IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL (ST) NO.4996 OF 2020
WITH
INTERIM APPLICATION NO.3383 OF 2020

The Bombay Dyeing & Manufacturing
Company Limited
C-1, Wadia International Centre
(Bombay Dyeing), Pandurang Budhkar
Marg, Worli, Mumbai-400 025. ..Appellant

Vs.

1. Ashok Narang
2. Rajkumar Sharma
302, Coste Belle, 687,
Perry Cross Road, Bandra (West),
Mumbai – 400 050. ..Respondents

WITH
SECOND APPEAL (ST) NO.4931 OF 2020
WITH
INTERIM APPLICATION NO.3343 OF 2020

The Bombay Dyeing & Manufacturing
Company Limited
C-1, Wadia International Centre
(Bombay Dyeing), Pandurang Budhkar
Marg, Worli, Mumbai-400 025. ..Appellant

Vs.

1. Paresh Harilal Sutaria
901, Shatrunjay, Neelkanth Valley,
Rajawadi, Ghatkopar (East),
Mumbai – 400 077.

2. Chetna Paresh Sutaria
901, Shatrunjay, Neelkanth Valley,
Rajawadi, Ghatkopar (East),
Mumbai – 400 077.

3. Pratham Paresh Sutaria
901, Shatrunjay, Neelkanth Valley,

Rajawadi, Ghatkopar (East),
Mumbai – 400 077. ..Respondents

WITH
SECOND APPEAL (ST) NO.4985 OF 2020
WITH
INTERIM APPLICATION NO.3370 OF 2020

The Bombay Dyeing & Manufacturing
Company Limited
C-1, Wadia International Centre
(Bombay Dyeing), Pandurang Budhkar
Marg, Worli, Mumbai-400 025. ..Appellant

Vs.

1. Deepak Kumar Gaddhyan
IRIS-1102, The Verandas
Golf Course Road, Sector 54,
Gurgaon – 122 002.

2. Rekha Gaddhyan
IRIS-1102, The Verandas
Golf Course Road, Sector 54,
Gurgaon – 122 002. ..Respondents

WITH
SECOND APPEAL (ST) NO.4986 OF 2020
WITH
INTERIM APPLICATION NO.3375 OF 2020

The Bombay Dyeing & Manufacturing
Company Limited
C-1, Wadia International Centre
(Bombay Dyeing), Pandurang Budhkar
Marg, Worli, Mumbai-400 025. ..Appellant

Vs.

1. Srinath Srinivasan
2. Jyothsna Srinath
1103, Raheja Empress,
Veer Savarkar Marg, Prabhadevi,
Mumbai – 400 025. ..Respondents

WITH
SECOND APPEAL (ST) NO.4990 OF 2020
WITH
INTERIM APPLICATION NO.3379 OF 2020

The Bombay Dyeing & Manufacturing
Company Limited
C-1, Wadia International Centre
(Bombay Dyeing), Pandurang Budhkar
Marg, Worli, Mumbai-400 025. ..Appellant

Vs.

1. Kersi Homi Patel
2. Sunnu Kersi Patel
Garden Home Building,
Apartment-114, Oud Metha Street 1,
P. O. Box 113723, Dubai,
United Arab Emirates. ..Respondents

WITH
SECOND APPEAL (ST) NO.4993 OF 2020
WITH
INTERIM APPLICATION NO.3380 OF 2020

The Bombay Dyeing & Manufacturing
Company Limited
C-1, Wadia International Centre
(Bombay Dyeing), Pandurang Budhkar
Marg, Worli, Mumbai-400 025. ..Appellant

Vs.

1. Narayanan Venkitraman
2. Mahalaxmi Narayanan
Flat No.401, 'B' Wing,
Riddhi Siddhi, 5th Road, Chembur,
Mumbai – 400 071. ..Respondents

WITH
SECOND APPEAL (ST) NO.4998 OF 2020
WITH
INTERIM APPLICATION NO.3385 OF 2020

The Bombay Dyeing & Manufacturing
Company Limited

C-1, Wadia International Centre
(Bombay Dyeing), Pandurang Budhkar
Marg, Worli, Mumbai-400 025. ..Appellant

Vs.

1. Dinesh Lodha
2. Nidhi Dinesh Lodha
3C/204, Whispering Palms,
Lokhandwala Township
Mumbai – 400 101. ..Respondents

WITH
SECOND APPEAL (ST) NO.5000 OF 2020
WITH
INTERIM APPLICATION NO.3387 OF 2020

The Bombay Dyeing & Manufacturing
Company Limited
C-1, Wadia International Centre
(Bombay Dyeing), Pandurang Budhkar
Marg, Worli, Mumbai-400 025. ..Appellant

Vs.

1. Rajkumar Sharma
2. Meenakshi Sharma
801, Vastu Building,
52 Pali Hill Road, Bandra (West),
Mumbai – 400 050. ..Respondents

WITH
SECOND APPEAL (ST) NO.5003 OF 2020
WITH
INTERIM APPLICATION NO.3389 OF 2020

The Bombay Dyeing & Manufacturing
Company Limited
C-1, Wadia International Centre
(Bombay Dyeing), Pandurang Budhkar
Marg, Worli, Mumbai-400 025. ..Appellant

Vs.

Rohit Chawla
1102, Snow Flama,

Dosti Flamingos, T. J. Road,
Sewri, Mumbai – 400 015. ..Respondent

WITH
SECOND APPEAL (ST) NO.5005 OF 2020
WITH
INTERIM APPLICATION NO.3391 OF 2020

The Bombay Dyeing & Manufacturing
Company Limited
C-1, Wadia International Centre
(Bombay Dyeing), Pandurang Budhkar
Marg, Worli, Mumbai-400 025. ..Appellant

Vs.

1. Surendra Kumar Jalan
2. Mrs. Anjali Jalan
G-1204, Royal Classique,
New Link Road, Andheri (W),
Mumbai – 400 053. ..Respondents

WITH
SECOND APPEAL (ST) NO.5009 OF 2020
WITH
INTERIM APPLICATION NO.3393 OF 2020

The Bombay Dyeing & Manufacturing
Company Limited
C-1, Wadia International Centre
(Bombay Dyeing), Pandurang Budhkar
Marg, Worli, Mumbai-400 025. ..Appellant

Vs.

1.Vishnukumar Poddar
2. Anuj Vishnukumar Poddar
201, Martins Nest, 9,
Central Avenue, Mumbai – 400 054. ..Respondents

Mr. Dinyar Madon, Senior Advocate a/w. Mr. Ziyad Mandon, Ms. Niyathi Kalra and Ms.Rujuta Patil i/b Negandhi, Shah & Himayatullah for the Appellants in IAST 93279 of 2020 in SAST 4996 of 2020.

Mr. J. P. Sen, Senior Counsel a/w. Mr. Vaibhav Ghogare, Ms. Niyathi Kalra, Ms. Sonu Bhasi and Ms. Rutuja Patil i/b. Negandhi, Shah & Himayatullah for the Appellants in IAST 93270 of 2020 in SAST 4985 of 2020.

Mr. Shiraz Rustomjee, Senior Counsel a/w. Mr. Jai Chhabria, Ms. Aradhana Bhansali, Ms. Aarti Jumani and Ms. Mansi Padwalkar i/b. Rajani Associates for the Respondents in SAST No.4931/2020 with IA No.3343/2020 with IAST No. 93269/2020, SAST No.4986/2020 with IA No.3375/2020, SAST No.4993/2020 with IA No.3380/2020, SAST No.4996/2020 with IA No.3383/2020 with IAST No.93279/2020, SAST No.5000/2020 with IA No.3387/2020, SAST No.5003/2020 with IA No.3389/2020 and SAST No.5009/2020 with IA No.3393/2020 for the Respondents.

Mr. Shiraz Rustomjee, Senior Counsel a/w. Jai Chhabria, Ms. Suta Kapadia, Ms. Anusha and Ms. Tushi Pant i/b. Keystone Partners for the Respondents in SAST No.4998/2020, SAST No.5005/2020, SAST No.4985/2020 & SAST No.4990/2020.

Ms. Niyathi Kalra and Ms. Rutuja Patil i/b. Negandhi, Shah & Himayatullah for the Appellants / Applicants in remaining matters.

CORAM : C.V. BHADANG, J.

RESERVED ON : 11th MARCH 2021
PRONOUNCED ON : 30 AUGUST 2021

COMMON JUDGMENT:

. These are second appeals under section 58 of the Real Estate (Regulation and Development) Act 2016 (‘Act of 2016’, for short) challenging the common judgment and order dated 31 December 2019 passed by the Maharashtra Real Estate Appellate Tribunal (‘Appellate Tribunal’, for short) in a group of first appeals.

The appeals involve common and connected questions of law and facts. As such they are being disposed of by this common judgment.

2. The Bombay Dyeing and manufacturing Company Ltd (the appellant), is the promoter and builder while the respondents are the buyers/allottees of the flats. The appellants had floated a project at Spring Mills Compound Wadala Mumbai. Phase II of the project consists of two towers ICC Tower one and ICC Tower two. The project was publicised and marketed as an ultra luxurious project with state of the art amenities. According to the respondents on the basis of the representation made in the advertisement, prospectus and brochure, the respondents booked flats in the two towers in the year 2012-13 and submitted booking application forms which incorporated the terms and conditions. The appellant issued confirmation letters and allotment letters. According to the respondents the appellant had expressly represented to deliver possession of the flats by 2017. The flats were allotted under the 20:80 scheme under which 80% consideration was to be paid at the time of delivery of possession. The respondents have paid approximately 20 % of the consideration that is about 2 crores in the year 1012-13 alongwith service tax and premium.

3. The Act of 2016 came into force on 1 May 2017 and the project was registered being an ongoing project under the said Act of 2016. According to the respondents at the time of registration the appellants unilaterally extended the completion date as 31 August 2018 and the revised date as 31 August 2019.

4. As the appellant failed to deliver possession of the flats as agreed the respondents filed separate complaints under section 31 of the Act of 2016 before the Maharashtra Real Estate Authority. ('Authority', for short) It was contended that the appellant has committed breach of section 12 read with section 18 of the Act of 2016. The respondents therefore sought cancellation of the allotment and refund of the amount paid with interest. The Authority by a common judgment dated 9 January 2020 and 25 January 2020 disposed of the complaints, advising the parties to execute and register the agreement of sale as per section 13 of the Act of 2016. Alternatively the Authority stipulated that in the event the respondents intend to withdraw from the project the same would be governed by the terms and conditions of the allotment. The Authority referring to the decision of this court in the case of *Neelkamal Realtors Suburban Private Limited and Anr. Vs. Union of India & Ors.*[1] found that section 12 not being retrospective in

1 *Writ Petition No.2737/2017 dated 6/12/2017*

operation would not apply in this case. The Authority did not pass any order regarding refund of the amount with interest as prayed.

5. Feeling aggrieved, the respondents/allottees challenged the same before the Appellate Tribunal in separate appeals. The Appellate Authority framed the following points for determination.

1 Whether Section 12 of the RERA applies prospectively or retrospectively or retroactively ?

2 Whether promoter committed breach of Section 12 and Section 18 of the RERA Act ?

3 Whether allottees are entitled for refund along with interest and compensation from the promoter, if yes what is the rate of interest ?

4 What order ?

6. The Appellate Tribunal found that section 12 of the Act of 2016 has a retroactive operation. On facts, it was found that the appellant had committed breach of section 12 and 18 of the Act of 2016. In the face of the findings as above, the Appellate Tribunal by a judgment and order dated 31 December 2019 partly allowed the appeals thereby setting aside the order passed by Authority. The Appellate Tribunal cancelled the allotments and directed return of the amount with service tax and MVAT etc with interest. A charge of the amount has been kept on the respective flat. Feeling aggrieved the appellants are before this court.

7. On 19 January 2021, these appeals were admitted on the following substantial questions of law.

(i) Whether Sections 12 and 18 of RERA Act are substantive in nature and not merely procedural ?

(ii) Whether Sections 12 and 18 of RERA Act are not declaratory of previous law but enact new law that affect substantive rights ?

(iii) Whether Section 12 of RERA Act, applies only to such representations as are made after the coming into force of the said Act of 2016 ?

(iv) Whether Section 18 of the RERA Act, would apply only to Agreements entered into after the coming into force of the said Act of 2016 ?

(v) Whether the first proviso to Section 3(1) of the Act of 2016 read along with Section 4(2)(l)(c) of RERA Act requires the Promoter to obtain the consent of the flat purchasers prior to notifying the date of completion of the Project while registering an ongoing Project ?

(vi) Whether a Promoter having notified a date of completion of an ongoing project under Section 4 of RERA Act is nevertheless bound to complete the Project by any earlier date indicated in any prior brochure/ advertisement/ agreement ?

(vii) Whether a refusal to remand a matter which has been decided solely on the ground of maintainability without any adjudication on the merits is a proper and legal exercise of power by an Appellate Authority ?

(viii) Whether a failure by an Appellate Authority to afford an opportunity to a party who has succeeded in the trial court on a point of maintainability to make its case on

the merits before the Trial Court constitutes a denial of natural justice ?

(ix) Whether an application for refund and for compensation under Section 18 of RERA Act can be filed only on the basis of a proper Agreement for sale, which records all material terms and conditions of the bargain including inter alia, the date for completion of the construction/project ?

(x) Whether the project completion date, originally notified at the time of registration under RERA Act, can be termed as the date specified in the agreement for sale for the purposes of an application for refund and for compensation made under Section 18 of the said Act of 2016 ?

8. I have heard the learned counsel for the parties on the aforesaid substantial questions of law. The parties have also filed synopsis of their submissions and I have gone through the same. The appeals were taken up for final disposal, as urged on behalf of the parties, in as much as the allotment pertains to the year 2012-13 and as the dispute is pending since long. The appeals are accordingly being disposed of finally by consent of parties.

9. Mr. Madan, the learned Senior Advocate for the appellants made following submissions.

(i) That the date of completion was stipulated as 31 August 2019 and the part occupation certificate for the two

buildings / relevant flats was obtained much before that date. Thus, there is no breach of any representation as regards the date of completion nor there is any breach on account of any changes effected to the layout or the amenities as agreed.

(ii) That the appellant had succeeded on the point of maintainability before the Authority which rightly held that the provisions of the Act of 2016 were prospective and the complaints were not maintainable. The respondents failed to comply with the order dated 9 January 2019 passed by the Authority and declined to complete the transaction. That the complaints before the Authority were only contested on account of preliminary objection as to maintainability and the merits of the complaints were not addressed nor the appellant had filed any affidavit in reply touching to the merits of the complaints. The Authority having upheld the contention on maintainability, in the appeal, the Appellate Tribunal was not justified in going into the merits of the complaints and at the highest in the event the Appellate Authority was not inclined to accept the preliminary ground of maintainability, the complaints ought to have been remanded back.

(iii) Even if the complaints were held to be maintainable, the proper course was to remand the matter for consideration on merits by the Adjudicating Authority under Section 71(1) of the Act of 2016.

(iv) That the provisions of Section 12 and 18 of the Act of 2016 are prospective in operation and no complaint could have been filed under either of these sections in respect of representations made or agreements entered into prior to the coming into force of the Act of 2016.

In order to elaborate the submission, reliance is placed on the decision of the Supreme Court in *Hitendra Vishnu Thakur & Ors. Vs. State of Maharashtra and Ors.*[2] , *R. Rajagopal Reddy Vs. Padmini Chandrasekharan*[3] , *Commissioner of Income Tax Vs. Vatika Township Private Limited* [4] , *Union of India Vs. M/s. Indusind Bank Limited* [5] , *G. J. Raja Vs. Tejraj Surana*[6] , *Shanti Conductors (P) Ltd. & Anr. Vs. Assam State Electricity Board & Ors.*[7] *and Purbanchal Cables and Conductors Private Limited Vs. Assam State Electricity Board* [8], in order to submit that the provisions of Section 12 and 18 have to held to be prospective in operation.

It is pointed out that in the case of *Neelkamal Realtors,* the constitutional validity of certain provisions of the said Act of 2016 including Section 18 was challenged. However, there was no

2 *(1994) 4 SCC 602*

3 *(1995) 2 SCC 630*

4 *(2015) 1 SCC 1*

5 *2016 (9) SCC 720*

6 *2019 SCC Online SC 989*

7 *2019 SCC Online SC 68*

8 *(2012) 7 SCC 462*

challenge to the vires of section 12 of the said Act of 2016 in the case of *Neelkamal Realtors*. It is submitted that this Court in the case of *Neelkamal Realtors* has held that the provisions of the Act of 2016 are quasi-retroactive in operation. It is submitted that retro-activity envisages that it is triggered by events that have transpired prior to coming into force of the Act of 2016. It is submitted that even the project that has commenced prior to the Act of 2016 in respect of which an occupation certificate has not yet been issued is required to be registered under the Act of 2016. However, this retro-activity does not affect any rights / liabilities that have already accrued / incurred, prior to coming into force of the Act of 2016. It is pointed out that the Act of 2016 thus cannot impose any new liabilities which did not exist prior thereto. It is submitted that reading of paragraph 256 of the judgment in *Neelkamal Realtors* would indicate that the Act of 2016 does not in any way modify the rights / liabilities of the respective parties under agreements, entered into prior to coming into force of the Act of 2016. In short, according to the learned Counsel, Section 12 and 18 of the Act of 2016 will not apply to the representations made and agreements entered into before coming into force of the said Act of 2016.

(v) In any event, the complaint under Section 18 of the Act of 2016 would lie only on the basis of stipulation regarding

the date of delivery in an 'Agreement for Sale' entered into between the parties.

(vi) It is submitted that Section 71(1) of the Act of 2016, cannot be read to hold that provisions of Section 12 and 18 have retrospective operation. It is submitted that the proviso to Section 71(1) of the Act of 2016, which envisages transfer of the complaints pending under the Consumer Protection Act to the Authority, are not an indication about the retrospective operation of the Act which would be clear from paragraph 255 of *Neelkamal Realtors (supra)* in which this Court held that, reference to pending cases, is obviously a reference to claims for interest and / or compensation pending when the RERA came into force. It is submitted that however, the prospective operation of Section 12 and 18 would not deprive either contracting parties of any preexisting contractual or statutory rights, arising under the terms of an agreement or allotment letter or a statute such as the Maharashtra Ownership Flats (Regulation of Promotion of Construction, Sale, Management and Transfer) Act, 1963 which govern the relationship between the parties.

(vii) It is submitted that even in respect of cause of action accruing prior to the coming into force of the Act, proceedings can be filed before the Authority, so long as the occupation certificate has not yet been issued in respect of the

project and consequently, the project is liable to be registered under the provisions of the said Act of 2016. However, in such a case, the complaints (on the basis of such preexisting cause of action) would be determined in accordance with the preexisting contractual and statutory rights of the parties and not as per the provisions of the said Act of 2016.

(viii) The learned Counsel has referred to the decision of the Delhi Bench of the Authority in *Santosh Kumar Maheshwar (HUF) Vs. M/s. Umang Realtech Private Limited*[9] and *Shikha Bansal Vs. M/s. Umang Realtech Private Limited* [10] in order to submit that the authority placing reliance on the decision of this Court in *Neelkamal Realtors* has held that Section 18 would be inapplicable to the agreements that are entered into prior to the coming into force of the Act of 2016. The orders of the Authority in the submission of the learned counsel though not binding have a persuasive value.

(ix) It is submitted that the reliance placed by the Appellate Tribunal on its earlier decisions is misplaced as in those decisions the Appellate Authority had no occasion to consider the law laid down by the Supreme Court on the retrospective operation of the statutes or the findings in *Neelkamal Realtors.* It is submitted

9 *Complaint No.7/2017 Order dated 19/4/2018 (RERA, Delhi)*

10 *Complaint No.11/2017 (RERA, Delhi)*

that the conjoint reading of Section 4 and 18 would show that the provisions of Section 18 are prospective in operation.

(x) It is submitted that the existence of an agreement is a necessary pre-requisite under Section 18 of the said Act of 2016 and in the absence of an agreement in writing as defined under Section 2(c) of the said Act of 2016, no liability can arise under Section 18 of the Act of 2016. For this purpose, reliance is placed on Section 13 read with Rule 10 of the Maharashtra Real Estate (Regulation and Development)(Registration of real estate projects, Registration of real estate agents, rates of interest and disclosures on website) Rules, 2017 ('Rules', for short) which requires the agreement to be in accordance with the model form at Annexure A. It is submitted that in this case admittedly there is no such agreement entered / executed between the parties, as a result of the refusal on the part of the respondents to execute agreement, despite requests by the appellant. It is submitted that thus the complaint, brought on the basis of the purported representation made in brochure is not maintainable much less when the relevant sections are not retrospective in operation.

(xi) That the Appellate Authority pronounced only the operative portion on 31 December 2019 without any supporting reasons which is illegal and has been repeatedly deprecated by the Supreme Court, including in the case of (i) *Balaji Baliram Mupade &*

Anr. Vs. State of Maharashtra and Ors.[11], *(ii) Anil Rai Vs. State of Bihar*[12], *(iii) Bhagwandas Fatehchand Daswani and Ors. Vs. HPA International and Ors.*[13] and *(iv) R. C. Sharma Vs. Union of India* [14]. The reasons were supplied on 13 March 2020 which, in the submission of learned counsel tantamounts to two separate orders, which is not acceptable.

10. On the contrary, it is submitted by the learned Senior Counsel for the respondents that the issue about the operation of Section 12 and 18 is no longer res-integra as it is covered by decision in *Neelkamal Realtors.* It is submitted that the contention that Section 12 would not apply to statements / representations made prior to the coming into force of the Act of 2016 and Section 18 would apply only with reference to the date of completion as mentioned by the promoter at the time of the registration of the project under Section 3 of the Act of 2016, cannot be accepted. It is submitted that this Court has already held that the application of the Act of 2016 to an ongoing project would indicate that the provisions are quasi retroactive in operation. It is submitted that although Section 12 was not under challenge in *Neelkamal Realtors,* the

11 *Civil Appeal No.3564/2020 dated 29/10/2020 Supreme Court*

12 *(2001) 7 SCC 318*

13 *(2000) 2 SCC 13*

14 *(1976) 3 SCC 574.*

findings in so far as Section 18 of the Act of 2016 are concerned would apply *mutatis mutandis* even to the application of Section 12 of the Act of 2016 which provides for refund of the amount paid by the allottees. It is submitted that it would be incongruous and illogical to assume that although Section 18 applies to matters that have transpired before coming into force of the Act of 2016, Section 12 would not apply. It is submitted that there are inherent indications in the Act of 2016 in the form of the first proviso to Section 3 and the first proviso to Section 71(1) of the Act of 2016 which would indicate that Act of 2016 applies to representations / agreements prior to the coming into force of the said Act of 2016.

11. It is submitted that Section 3 and 4 of the Act of 2016 have to be read harmoniously with Section 18 of the said Act of 2016.

12. It is alternatively submitted that the delay in completion and handing over of possession continued even after the Act of 2016 came into force on 1 May 2017 in as much as the appellants obtained the commencement certificate on or about 16 March 2017 and first part occupation certificate in March 2019. In short, according to the learned counsel, it is a continuing wrong / default on the part of the appellants even after the Act of 2016 came into

force. Reliance is placed on the decision of the Supreme Court in *M/s Imperia Structures Ltd. vs Anil Patni and Ors.* [15] *and the decision of the Allahabad High Court in Habitech Infrastructure Ltd. Vs. State of Uttar Pradesh and Ors. Writ Petition (C) No.9120 of 2020*[16] *and that of the Punjab and Haryana High Court in Experion Developers Pvt. Ltd. Vs. State of Haryana and Ors. CWP No.38144 of 2018*[17]

13. It is submitted that paragraph 18 of the impugned judgment cannot be read in isolation as the Appellate Tribunal was conscious of the fact that Section 12 was not under challenge in *Neelkamal Realtors*. It is submitted that the submission based on paragraph 39 of the impugned judgment that there is misquoting of paragraphs of *Neelkamal Realtors* is also incorrect which according to the learned counsel is an obvious typographical error. The learned counsel pointed out that paragraph 28 are the Appellate Tribunal's own findings.

14. It is submitted that the contention about requirement of a 'written agreement' was not raised before the Authority. It is submitted that the respondents/ allottees submitted before the

15 *(2020)10 SCC 783*

16 *Writ Petition (C) No.9120 of 2020*

17 *CWP No.38144 of 2018*

Appellate Tribunal that Section 18 applies even in the absence of a formal written agreement. In reply thereto, it was contended on behalf of the appellant in the written submission dated 22 October 2019 that this question was not germane and did not arise in the appeals. It is submitted that thus the Appellate Tribunal has not rendered and was not called upon to render a finding on the same. It is pointed out that the findings by the Appellate Tribunal in paragraph 35, 73 and 78 are recorded in a different context and not in the context of whether Section 18 could apply in the absence of a formal written agreement. It is submitted that therefore the appellant cannot be allowed to raise said contention for the first time in second appeal for which reliance is placed on the decision in the case of *Maharaj Singh And Ors. vs Hukum Singh*[18]. It is alternatively submitted that appellants by their conduct have waived its right to raise the said question / issue. Reliance in this regard is placed on the decision in *Mumbai International Airport Pvt. Ltd. Vs Golden Chariot Airport & Anr.*[19] , *Suzuki Parasrampuria Suitings Pvt. Ltd. Vs. Official Liquidator of Mahendra Petrochemicals Ltd.* [20] *and Amritlal N. Shah Vs. Alla Annapurnamma* [21].

18 *AIR 1964 Allahabad 136*

19 *(2010) 10 SCC 422*

20 *(2018) 10 SCC 707*

21 *AIR 1959 AP 9*

15. It is submitted that even otherwise Section 18 is applicable where there is a contractual understanding or agreement, absence of formal written agreement for sale, not notwithstanding. It is submitted that the agreement for sale as defined under Section 2(c) of the Act of 2016, has to be liberally construed to include not only a formal written agreement for sale but any other form of agreement or contractual understanding. It is submitted that in this case the brochures, booking application, forms / confirmation letters, allotment letters and the correspondence, exchanged between the parties, clearly lead to a contractual understanding, sufficient to satisfy the requirement of an agreement for sale, within the meaning of Section 18 of the said Act of 2016. It is pointed out that in the brochure and several other documents the date of completion was stipulated as 16 March 2017.

16. The rival contentions now fall for determination. Notwithstanding the extensive narration of the facts and the submissions, the dispute falls in a narrow compass and belies the weight of the record. The dispute essentially is that according to the respondents the project was not completed within the time agreed and there were changes effected in the layout and the amenities which is in breach of section 12 and 18 of the said Act of 2016. The respondents therefore sought cancellation of the allotment and

refund with interest. On the contrary according to the appellant section 12 and 18 are inapplicable, those sections not being retrospective in operation. It is submitted that year 2017 was never the time agreed for completion and section 18 would not otherwise apply in the absence of a written agreement which in fact could not be executed on account of the lapse of the respondents. Incidentally there is also an issue whether the Appellate Tribunal could have dealt with the merits of the matter or was required to remand the complaints to the authority or the adjudicating officer under section 71(1) of the Act of 2016.

17. I would now propose to deal with the various questions framed *ad seriatim.*

Question Nos.(i) to (iv)

18. These questions can be taken up together. The question atleast in so far as section 18 is concerned is no longer res-integra. The constitutional validity of the said section amongst others was subject matter of challenge in *Neelkamal Realtors*. The Division bench of this Court has noted that the challenge to various provisions was interalia on the ground of retrospective/retroactive application of certain provisions and unreasonable restrictions placed by certain provisions, contrary to Article 19(1)(g) and in

violation of Article 14 of the Constitution of India. This Court held that the provisions of Section 18 are not retrospective in nature. They may to some extent be having retroactive or quasi retroactive effect. It was held that on that ground the validity of the provisions cannot be challenged. In para 142 the Division Bench held that the Act of 2016 was enacted to protect the interest of consumers in the real estate sector. It has been held that the Act of 2016 was enacted in Public Interest.

19. In my considered view, it is neither necessary nor permissible to revisit these provisions in order to examine their nature. It hardly needs to be stated that I am bound by the decision in *Neelkamal Realtors*. It needs to be stated that the Act of 2016 was enacted for regulation and promotion of the real estate sector and to ensure sale of plots, apartments, flats etc in an efficient and transparent manner and to protect the interest of consumers in the real estate Sector. To that extent it is predominantly a beneficial piece of legislation. It is true that the Act of 2016 contains provisions which aim at balancing the rights of the builders/developers That is bound to be so, as else otherwise the same shall not stand the scrutiny of Article 14 of the Constitution of India.

20. Coming to Section 12 it provides for the obligation of promoter regarding veracity of the advertisement or prospectus. It provides that if any person making an advance or deposit on the basis of the information contained in the notice, advertisement or prospectus or on the basis of any model apartment etc, sustains any loss or damage by reason of any incorrect false statement included therein, shall be entitled to compensation from the promoter. The proviso entitles the person affected by such incorrect, false statement to withdraw from the project and to get the refund with interest and compensation. A comparison of section 12 and section 18 would show that even section 18 provides for return of the amount with interest and compensation if the promoter fails to complete or is unable to give possession of an apartment, plot or building in accordance with the terms of the agreement for sale or as the case may be, duly completed by the date specified therein or due to discontinuance of the business etc with which we are not presently concerned. Incidentally section 18 also gives an option to the allotee to withdraw from the project. Subsection 3 of section 18 is relevant for the purpose and reads thus-

> *18(3) – If the promoter fails to discharge any other obligations imposed on him under this Act or the rules and regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to*

the allottees, in the manner as provided under this Act.

It can thus be seen that under subsection 3 of Section 18 the promoter is obliged to discharge any other obligation imposed under the Act of 2016 or the rules or regulations made thereunder (which would include the obligation under section 12) and in the event of failure thereto would be liable to pay compensation. Thus in my humble opinion section 12 cannot be read in isolation and has to be read with section 18 of the Act of 2016. To put it differently both section 12 and section 18 of the Act of 2016 provide for an option to the allottee to withdraw from the project and to get refund alongwith interest and compensation determined in accordance with the provisions of the Act of 2016. While under section 12 the liability of the promoter arises on account of the allottee sustaining any loss or damage on account of any incorrect or false statement contained in the notice, advertisement or prospectus under section 18 it is interalia on account of the failure of the promoter to complete or to give possession in accordance with the terms of the agreement for sale or as the case may be duly completed by the date specified therein. Thus although the validity of section 12 was not under challenge in *Neelkamal Realtors* there is no reason why Section 12 should be treated differently.

21. There was a serious debate during the course of the arguments at bar whether the section 12 and 18 are substantive in nature or merely procedural and whether they are merely declaratory in nature of the existing/previous law or enact new law affecting substantive rights. It was contended on behalf of the appellant that they are substantive provisions creating new rights/liabilities and as such cannot apply to transactions /representations/agreements entered into prior to the coming into force of the Act of 2016.

22. I have already noticed that we have a binding decision in *Neelkamal Realtors* in sofar as nature of the various provisions of the Act of 2016 including section 18 and it is not possible to revisit or reexamine the same. Thus it is not necessary to make a detailed reference to the decisions in *Hitendra Vishnu Thakur and Ors. Vs. State of Maharashtra and Ors.* [22], *R. Rajagopal Reddy (Dead) by LRs. & Ors. Vs. Padmini Chandrasekharan (Dead) by LRs.*[23], *Commissioner of Income Tax (Central)-I, New Delhi Vs. Vatika Township Pvt. Ltd.*[24], *Union of India Vs. Indusind Bank Ltd* [25], *G.J.Raja Vs. Tejraj Surana* [26] *and Shanti Conductors (P) Ltd. & Anr.*

22 *(1994) 4 SCC 602*

23 *(1995) 2 SCC 630*

24 *(2015) 1 SCC 1*

25 *(2016) 9 SCC 720*

26 *(2019) SCC Online SC 989*

Vs. Assam State Electricity Board and Ors. [27] However, all that can be said is that the provisions have been held to be retroactive or quasi retroactive in nature. I also find that no different considerations can arise even in respect of section 12 of the Act of 2016. It is necessary to note that section 3 of the Act of 2016 obliges the promoter to register the ongoing project and the project for which completion certificate has not been issued. Within three months of the coming into force of the said Act of 2016.

23. A brief reference may be made at this stage to the decision of the Full bench of this Court in *Badrinarayan Shankar Bhandari* in which it is held thus in para 38 of the Judgment

> *38. (i) A prospective statute operates forwards from the date of its enactment conferring new rights on parties without reference to any anterior event, status or characteristic;*
>
> *(ii) Retrospective statute, on the other hand, operates backwards, attaches new consequences, though for the future, but to an event that took place before the statute was enacted. It takes away vested rights. Substantive benefits which were already obtained by a party are sought to be taken away because of legislation being given effect to from a date prior to its enactment. The rules of interpretation of statute raise a presumption against such retrospective effect to a legislation. In other words, if the Legislature has not expressly or by necessary implication given effect to a*

27 *2019 SCC Online SC 68*

statute from a date prior to its enactment, the Court will not allow retrospective effect being given to a legislation so as to take away the vested rights. Statutes enacted for regulating succession are ordinarily not applicable to successions which had already opened, as otherwise the effect will be to divest the estate from persons in whom it had vested prior to coming into force of the new statutes. Muhammed Abdus Samad Vs. Qurban Hussain, ILR.26 Allahabad 119 (129) P.C.

(iii) There is the intermediate category called "Retroactive Statute" which does not operate backwards and does not take away vested rights. Though it operates forwards, it is brought into operation by a characteristic or status that arose before it was enacted. For example, a provision of an Act brought into force on January, 2014, the Act applies to a person who was employed on 1 January, 2014 has two elements:

(a) that the person concerned took employment on 1 January, 2014 - an event;

(b) that the person referred to was an employee on that day - a characteristic or status which he had acquired before 1 January 2014. Insofar as the Act applies to a person who took employment on 1 January 2014, the Act is prospective. Insofar as the Act applies to a person who had taken employment before 1 January 2014, the Act is retroactive.

The Section 12 & 18 are quasi retroactive in nature and would apply to representation made and

agreements entered into prior to the coming into force of the Act.

It can thus be seen that a retroactive statute or provision would trigger itself on the basis of some event, status or characteristics prior to the coming into force of the statute. The points are answered accordingly

24. **Question No.(v)** - The first proviso to Section 3(1) of the Act of 2016 requires an ongoing project that is a project for which a completion certificate has not been issued to be registered under the Act of 2016. The promoter is enjoined to make an application, in respect of an ongoing project, within three months of the date of commencement of the Act of 2016. It is a matter of record that the Appellant has got the project registered as an ongoing project by stipulating the date of completion as 31 August 2018 and revised date as 31 August 2019. Section 4(2)(l)C) of Act of 2016 requires the promoter to submit a declaration supported by affidavit stating the time period within which he undertakes to complete the project or phase thereof as the case may be. Nothing has been brought to my notice that before stipulation of the revised date, at the time of the registration of an ongoing project, the promoter is required to obtain consent of the flat purchasers/allottees. The point is answered accordingly.

25. **Question No.(vi)** - Although the parties had advanced their submissions on the point I find that the said issue is also covered by the decision in *Neelkamal Realtors*. The Division Bench has held thus in para 305.

> *Section 4(2)(l)(C) enables the promoter to revise the date of completion of project and hand over possession. The provisions of RERA, however, do not rewrite the clause of completion or handling over possession in agreement for sale. Section 4(2)(l)(C) enables the promoter to give fresh time line independent of the time period stipulated in the agreements for sale entered into between him and the allottees so that he is not visited with penal consequences laid down under RERA. In other words, by giving opportunity to the promoter to prescribe fresh time line under Section 4(2)(l)(C) he is not absolved of the liability under the agreement for sale.*
>
> *(Emphasis supplied)*

26. A meaningful reading of the aforesaid para would indicate that the Division Bench has found that on one hand the promoter is entitled to stipulate fresh time line independent of the time period stipulated in the agreement, so that he is not visited with penal consequences. However this does not absolve the promoter of the liability under the agreement for sale. A perusal of the judgment in *Neelkamal Realtors* would show that the Division Bench has made a distinction between the penal provisions and

provisions leading to or providing for civil consequences and liabilities. It is necessary to note that the Act of 2016 requires the promoter to register ongoing projects that is projects where the completion certificate is not issued. While doing so the Act of 2016 aims at balancing the rights/interest of the promoter by enabling him to stipulate a fresh timeline so as absolve him of the penal consequences. However in so far as rights and liabilities of the parties are concerned the promoter is not absolved of the liability thereunder. To put it differently, the Division Bench has in terms held that the stipulation of the fresh/revised date is only to absolve the promoter of the penal consequences and not otherwise. In the face of the finding of the Division Bench it is neither necessary nor possible to dwell independently on the issue. The point is answered accordingly.

27. **Question Nos.(vii) and (viii)**- There was a serious debate during the course of the arguments at the bar, as to whether the complaint was decided by the Authority only on the basis of the Preliminary issue of maintainability or otherwise. The parties have also advanced arguments on the necessity and/or advisability and propriety of a remand.

28. A perusal of the order passed by the authority would show that the Authority has noted the decision in *Neelkamal Realtors*. The authority has found that section 12 cannot be applied retrospectively to transactions that transpired before the Act of 2016 came into force. The authority has essentially refused to grant the relief of refund with interest on the ground that allowing bulk withdrawal from the project involving about 520 allottees will jeopardize the project which was at an advanced stage of construction where 80% of the super structure was completed. The Authority has also noted that under section 4(2)(l)(C) of the Act of 2016 read with Rule 4(2) of the Maharashtra Real Estate (Regulation and Development) etc Rules 2017 (Rules for short) the promoter was entitled to prescribe fresh timeline which in the instant case, was stated to be August 2019. The Authority has noted that the parties were at an advanced stage of negotiations and the draft agreement for sale was exchanged between the parties post the enforcement of the Act of 2016. It is in these circumstances that the Authority has disposed of the complaints by "advising" the parties to execute and register the agreements of sale as per section 13 of the Act of 2016. The authority has also alternatively stipulated that if the complainants intend to withdraw from the project then such withdrawal shall be guided by the terms and conditions of the

allotment letters. Significantly there is no reference to section 18 of the Act of 2016 in the order of the authority.

29. On a perusal of the order passed by the authority it is not possible to accept that it is passed purely on the basis of the preliminary objection. What appears to have weighed with the authority is that the project involving about 520 allottees and which was at an advanced stage of construction would be jeopardized requiring withdrawal of amount from the separate account under section 4(2)(l)(D) of the Act of 2016, if bulk withdrawal is permitted. A perusal of the order would further show that specific submissions were made before the authority that the appellants are willing to execute and register the agreement of sale, that the project is at an advanced stage of development as per the sanctioned plans and approvals which were disclosed at the time of registration of the project under the Act of 2016. It was also contended that there are no changes made which would amount to violation of section 14 of the Act of 2016. The appellant also expressed commitment to execute and register the agreement strictly as per the provisions of the Act of 2016 and the rules and regulations framed thereunder and to deliver possession as per the revised timeline. The order also records that multiple opportunities were given to the parties to settle the matter amicably. Thus it is not

possible to accept that the authority has refused to entertain the complaint solely by upholding the preliminary objection. Quite to the contrary the Authority has alternatively indicated that if the complainants intend to withdraw from the project the same shall be governed by the conditions of the allotment letter.

30. Both the learned members of the Appellate Tribunal have separately dealt with the issue of remand. The Tribunal has found that there was neither a request for framing of a preliminary issue nor any such issue was framed by the authority. It has also been noticed that in spite of an opportunity granted by the Tribunal by order dated 10/22 April 2019 for filing additional pleadings no defense on merits was filed.

31. In any event I find that the Appellate Tribunal(which would be final fact finding authority) has extensively considered the rival contentions both on law and on facts. The findings cannot be said to be infirm or perverse, so as to give rise to any substantial question of law. It is necessary to note that the Appellate Tribunal has not granted any compensation. Thus there was no occasion for a remand to the adjudicating officer under Section 71(1) of the Act of 2016. In any event I do not find that the Tribunal was in error in

refusing to remand the complaints nor a case for remand is made out in these appeals.

32. It is undisputed that the provisions of the Code of Civil Procedure do not apply to the authorities under the said Act of 2016. Normally the Court would be slow in directing a remand unless it is necessary for compelling reasons and in the facts and circumstances of the case. Once it is found on the perusal of the impugned order passed by the authorities that the same was not purely based on the preliminary objection about maintainability and further having found that the Appellate Tribunal has extensively gone into the contentions both on facts and in law, in my considered view, the order of remand is not justified in this case. The point is answered accordingly.

33. **Question Nos. (ix) and (x)** - These questions can be taken up together for consideration. The issue is short whether operation of section 18 requires a written agreement for sale. On behalf of the appellant, reliance is placed on Section 2(c) of the Act of 2016 which defines an agreement for sale alongwith Section 13 and Rule 10 of the 2017 Rules. It is submitted that as per Rule 10 of the 2017 Rules, for the purpose of Subsection 2 of Section 13, an agreement for sale, shall be in conformity with the provisions and

rules and regulations made thereunder and shall be in accordance with the model form of agreement at Annexure A. It is thus submitted that the complaints could not have been brought under Section 18 in the absence of the agreement for sale and only on the basis of alleged representations made in a brochure.

34. On the contrary, it is contended on behalf of Respondents that the contention as sought to be raised in the appeal was not raised before the Authority or the Appellate Tribunal. It is pointed out that quite to the contrary, in the written submissions dated 22 October 2019, it was claimed on behalf of respondents that this question was not germane and did not arise in the appeals. It is submitted that in such circumstances, the Appellate Tribunal has not rendered a finding on said issue. Thus, the appellants cannot be allowed to raise the contention for the first time in the second appeal. Reliance is placed on the decision in *Maharaj Singh and Others Vs. Hukum Singh*[28] in this regard. It is submitted that the appellants by their conduct has waived their right to raise this issue and the appellants cannot be permitted to approbate and reprobate.

35. It is submitted that Section 2(c) defines an 'Agreement for Sale' and does not specifically refer to a formal "written agreement for sale", unlike in Section 13 of the said Act of 2016

28AIR 1964 ALL 136

which makes a specific reference to a written agreement for sale. It is submitted that Section 13 is in the context of a prohibition against the promoter from accepting the sum more than 10% of the cost of apartment, without first entering into an agreement for sale. It is thus submitted that the object of Section 13 is limited and Section 13 cannot be used or relied upon to reckon the definition of an agreement for sale as defined in Section 2(c) of the Act of 2016. It is submitted that there are several sections such as Section 11, 12, 14, 15, 19, 31, 32 and 71 which refer to the rights of the allottees which is defined under Section 2(d) of the Act of 2016 and none of these provisions set out a requirement of a formal written agreement for sale in order to enable the allottees to enforce the rights. It is submitted that Section 8 of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act of 2016, 1963 ('MOFA', for short) also casts an obligation on the promoter to refund amount received with interest, in the event of failure to give possession in accordance with the terms of the agreement. It is submitted that Section 18 of the Act of 2016 is similar to Section 8 of MOFA. Reliance is placed on the decision in *G. Swaminathan Vs. Shivram Co-operative Housing Society and Ors.*[29] and *Neena Sudarshan Wadia Vs. M/s. Venus Enterprises*[30] in order to submit that in similar provisions under the

29Writ Petition No.1869 of 1982 decided on 24/2/1983 & 25/2/1983

30(1984) 2 Bom.C.R. 505

MOFA, there is no requirement of a written and registered agreement as contemplated under Section 4 for invocation of Section 7 of MOFA.

36. It is submitted that this Court in *Neelkamal Realtors* has held RERA Act to be a beneficial legislation devised to protect the purchasers in the real estate sector who are adversely affected financially and otherwise by unregulated delays in projects. Reliance is placed on *(i) Lanco Anpara Power Ltd. Vs. State of U.P. and Ors.*[31], *(ii) Regional Provident Fund Commissioner Vs. Hooghly Mills Co. Ltd. and Ors.*[32], *(iii) National Insurance Co. Ltd. Vs. Laxmi Narain Dhut*[33] in order to submit that the Act of 2016 being a beneficial legislation to be given due weightage and is free to resort to historical, contextual and purposive interpretation and not textual one. Reliance is also placed on a decision of this Court in *Lavasa Corporation Ltd Vs. Jitendra Jagdish Tulsiani and Anr.*[34]. It is submitted that in the absence of a specific date, a reasonable period should be applied as held by the Supreme Court in *Fortune Infrastructure & Anr. Vs. Trevor D'lima and Ors.* [35] *and Kolkata West International City Pvt. Ltd. Vs. Devasis Rudra*[36]. Reliance is also

312016 10 SCC 329

322012 2 SCC 489

33*2007 3 SCC 700*

34*(2018) 6 Bom. C.R. 172*

35*(2018) 5 SCC 442*

36*2019 SCC Online SC 438*

placed on the decision of the Supreme Court in *Pioneer Urban Land and Infrastructure Ltd. Vs. Govindan Raghavan* [37]. It is submitted that the Appellate Tribunal has rightly found that the booking of the flats being made in year 2012-13, it was reasonable to expect delivery of possession within three years and in any event not beyond 2017.

37. That apart from Section 18, the respondents are entitled to seek refund together with interest even under Section 12 of the said Act of 2016 based on the false and incorrect representations made. It is submitted that there is correspondence, in which the respondents have stated that the possession was agreed to be delivered by 2017 and said aspect was never controverted.

38. In reply, it is submitted on behalf of the appellants that there is failure on the part of the respondents to execute the agreement although the Authority had asked the parties to execute the agreement inspite of attempts by the appellants to require the respondents to execute the agreement. It is submitted that the Appellate Tribunal in paragraph 35, 73 and 78 has recorded a finding and has dwelt upon the contention about the requirement of a written agreement for application of Section 12 and thus, the appellants cannot be precluded from raising the same more so when

37 *(2019) 5 SCC 725*

the issue goes to the root of the matter. It is submitted that the respondents cannot place reliance on the authorities under the MOFA nor support its case for application of Section 12 of the said Act of 2016. It is submitted that the Tribunal was not right in finding that there was discrepancy in the matter of the agreement circulated vis-a-vis the model Annexure A, under the Rules of 2017. It is submitted that even otherwise the Act of 2016 provides for appropriate modification and alterations in the model agreement subject to the condition that they are not in derogation of the provisions of the Act of 2016 and the rules and regulations framed thereunder. It is submitted that the decisions relied upon by the respondents are distinguishable on facts.

39. I have carefully considered the rival submissions made on the said issue. It is a matter of record that the formal agreements for sale has not been executed in the present case. It is not necessary to go into the question of the reasons for such non execution in as much as the question is whether in the absence of a written agreement whether the provisions of Section 18 can be invoked. At the outset, it is necessary to note that in the written submissions dated 22 October 2019 the appellants claimed that the only issue which arose in the appeal was whether the complaint was maintainable under Section 12 and 18 of the said Act of 2016. It

was specifically claimed that the various contentions raised by the Respondents namely Section 18 of the Act of 2016 would apply even in the absence of a registered agreement and are not germane and do not arise in the Appeal before the Appellate Tribunal. It is on account of such a stand being taken, it is contended on behalf of the respondents that the appellants cannot be permitted raise said issue for the first time in the second appeal. The said aspect is countered on behalf of the appellants, primarily on two grounds. Firstly that the Appellate Tribunal has dealt with this aspect and secondly the issue which goes to the root of the matter can otherwise be allowed to be raised for the first time in the appeal. It is contended on behalf of the respondents that the findings in para 35, 73 and 78 of the impugned judgment are rendered in different context.

40. I have gone through the paragraphs 35, 73 and 78. In para 35, the Tribunal has noted that in the brochure the date of possession was shown as 2017. The Tribunal has found that if the booking is done in the year 2013, it is quite possible and probable that the possession might have been agreed to be delivered within reasonable time i.e. by the year 2017. The Tribunal has then referred to the decision of the Supreme Court in *Kolkata West International City and Fortune Infrastructure (supra)* in order to find that the appellants having failed to give possession in the year 2017,

it committed breach of Section 18 of the Act of 2016. Even in para 73 and 78, the Tribunal has held that Section 12 and 18 are applicable to the contractual arrangements between the parties. In para 35 the Tribunal has found that there is sufficient evidence on record to substantiate that the promoter had agreed to hand over possession by 2013 which is a finding of fact. Although there is no specific reference to the requirement of a written agreement, so as to attract Section 18 of the Act of 2016, the Appellate Tribunal has found that on the basis of the contractual arrangement, the respondents have established the case of breach of Section 18. In my considered view, apart from aforesaid findings the issue being a question of law, which goes to the root of the matter, can be allowed to be raised in the second appeal. It is well settled that normally the Court would allow a pure question of law, which goes to the root of the matter to be raised in the second appeal although not specifically raised earlier. In that view of the matter, it is not necessary to dwell on the various cases on which reliance is placed by either of the parties, on the point of the permissibility of the said ground being raised in the Second Appeal.

41. Section 2(c) defines an agreement for sale entered into between the promoter and the allottee. It is necessary to note that Section 2(c) does not say that an agreement has to be in writing

entered between the promoter and the allottee. Section 13 provides that no deposit or advance shall be taken by the promoter, without first entering into the agreement for sale. Thus, the learned counsel for the respondent is right that Section 13 has to be read in the context of prohibition against the promoter from accepting the sum in excess of 10% of the cost of the flat as an advance payment or an application fee etc. Rule 10 of the 2017 Rules, specifically says that for the purpose of sub-section (2) of Section 13 of the Act of 2016, the agreement for sale shall be in conformity with the provisions, rules and regulations made thereunder and shall be in accordance with the model form of agreement at Annexure A. Thus, the requirement of the agreement for sale being in conformity with Annexure A of the 2017 Rules has also to be read in the context and for the purposes of Section 13. Thus, there is a considerable force in the argument on behalf of the respondents that Section 18 read with Section 2(c) of the Act of 2016 which defines an agreement for sale in terms do not provide for the requirement of a written agreement of sale. It is necessary to emphasise that Section 13 which provides for a prohibition against the promoter from accepting the sum in excess of 10% of the cost of the apartment in explicit terms refers to a written agreement for sale read with Rule 10 of 2017 Rules and also prescribes the model agreement of sale. Had the legislature

intended the agreement referred to in Section 18 also to be in writing, nothing prevented it from doing so.

42. Thus, in my considered view, the reliance placed on Section 13 read with Rule 10 of the 2017 Rules, in order to import the requirement of a written agreement under Rule 18 read with Section 2(c) of the Act of 2016 is misplaced. However, I do not propose to lay down an absolute proposition of binding nature on the said issue, in as much as the impugned judgment granting refund of the consideration and interest can otherwise be sustained on the basis of Section 12 of the said Act of 2016. I have already held that Section 12 would also apply to the obligation of the promoter regarding the information given and the representations made prior to the registration of the project under the Act of 2016 as ongoing project. Section 12 provides that where any person makes an advance or a deposit on the basis of the information contained in the notice, advertisement or prospectus or on the basis of any model apartment, plot or building, as the case may be, and sustains any loss or damage by reason of any incorrect, false statement included therein, he shall be compensated by the promoter in the manner as provided under this Act of 2016. The proviso to Section 12 suggests that if the person affected by such incorrect, false statement contained in the notice, advertisement or prospectus, or the model

apartment, plot or building, as the case may be, intends to withdraw from the proposed project, he shall be returned his entire investment alongwith interest at such rate as may be prescribed alongwith compensation, in the manner provided under this Act of 2016. As noticed earlier, in the present case, the impugned order only grants refund of the consideration and interest.

43. In the present case, the Tribunal has found in para 37, on the basis of the documents filed, that the lay out plan is modified by the appellants without consent of the allottees and even the amenities assured to be given at the time of the transaction on the basis of advertisement, brochures etc. were refused to be given later on. Thus, the Tribunal has found as a finding of fact that there is sufficient documentary evidence on record to show that the promoter has committed breach of Section 12. In para 74 the Tribunal has found that there is sufficient evidence to substantiate that the appellant had agreed to handover possession by 2017 and the brochure of the project mention the date for ready to move in possession as 2007 in both the towers ICC I and II. The Tribunal has taken note of communications in which the respondents had mentioned that the date of possession was 2017 and there was no denial of the same by the appellants. It is true that there is no date of possession mentioned in the booking application form / allotment

letter nor there is an agreement of sale. However, the brochure indeed mentions the date of possession as 2017. It is necessary to note that Section 12 makes a reference to a notice, advertisement or prospectus. The learned counsel for the appellants have referred to the disclaimer in the brochure which reads thus-

> *Disclaimer : All specifications, conceptual designs, dimensions, images, amenities and facilities shown herein are for the purposes of representation only. The same are subject to approval and changes without any notice or intimation and shall not constitute an offer and/or contract. The terms and conditions of agreement for sale between the parties shall prevail and be binding. Tolerance of +/- 3% is possible in unit areas on account of design and construction variances.*

It is submitted that therefore the date of possession as mentioned in the brochure which will be subject to the said disclaimer. It is not possible to accept the said contention, in as much as, the disclaimer refers to the specifications, conceptual designs, dimensions, images, amenities and facilities which does not include the date of possession. It was also contended that the allottees have given different dates of possession and the discrepancy would indicate that there was no such agreement. The said contention also in my considered view cannot be accepted as none of the allottees have mentioned the date beyond 2017. In my

considered view, the finding of fact recorded by the Tribunal which is a final fact finding authority, in the absence of said finding being shown to be perverse and/or against the weight of record is not susceptible to interference. In this case, at the time of registration, the appellants notified the date for possession as 31 August 2018 which was revised to 31 August 2019. Indisputably, the part occupation certificate (OC) was obtained for the first time in March 2019 and thereafter in June 2019. Thus, the OC was not obtained even prior to the initial date as mentioned at the time of registration i.e. 31 August 2018. Looked from any angle, the finding as recorded by the Appellate Tribunal does not suffer from any infirmity.

44. A brief reference at this stage may be made to the cases cited. It is true that in *Lavasa Corporation Ltd. (supra)* there was an "Agreement to Lease" executed for a period of 999 years and the learned Single Judge of this Court on facts held that it was really a transaction of sale. In the case of *G. Swaminathan and Neena Wadia (supra)* which arose under the MOFA, the question was whether the agreement was required to be registered. Thus, both these cases may not be of any assistance on the question of the requirement of a written agreement for sale that too under the provisions of the said Act of 2016.

45. The cases of *(i) Fortune Infrastructure (ii) Pioneer Urban Land (iii) Kolkata West International City* all arose under the provisions of Consumer Protection Act of 2016. In *Pioneer and Kolkata West International City* there were agreements executed between the parties. However, what is relevant is that in *Fortune Infrastructure*, the Supreme Court in the context of the complaint filed under the Consumer Protection Act, where there was a delay in delivery of possession and the project was transferred to another entity has held in para 15 that a person cannot be made to wait indefinitely for the possession of flats allotted to them. In the case of *Fortune Infrastructure,* although there was an agreement executed between the parties, there was no delivery period stipulated in the agreement. This is what is held in para 15 of the judgment.

> *Moreover, a person cannot be made to wait indefinitely for the possession of the flats allotted to them and they are entitled to seek the refund of the amount paid by them, alongwith compensation. Although we are aware of the fact that when there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. In the facts and circumstances of this case, a time period of three years would have been reasonable for completion of the contract i.e. the possession was required to be given by last quarter of 2014. Further, there is no dispute as to the fact that until now there*

is no redevelopment of the property. Hence, in view of the above discussion, which draws us to an irresistible conclusion that there is deficiency of service on the part of the appellants and accordingly the issue is answered. When once this Court comes to the conclusion that there is deficiency of services, then the question is what compensation the respondent complainants are entitled to ?

46. It is true that the case of *Fortune Infrastructure* involved the claim of deficiency of service and compensation under the Consumer Protection Act. However, as noted earlier, the Supreme Court has held that the person in such circumstances, cannot be made to wait indefinitely for the possession of flats allotted to him.

47. This takes me to the last point about the pronouncement of the operative portion on 31 December 2019 followed by the reasons which were supplied on 13 March 2020. At the outset, it may be mentioned that the contention on behalf of the appellants that this amounts to deliver of two judgments / orders cannot be accepted. However, at the same time, it is true that the operative portion was pronounced in December 2019 and after two and half months, the reasons were supplied. The Supreme Court in the judgments cited have deprecated such practice. However, the question is whether in the present case, the fact that the reasons were supplied after two and half months is sufficient to set aside the

impugned judgment. In the case of *Balaji Mupade*, the operative order was pronounced on 21 January 2020 and as per the report of the registry the reasons were supplied on 9 October 2020 i.e. after a period of nine months which was much more than what has been observed to be the maximum time after even pronouncement of reserved judgment as per the case of *Anil Rai.* A Special Leave Petition was filed in the interregnum in March 2020. In the case of *Anil Rai*, the Supreme Court after invoking Section 353(1) of Cr.P.C. noted that judgment in a criminal case has to be pronounced immediately or at some subsequent time which period cannot extend beyond six weeks. In *R.C.Sharma*, there was a delay of eight months in delivery of the judgment and lastly in *Bhagwandas,* there was a delay of nearly five years after the conclusion of the hearing. In my humble opinion, although the practice of pronouncing of operative order to be followed by the reasons, has not been approved, it is only in two cases namely in case of *Bhagwandas* (where the delay was of five years) and in Balaji Mupade (where the delay was of 9 months before which the Petitioner had approached the Supreme Court) the impugned judgments were set aside on the sole ground of delay. In my considered view, although there is a delay in supplying of reasons, which cannot strictly be approved, the perusal of the judgment shows that the Appellate Tribunal has considered the relevant aspects and it has not been shown on facts

that on account of delay certain submissions and grounds which were urged have not been considered by the Appellate Tribunal. In that view of the matter, the said contention cannot be accepted in the facts and circumstances of the present case.

48. Before concluding, I may note that the parties have relied upon several judgments including the order passed by the Delhi Authorities and the Appellate Tribunal. I have independently gone through the judgment of the Division Bench of this Court in *Neelkamal Realtors* and has found that the issue about the nature of Section 18 and operation is no longer *res integra* and we have to abide by the finding of the Division Bench in *Neelkamal Realtors.* I have also found that Section 12 cannot be interpreted differently. On behalf of the Appellant reliance is also placed on certain orders passed by the Appellate Tribunal in other matters to show that in those cases the Appellate Tribunal has ordered a remand. I am afraid the said reliance is also misconceived. The question whether remand is necessary or justified would depend on facts and circumstance of each case and there are no universal principles which can be deduced about the circumstances in which such remand has to be ordered. Some of the judgments relied upon are much prior in point of time to the enactment of the Act of 2016 and I do not find it necessary to have a detailed reference to them, lest at the cost of prolixity.

49. In the result, the Appeals are hereby dismissed with no order as to costs. In view of disposal of Second Appeals, the Interim Applications are disposed of.

50. At this stage, the learned counsel for the Appellants seeks stay of the impugned order passed by the Appellate Tribunal, in order to enable the Appellants to take further steps as may be advised.

51. The prayer is opposed on behalf of the Respondents. It is pointed out that there was no interim relief operating during the pendency of these Appeals. Therefore, there is no question of grant and/or continuation of any interim relief after the dismissal of the Appeals. The learned Senior counsel has however pointed out that the Respondents have not as yet filed any proceedings, for execution of the impugned judgment passed by the Appellate Tribunal.

52. Considering these circumstances and having regard to the fact that there was no interim relief operating during the pendency of the Appeal, the prayer for stay is hereby rejected.

C.V. BHADANG, J.