles of natural justice, are empowered to give relief of a specific nature and to award, wherever appropriate, compensation to the consumers and to impose penalties for non-compliance with their orders.

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12. As per Section 3 of the Act, as already stated above, the provisions of the Act shall be in addition to and not in derogation of any other provisions of any other law for the time being in force. Having due regard to the scheme of the Act and purpose sought to be achieved to protect the interest of the consumers better, the provisions are to be interpreted broadly, positively and purposefully in the context of the present case to give meaning to additional/extended jurisdiction, particularly when Section 3 seeks to provide remedy under 19 the Act in addition to other remedies provided under other Acts unless there is a clear bar."

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In *National Seeds Corporation Limited* v. *M. Madhusudhan Reddy,*[7] the jurisdiction of the District Consumer forum was challenged on the ground that there was an arbitration clause in the Agreement between the parties. It was contended that the provisions of the Seeds Act, 1966 would prevail over the Consumer Protection Act. Relevant extracts of the ruling are extracted hereinunder :

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[6] (2004) 1 SCC 305.

[7] (2012) 2 SCC 506.

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"**57**. It can thus be said that in the context of farmers/growers and other consumers of seeds, the Seeds Act is a special legislation insofar as the provisions contained therein ensure that those engaged in agriculture and horticulture get quality seeds and any person who violates the provisions of the Act and/or the Rules is brought before the law and punished. However, there is no provision in that Act and the Rules framed thereunder for compensating the farmers, etc. who may suffer adversely due to loss of crop or deficient yield on account of defective seeds supplied by a person authorised to sell the seeds. That apart, there is nothing in the Seeds Act and the Rules which may give an indication that the provisions of the Consumer Protection Act are not available to the farmers who are otherwise covered by the wide definition of "consumer" under Section 2(1)(d) of the Consumer Protection Act. As a matter of fact, any attempt to exclude the farmers from the ambit of the Consumer Protection Act by implication will make that Act vulnerable to an attack of unconstitutionality on the ground of discrimination and there is no reason why the provisions of the Consumer Protection Act should be so interpreted.

....

62. Since the farmers/growers purchased seeds by paying a price to the appellant, they would certainly fall within the ambit of Section 2(1)(d)(i) of the Consumer Protection Act and there is no reason to deny them the remedies which are available to other consumers of goods and services."

....

64. According to the learned counsel for the appellant, if the growers had applied for arbitration then in terms of Section 8 of the Arbitration and Conciliation Act the dispute arising out of the arbitration clause had to be 23 referred to an appropriate arbitrator and the District Consumer Forums were not entitled to entertain their complaint. This contention represents an extension of the main objection of the appellant that the only remedy available to the farmers and growers who claim to have suffered loss on account of use of defective seeds sold/supplied by the appellant was to file complaints with the Seed Inspectors concerned for taking action under Sections 19 and/or 21 of the Seeds Act.

A **66**. The remedy of arbitration is not the only remedy available to a grower. Rather, it is an optional remedy. He can either seek reference to an arbitrator or file a complaint under the Consumer Protection Act. If the grower opts for the remedy of arbitration, then it may be possible to say that he cannot, subsequently, file complaint under the Consumer Protection Act. However, if he chooses to file a complaint in the first instance before the competent Consumer Forum, then he cannot be denied relief by invoking Section 8 of the Arbitration and Conciliation Act, 1996. Moreover, the plain language of Section 3 of the Consumer Protection Act makes it clear that the remedy available in that Act is in addition to and not in derogation of the provisions of any other law for the time being in force."

Subsequently, the judgments in *Thirumurugan Cooperative Agricultural Society* (Supra) and *National Seeds* were followed in *Virender Jain* v. *Alaknanda Cooperative Group Housing Society Limited and others*.[8]

20.3 Various judgments of this Court have upheld the applicability of provisions of Consumer Protection Act as an additional remedy, despite the existence ofremedies under special statutes, including the Arbitration and Conciliation Act, 1996. In *Emaar MGF Land Ltd.* v. *Aftab Singh,*[9] this Court has held that the remedy under the Consumer Protection Act, 1986 is confined to the Complaint filed by a Consumer as defined by the Act, for defects and deficiency caused by the service provider. The existence of an arbitration clause was not a ground to restrain the Consumer Fora from proceeding with the consumer complaint.

20.4 We will now consider the provisions of the RERA Act, which was brought into force on 01.05.2016.

The Statement of Objects and Reasons of the RERA Act, 2016 read as follows :

"THE STATEMENT OF OBJECTS AND REASONS

The real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. While this sector has grown significantly in recent years, it has been

[8] (2013) 9 SCC 383.
[9] (2019) 12 SCC 751.

largely unregulated, with absence of professionalism and standardisation and lack of adequate consumer protection. Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is not adequate to address all the concerns of buyers and promoters in that sector. The lack of standardisation has been a constraint to the healthy and orderly growth of industry. Therefore, the need for regulating the sector has been emphasised in various forums.

In view of the above, it becomes necessary to have a Central legislation, namely, the Real Estate (Regulation and Development) Bill, 2013 in the interests of effective consumer protection, uniformity and standardisation of business practices and the transactions in the real estate sector. The proposed Bill provides for the establishment of the Real Estate Regulatory Authority (the Authority) for regulation and promotion of 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 real estate sector and establish the Real Estate Appellate Tribunal to hear appeals from the decisions, directions or orders of the Authority.

(emphasis supplied)

20.5 Section 18 of the RERA Act, 2016 provides the remedy of refund with interest and compensation to allottees, when a Developer fails to complete the construction or give possession as per the Agreement of Sale. The remedies under Section 18 are "*without prejudice to any other remedy available*".

20.6 Section 71 of the RERA Act empowers the RERA Authority to determine compensation payable under Sections 12, 14, 18 and 19 of the Act. The proviso to Section 71 provides that a consumer has the right to withdraw its complaint before the consumer fora in respect of matters covered under Sections 12, 14, 18 and 19 of the Act, and file the same before the RERA.

Section 71 reads as :

"**71**. **Power to adjudicate.–** (1) For the purpose of adjudging compensation under sections 12, 14, 18 and section 19, the Authority shall appoint, in consultation with the appropriate Government, one or more judicial officer as deemed necessary,

who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard:

Provided that any person whose complaint in respect of matters covered under sections 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986 (68 of 1986), on or before the commencement of this Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act".

20.7 Section 79 of the RERA Act bars the jurisdiction only of civil courts in respect of matters which an authority constituted under the RERA Act is empowered to adjudicate on.

Section 79 reads as :

"79. Bar of jurisdiction: No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

20.8 Section 88 of the RERA Act is akin to Section 3 of the Consumer Protection Act, and provides that the provisions of the RERA Act shall apply in in addition to and not in derogation of other applicable laws. Section 88 reads as :

"**88. Application of other law not barred**: The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force."

20.9 An allottee may elect or opt for one out of the remedies provided by law for redressal of its injury or grievance. An election of remedies arises when two concurrent remedies are available, and the aggrieved party chooses to exercise one, in which event he loses the right to simultaneously exercise the other for the same cause of action.

20.10 The doctrine of election was discussed in *A.P. State Financial Corporation* v. *M/s GAR Re-rolling Corporation,*[10] in the following words :

> "**15**. The Doctrine of Election clearly suggests that when two remedies are available for the same relief, the party to whom the said remedies are available has the option to elect either of them but that doctrine would not apply to cases where the ambit and scope of the two remedies is essentially different. To hold otherwise may lead to injustice and inconsistent results. …. Since, the Corporation must be held entitled and given full protection by the Court to recover its dues it cannot be bound down to adopt only one of the two remedies provided under the Act. In our opinion the Corporation can initially take recourse to Section 31 of the Act but withdraw or abandon it at any stage and take recourse to the provisions of Section 29 of the Act, which section deals with not only the rights but also provides a self-contained remedy to the Corporation for recovery of its dues. If the Corporation chooses to take recourse to the remedy available under Section 31 of the Act and pursues the same to the logical conclusion and obtains an order or decree, it may thereafter execute the order or decree, in the manner provided by Section 32(7) and (8) of the Act. The Corporation, however, may withdraw or abandon the proceedings at that stage and take recourse to the provisions of Section 29 of the Act. A 'decree' under Section 31 of the Act not being a money decree or a decree for realisation of the dues of the Corporation, as held in Gujarat State Financial Corpn. v. Naatson Mfg. Co. P. Ltd. [(1979) 1 SCC 193, 198 : AIR 1978 SC 1765, 1768] recourse to it cannot debar the Corporation from taking recourse to the provisions of Section 29 of the Act by not persuing the decree or order under Section 31 of the Act, in which event the order made under Section 31 of the Act would serve in aid of the relief available under Section 29 of the Act
>
> 16. The doctrine of election, as commonly understood, would, thus, not be attracted under the Act in view of the express phraseology used in Section 31 of the Act, viz., "without prejudice to the provisions of Section 29 of this Act". While the Corporation cannot simultaneously pursue the two remedies, it is under no disability to

[10] (1994) 2 SCC 647.

A take recourse to the rights and remedy available to it under Section 29 of the Act even after an order under Section 31 has been obtained but without executing it and withdrawing from those proceedings at any stage. The use of the expression "without prejudice to the provisions of Section 29 of the Act" in Section 31 cannot be read to mean that the Corporation after obtaining a final order under Section 31 of the Act from a court of competent jurisdiction, is denuded of its rights under Section 29 of the Act. To hold so would render the above-quoted expression redundant in Section 31 of the Act and the courts do not lean in favour of rendering words used by the Legislature in the statutory provisions redundant. The Corporation which has the right to make the choice may make the choice initially whether to proceed under Section 29 of the Act or Section 31 of the Act, but its rights under Section 29 of the Act are not extinguished, if it decides to take recourse to the provisions of Section 31 of the Act. It can abandon the proceedings under Section 31 of the Act at any stage, including the stage of execution, if it finds it more practical, and may initiate proceedings under Section 29 of the Act."

The doctrine of election is based on the rule of estoppel. In *P.R. Deshpande* v. *Maruti Balaram Haibatti*,[11] it was held that :

E **"8**. The doctrine of election is based on the rule of estoppel — the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel) which is a rule in equity. By that rule, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. (vide Black's Law Dictionary, 5th Edn.)"

In *National Insurance Co. Ltd.* v. *Mastan & Ors*.,[12] claims for compensation were filed both under the Workmen's Compensation Act, 1923 and the Motor Vehicles Act, 1988. This Court held that the doctrine of election was incorporated in Section 167 of the Motor Vehicles Act. The relevant extract from the judgment reads as follows :

[11] (1998) 6 SCC 507.
[12] (2006) 2 SCC 641.

'**23**. The "doctrine of election" is a branch of "rule of estoppel", in terms whereof a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. The doctrine of election postulates that when two remedies are available for the same relief, the aggrieved party has the option to elect either of them but not both. Although there are certain exceptions to the same rule but the same has no application in the instant case.

....

27. The first respondent having chosen the forum under the 1923 Act for the purpose of obtaining compensation against his employer cannot now fall back upon the provisions of the 1988 Act therefor, inasmuch as the procedure laid down under both the Acts are different save and except those which are covered by Section 143 thereof.

33. On the establishment of a Claims Tribunal in terms of Section 165 of the Motor Vehicles Act, 1988, the victim of a motor accident has a right to apply for compensation in terms of Section 166 of that Act before that Tribunal. On the establishment of the Claims Tribunal, the jurisdiction of the civil court to entertain a claim for compensation arising out of a motor accident, stands ousted by Section 175 of that Act. Until the establishment of the Tribunal, the claim had to be enforced through the civil court as a claim in tort. The exclusiveness of the jurisdiction of the Motor Accidents Claims Tribunal is taken away by Section 167 of the Motor Vehicles Act in one instance, when the claim could also fall under the Workmen's Compensation Act, 1923. That section provides that death or bodily injury arising out of a motor accident which may also give rise to a claim for compensation under the Workmen's Compensation Act, can be enforced through the authorities under that Act, the option in that behalf being with the victim or his representative. <u>But Section 167 makes it clear that a claim could not be maintained under both the Acts.</u> In other words, a claimant who becomes entitled to claim compensation under both the Motor Vehicles Act, 1988 and the Workmen's Compensation Act, because of a motor vehicle accident has the choice of proceeding under either of the Acts before the forum concerned. By confining the

A claim to the authority or the Tribunal under either of the Acts, the legislature has incorporated the concept of election of remedies, insofar as the claimant is concerned. In other words, he has to elect whether to make his claim under the Motor Vehicles Act, 1988 or under the Workmen's Compensation Act, 1923. The emphasis in the section that a claim cannot be made under both the enactments, is a further reiteration of the doctrine of election incorporated in the scheme for claiming compensation. The principle "where, either of the two alternative Tribunals are open to a litigant, each having jurisdiction over the matters in dispute, and he resorts for his remedy to one of such Tribunals in preference to the other, he is precluded, as against his opponent, from any subsequent recourse to the latter" (see R. v. Evans [(1854) 3 E & B 363 : 118 ER 1178]) is fully incorporated in the scheme of Section 167 of the Motor Vehicles Act, precluding the claimant who has invoked the Workmen's Compensation Act from having resort to the provisions of the Motor Vehicles Act, except to the limited extent permitted therein. The claimant having resorted to the Workmen's Compensation Act, is controlled by the provisions of that Act subject only to the exception recognised in Section 167 of the Motor Vehicles Act."

(emphasis supplied)

In *Transcore* v. *Union of India,*[13] this Court considered the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 ("*SARFAESI Act*") and the Recovery of Debts due to Banks and Financial Institutions Act, 1993 ("*RDDB Act*"), wherein it was held that there are three elements of election *viz.* existence of two or more remedies, inconsistencies between such remedies, and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply.

The judgment in Transcore was subsequently followed in *Mathew Varghese* v. *M. Amritha Kumar,*[14] where it was held that :

"46. A reading of Section 37 discloses that the application of the SARFAESI Act will be in addition to and not in derogation of the

[13] (2008) 1 SCC 125.

[14] (2014) 5 SCC 610.

provisions of the RDDB Act. In other words, it will not in any way nullify or annul or impair the effect of the provisions of the RDDB Act. We are also fortified by our above statement of law as the heading of the said section also makes the position clear that application of other laws are not barred. The effect of Section 37 would, therefore, be that in addition to the provisions contained under the Sarfaesi Act, in respect of proceedings initiated under the said Act, it will be in order for a party to fall back upon the provisions of the other Acts mentioned in Section 37, namely, the Companies Act, 1956, the Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, or any other law for the time being in force."

20.11 In a recent judgment delivered by this Court in *M/s Imperia Structures Ltd.* v. *Anil Patni and Anr*,[15] it was held that remedies under the Consumer Protection Act were in addition to the remedies available under special statutes. The absence of a bar under Section 79 of the RERA Act to the initiation of proceedings before a fora which is not a civil court, read with Section 88 of the RERA Act makes the position clear. Section 18 of the RERA Act specifies that the remedies are "without prejudice to any other remedy available". We place reliance on this judgment, wherein it has been held that :

"31. Proviso to Section 71(1) of the RERA Act entitles a complainant who had initiated proceedings under the CP Act before the RERA Act came into force, to withdraw the proceedings under the CP Act with the permission of the Forum or Commission and file an appropriate application before the adjudicating officer under the RERA Act. The proviso thus gives a right or an option to the complainant concerned but does not statutorily force him to withdraw such complaint nor do the provisions of the RERA Act create any mechanism for transfer of such pending proceedings to authorities under the RERA Act. As against that the mandate in Section 12(4) of the CP Act to the contrary is quite significant.

32. Again, insofar as cases where such proceedings under the CP Act are initiated after the provisions of the RERA Act came

[15] (2020) 10 SCC 783.

into force, there is nothing in the RERA Act which bars such initiation. The absence of bar under Section 79 to the initiation of proceedings before a fora which cannot be called a civil court and express saving under Section 88 of the RERA Act, make the position quite clear. Further, Section 18 itself specifies that the remedy under the said section is "without prejudice to any other remedy available". Thus, the parliamentary intent is clear that a choice or discretion is given to the allottee whether he wishes to initiate appropriate proceedings under the CP Act or file an application under the RERA Act."

21. Whether the Apartment Buyers are entitled to terminate the Agreement, or refund of the amount deposited with Delay Compensation.

21.1 The issue which now arises is whether the apartment buyers are bound to accept the offer of possession made by the Developer where the Occupation Certificate has been issued, along with the payment of Delay Compensation, or are entitled to terminate the Agreement.

The factum of delay in completing the construction and making the offer of possession is an undisputed fact in this case.

21.2 In the present case, the allottees before this Court in the present batch of appeals, can be categorised into two categories:-

i) Apartment Buyers whose allotments fall in Phase 1 of the project comprised in Towers A6 to A10, B1 to B4, and C3 to C7, where the Developer has been granted occupation certificate, and offer of possession has been made, are enlisted in **Chart A**;

ii) Apartment Buyers whose allotments fall in Phase 2 of the project, where the allotments are in Towers A1 to A5, B5 to B8, C8 to C11, where the Occupation Certificate has not been granted so far, are set out in **Chart B** below.

CHART A

APARTMENTS WHERE O.C. OBTAINED BY DEVELOPER

S. No.	Cause Title & Civil Appeal No.	Particulars of Allotment Sale Consideration	Amount Paid by the Apartment Buyer on the date of filing of Complaint	Possession of Flat offered on	Status
1	C.A. No.5785/2019 IREO Grace Realtech Private Ltd. v. Abhishek Khanna	Unit CD-C4-04-402 **Tower C4** **Rs.1,45,22,006/-**	**Rs. 1,44,72,364/-**	Possession offered on 28.06.2019	
2	C.A. No.8480/2019 IREO Grace Realtech Private Ltd. v. Promila Kashyap & Another	Unit CD-B3-09-904 **Tower B3** **Rs.1,73,06,088.42/-**	**Rs. 1,70,32,041/-**	Possession offered on 28.06.2019.	
3.	C.A. No.3064/2020 Parvesh Maggoo v. IREO Grace Realtech Pvt. Ltd.	Unit CD-A6-02-203 **Tower A6** **Rs.1,70,08,0261.56/-**	Rs.1,59,29,016/-	Possession offered on 14.06.2019	An Affidavit dt.16.09.2019 was filed by the Developer before the National Company Law Tribunal undertaking to refund the principal amount of Rs.1,59,29,016/ to the Apartment Buyer. However, the Developer has not refunded the amount so far.

CHART B

APARTMENTS WHERE NO O.C. AVAILABLE EVEN AS ON DATE

S. No.	Cause Title & Civil Appeal No.	Particulars of Allotment Sale Consideration	Amount Paid by the Apartment Buyer on the date of filing of Complaint	Status of construction
1.	C.A. No. 7615/2019 IREO Grace Realtech Private Ltd. vs Daraksha Khan	Unit CD-A2-03-301 **Tower A2** **Rs. 1,96,01,772/-**	Rs. 60,60,828/- on 28.10.2016	After filing the Complaint, the 4th demand for casting of Lower Basement Slab was demanded on 1.2.2017. **No O.C. even on date.**

A	2.	C.A. No.8482/2019 IREO Grace Realtech Private Ltd. v. Gunish Chawla	Unit CD-C9-03-303 **Tower C9** **Rs. 1,55,72,177/-**	Rs. 1,43,07,009/- on 28.02.2017.	**No O.C. even on date.**
B	3.	C.A. No.7975/2019 IREO Grace Realtech Private Ltd. v. Amit Arora	Unit CD-A3-06-603 **Tower A3** **Rs. 1,92,17,760/-**	Rs. 1,80,50,068/- on 10.03.2017	Instalment No.10 for casting of Top Floor Roof Slab was raised on 07.03.2017 **No O.C. even on date.**
C	4.	C.A. 8785-8794/2019 IREO Grace Realtech Private Ltd. v. Pradeep Kumar Gupta	Unit CD-A1-06-601 **Tower A1** **Rs. 1,99,20,649/-**	Rs. 61,22,733/- on 20.01.2017	The 4th demand for casting of Lower Basement Slab was raised on 10.01.2017. **No O.C. even on date.**
D	5.	C.A. 8785-8794/2019 IREO Grace Realtech Private Ltd. v. Monica Khuller	Unit CD-A2-11-1102 **Tower A2** **Rs. 2,01,86,365/-**	Rs. 62,05,441 as on 24.01.2017	The 4th demand for casting of Lower Basement Slab was raised on 10.01.2017. **No O.C. even on date.**
	6.	C.A. 8785-8794/2019 IREO Grace Realtech Private Ltd. v. Neelam Mittal	Unit CD-A1-08-802 **Tower A1** **Rs. 1,99,20,649/-**	Rs. 61,22,738/-	The 4th demand for casting of Lower Basement Slab was raised on 10.01.2017. **No O.C. even on date.**
E	7.	C.A. 8785-8794/2019 IREO Grace Realtech Private Ltd. v. Shiladitya Gangopadhya	Unit CD-A1-04-401 **Tower A1** **Rs. 2,02,71,389/-**	Rs. 62,09,828/- On 24.01.2017	The 4th demand for casting of Lower Basement Slab was raised on 10.01.2017. **No O.C. even on date.**
F	8.	C.A. 8785-8794/2019 IREO Grace Realtech Private Ltd. v. Kartik Ahuja	Unit CD-A2-03-302 **Tower A2** **Rs. 2,01,86,365/-**	Rs. 62,05,440/- On 23.02.2017	The 4th demand for casting of Lower Basement Slab was raised on 10.01.2017. **No O.C. even on date.**
	9.	C.A. 8785-8794/2019 IREO Grace Realtech Private Ltd. v. Gagan Preet Singh	Unit CD-A1-12-1201 **Tower A1** **Rs. 2,02,92,883/-**	Rs. 62,38,594/- On 23.02.2017	The 4th demand for casting of Lower Basement Slab was raised on 10.01.2017. **No O.C. even on date.**
G	10.	C.A. 8785-8794/2019 IREO Grace Realtech Private Ltd. v. Raman Narula	Unit CD-A2-09-903 **Tower A2** **Rs. 1,89,41,277/-**	Rs. 58,55,695/- On 23.02.2017	The 4th demand for casting of Lower Basement Slab was raised on 10.01.2017. **No O.C. even on date.**

H

11.	C.A. 8785-8794/2019 IREO Grace Realtech Private Ltd. v. Priyanka Gupta	Unit CD-A2-05-501 **Tower A2** **Rs. 1,84,06,981/-**	Rs. 56,88,308/- On 23.02.2017	The 4th demand for casting of Lower Basement Slab was raised on 10.01.2017. **No O.C. even on date.**
12.	C.A. 8785-8794/2019 IREO Grace Realtech Private Ltd. v. Raj Sethi	Unit CD-A2-03-303 **Tower A2** **Rs. 1,89,41,277/-**	Rs. 58,55,696/- On 23.02.2017	The 4th demand for casting of Lower Basement Slab was raised on 10.01.2017. **No O.C. even on date.**
13.	C.A. 8785-8794/2019 IREO Grace Realtech Private Ltd. v. Kunal Wadhwa	Unit CD-A1-11-1102 **Tower A1** **Rs. 2,02,92,883/-**	Rs. 62,38,595/- On 23.02.2017	The 4th demand for casting of Lower Basement Slab was raised on 10.01.2017. **No O.C. even on date.**
14.	C.A. 8454/2019 IREO Grace Realtech Private Ltd. v. Vishal Dua	Unit CD-B7-07-704 **Tower B7** **Rs. 1,38,83,798.04/-**	Rs. 1,16,87,089/-	**No O.C. even on date.**
15.	C.A. 9139/2019 IREO Grace Realtech Private Ltd. v. Mukesh Makkar	Unit CD-C11-06-602 **Tower C11** **Rs. 1,56,79,491.91/-**	Rs. 1,44,87,344/-	**No O.C. even on date.**
16.	C.A. 9216/2019 IREO Grace Realtech Private Ltd. v. Ritu Hasija	Unit CD-A1-01-102 **Tower A1** **Rs. 2,02,71,389.77 /-**	Rs. 63,29,440/-	**No O.C. even on date.**
17.	C.A. 9638/2019 IREO Grace Realtech Private Ltd. v. Prabhat Kumar Swami	Unit CD-A2-06-601 **Tower A2** **Rs. 1,84,06,981.50 /-**	Rs. 57,09,566/-	After filing of complaint, the 4th instalment for casting of lower basement slab was demanded on 01.02.2017. **No O.C. even on date.**

Chart A allottees

(i) We are of the view that allottees at Serial Nos. 1 and 2 in ChartA are obligated to take possession of the apartments, since the construction was completed, and possession offered on 28.06.2019, after the issuance of Occupation Certificate on 31.05.2019. The Developeris however obligated topay Delay Compensation for the period of delay which has occurred from 27.11.2018 till the date of offer of possession was made to the allottees.

(ii) Insofar as the allottee at Serial No.3 in Chart A is concerned, he has filed Civil Appeal No.3064 of 2020 under Section 62 of the Insolvency and Bankruptcy Code, 2016 before this Court. We were informed by theCounsel for the allottee that the Developer had filed an affidavit dated 16.09.2019 before the National Company Law Tribunal ("NCLT") stating that it was willing to refund the principal amount of Rs.1,59,29,016/- in four equal instalments, and had produced photocopy of the cheques. The relevant portion of the affidavit filed by the Developer before the NCLT is extracted hereunder :-

> "**3**. Without prejudice to contentions and averments raised during the course of arguments by the Corporate Debtor, the Corporate Debtor explored the possibility of the settlement with the Petitioner and had offered to pay the entire principal amount i.e. 1,59,29,016/- in a time bound manner by way of 4 equal instalments, wherein 1st instalment starting from 16.09.2019. Copy of the Cheques by the Corporate Debtor for payment of the principal amount in full is annexed herewith and marked as Annexure-A."

Despite the said Undertaking given before the NCLT, the Developer has failed to refund even the principal amount so far.

We direct the Developer to refund the amount deposited by the said Appellant within a period 4 weeks from the date of this judgment with interest @ 9% p.a. from 16.09.2019 (date of the affidavit filed by the Developer before the NCLT). If this direction is not complied with, the Developer will be liable to pay Default Interest @12% p.a. on the entire amount.

Chart B allottees

(i) Insofar as the allottees in Chart B are concerned, they have paid part consideration, in most cases up to the 4th instalment till 2017, when they found that there was no progress being made in respect of the Towers in which the apartments had been allotted to them.It is an admitted position that Occupation Certificate for Towers A1, A2, A3, B7, C9 and C11, in which the allotments have been made for this category has not been issued by the Municipal Corporation.

The apartments have not been ready for allotment even as on 30.06.2020, as per the date fixed before the RERA Authority.

(ii) The allottees submitted that they were facing great hardship since they had obtained loans from Banks for purchasing these apartments, and were paying high rates of interest. In 2017, when they

realised that there was no construction activity in progress, they were constrained to file consumer complaints before the National Commission, and then discontinued payment of further instalments.

(iii) The Developer made an alternate offer of allotment of apartments in Phase 1 of the project. The allottees are however not bound to accept the same because of the inordinate delay in completing the construction of the Towers where units wereallotted to them. The Occupation Certificate is not available even as on date, which clearly amounts to deficiency of service. The allottees cannot be made to wait indefinitely for possession of the apartments allotted to them, nor can they be bound to take the apartments in Phase 1 of the project. The allottees have submitted that they have taken loans, and are paying high rates of interest to the tune of 7.9% etc. to the Banks.

Consequently, we hold that the allottees in ChartB are entitled to refund of the entire amount deposited by them.

(iv) In so far as awardof compensation by payment of Interest is concerned, clause 13.4 of the Apartment Buyer's Agreement provides that the Developer shall be liable to pay the allottee compensation calculated @ Rs. 7.5 per sq. ft. of the Super Area for every month of delay, after the end of the Grace Period. The compensation will be payable only for a period of 12 months.

The Apartment Buyers in their Complaint filed before the National Commission made a prayer for refund of the amount deposited alongwith Interest @ 20% p.a. compounding quarterly till its realisation. The Apartment Buyers, in their submissions have stated that they have obtained home loans on which Interest @ 7.90% p.a. is being paid, even as on date.

We have considered the rival submissions made by both the parties. The Delay Compensation specified in the Apartment Buyer's Agreement of Rs. 7.5 per sq. ft. which translates to 0.9% to 1% p.a. on the amount deposited by the Apartment Buyer cannot be accepted as being adequate compensation for the delay in the construction of the project. At the same time, we cannot accept the claim of the Apartment Buyers for payment of compound interest @ 20% p.a., which has no nexus with the commercial realities of the prevailing market. We have also taken into consideration that in *Subodh Pawar v. IREO Grace*, this Court recorded the statement of the Counsel for the Developer that the amount would be refunded with Interest @ 10% p.a. A similar order was passed

A in the case of *IREO v. Surendra Arora*. However, the Order in these cases were passed prior to the out-break of the pandemic.

We are cognizant of the prevailing market conditions as a result of Covid–19 Pandemic, which have greatly impacted the construction industry.

B In these circumstances, it is necessary to balance the competing interest of both parties. We think it would be in the interests of justice and fairplay that the amounts deposited by the Apartment Buyers is refunded with Interest @ 9% S.I. per annum from 27.11.2018 till the date of payment of the entire amount.

C The refund will be paid within a period of three months from the date of this judgment. If there is any further delay, the Developer will be liable to pay default interest @ 12% S.I. p.a.

(v) The Developer shall not deduct the Earnest Money of 20% from the principal amount, or any other amount as mentioned in Clause 21.3 of the Agreement, on account of the various defaults committed by D the Developer, including the delay of over 7 months in obtaining the Fire NOC.

(vi) In Civil Appeal No.9139 of 2019, we were informed by the learned counsel that the Respondent had made a request for refund of the amount deposited since his wife was critical and required a lung E transplant, to meet the huge expenses of hospitalisation. However, the Developer failed to refund the amount. During the pendency of proceedings, the wife has since expired on 08.12.2020, and there are pending hospital bills to the tune of Rs.50 to 60 lakhs to be cleared.

We direct the Developer to refund the entire amountdeposited by F this respondent alongwith Interest @ 9%S.I. p.a. within a period of 4 weeksfrom the date of this judgment. The failure to refund the amount within 4 weekswill make the Developer liable for payment of default interest @ 12% S.I. p.a. till the payment is made.

The Civil Appeals are accordingly disposed of, with no order as to costs. All pending applications are disposed of. G

Ordered accordingly.

Devika Gujral Appeal disposed of.