BEFORE THE UTTARAKHAND REAL ESTATE APPELLATE TRIBUNAL AT DEHRADUN

Present: Hon'ble Mr. Rajendra Singh

------ Member (J)

Hon'ble Mr. Rajeev Gupta

------Member (A)

APPEAL NO. 27 of 2019

1. M/s GTM Builders & Promoters Pvt. Ltd. D-21, Office No. 217 (Second Floor), Corporate Park, Section-21, Dwarka, Delhi-110077 through its authorized Singatory/Director Mr. Nitin Kapoor.
2. M/s Sargam Estate Pvt. Ltd. D-21, Office No.217 (Second Floor), Corporate Park, Sector-21, Dwarka, Delhi-110077 through its authorized Signatory/Director, Mr. Nitin Kapoor.

.... Appellants/Promoters

vs

1. Mrs. Shobha Malhotra w/o Mr. Prem Malhotra, r/o House No. 1402, Sector-16, Faridabad, Haryana-121002.
2. Mr. Prem Malhotra s/o Late R.D. Malhotra, r/o House No. 1402, Sector-16, Faridabad, Haryana-121002.

..........Respondents

Present: Sri S.C.Sharma & Sri Vikrant Gambhir, Advocates, for the appellants-promotors
Sri Anand Chamoli, Advocate for the respondents-homebuyers.

JUDGMENT

DATED: DECEMBER 22, 2022

Per: Sri Rajeev Gupta, Member (A)

This appeal has been filed against the order dated 29.07.2019 passed by Uttarakhand Real Estate Regulatory Authority (for short 'RERA') in a complaint made by the respondents. Against this order, the appellants approached the Hon'ble High Court by WPMS No. 3001/2019. Hon'ble High Court in its judgment and order dated 26.09.2019, dismissed this writ petition on the ground of alternative remedy, inasmuch as the order of RERA is evidently an appealable order under Section 43 of the Real Estate (Regulation and

Development) Act, 2016, (No. 16/2016) (hereinafter referred to, the Act).

2. On the objection of the Ld. Senior Counsel for the petitioners to the point of jurisdiction of Uttarakhand RERA in the matter, the Hon'ble High Court ordered that the Appellate Tribunal, before proceeding in the matter shall consider the point of jurisdiction in the first instance.

3. In compliance of the above order of Hon'ble High Court, this Tribunal heard the arguments of Ld. Counsel for both the sides on the point of jurisdiction and perused the record and vide its order dated 19.04.2021 held that RERA had jurisdiction to hear the complaint. The extract of this Tribunal's order dated 19.04.2021 is reproduced as hereunder:

> "4. In the order impugned dated 29.07.2019, Ld. Authority below has dealt with this issue in point no.1, as to whether the complaint is time barred under the Limitation Act and whether this Regulatory Authority does not have jurisdiction to hear it. In its decision on this issue, Ld. Authority below has observed that the respondents (appellants herein) have stated in their written reply that the sale deed of the flat had been executed and registered in favour of the complainants (respondents herein) on 13.05.2013 and the possession certificate was issued on 10.01.2014, which was accepted by the complainants. The complaint before RERA has been filed after five years and is, therefore, time barred. It is also argued that at the time of registration of sale deed, the complainants did not make any objection and now they cannot raise any question about delayed possession and interest. The complainants, in their counter reply, have stated that they had made almost the entire payment by July, 2008 for the flat. Subsequently, time to time they requested the respondents to pay the interest amount on the bank loan, as per the tripartite agreement, which was declined by the respondents. The complainants wrote to the respondents on 23.06.2011 about the delay and for completing the construction work of the flat, but, in reply, the respondents sent letters dated 25.11.2011 and 29.12.2011 carrying threat for cancellation of the allotment of the flat. The respondents, without obtaining occupancy certificate and completion certificate from the competent authority, gave letter/ proposal to the complainants for taking possession. The respondents in the *mala fide* way and for threatening the complainants sent a final demand note dated 30.06.2012 for Rs.17,72,681/- plus service tax, while the complainants had paid an amount exceeding

the full cost of the flat including bank interest. The complainants were afraid that their entire amount will be seized by the respondents and, therefore, under duress and pressure of the respondents, they had to get the sale deed of the flat executed. Ld. Authority below, on observation of the documents filed before it, has found force in the contention of the complainants that they had the fear of their money being seized by the respondents. Ld. Authority below has also observed that till the time of the registration of the sale deed of the flat, respondents had not obtained the occupancy certificate or completion certificate from MDDA and without obtaining occupancy certificate, they have illegally handed over the possession of the flat to the complainants. After registration of the sale deed, the complainants, on 30.01.2014, informed the respondents about the shortcomings in the flat through email and on 19.05.2014 filed a complaint in the District Consumer Redressal Forum, Delhi, which remained pending there till 07.05.2018. Certified copy of the order dated 07.05.2018 of the District Consumer Redressal Forum was obtained by the complainants on 10.09.2018. *Vide* this order, the complaint was returned to the complainant as the amount involved in the complaint was more than 20 lacs. Thereafter, the present complaint under the Act was filed on 30.10.2018.

5. Ld. Authority below has held that the complainants have given satisfactory explanation of the period between the execution of the sale deed and filing of the present complaint and the correspondence between both the parties before and after the sale deed, shows that the complainants in order to secure the amount given to the respondents, agreed for the registration of the sale deed under duress. Ld. Authority below has further observed that till the time of the registration of the sale deed and even till the present, respondents have not got the completion certificate of the project from the competent authority and in this way the project of the respondents is covered under Section 3 of the Act. Ld. Authority below has observed that, in these circumstances, the complaint filed under the Act, is not held to be time barred and this Regulatory Authority has jurisdiction to hear the same.

6. The appellants, in the appeal, have referred to Section 3 of the Act and submitted that project where no activity, as mentioned in Section 3(1) of the Act, is being undertaken and the construction is complete, is excluded from the registration and accordingly the project of the appellants named: GTM Forest and Hills was not registered with RERA. The respondents jointly booked a threebed room flat bearing No. 302, 3rd Floor, Tower No. FH 09 vide agreement dated 26.11.2006. The construction in the first phase of the project was completed in the year 2012 with some delay occasioned due to various *force majeure* circumstances. After completion of the construction work in the said project, the appellant no. 1 applied to the MDDA for issuance of part completion of the project. MDDA categorically recorded that the construction work in the said

project is complete, however, it also noted that there is no provision for issuance of part completion certificate and accordingly, the same cannot be issued/ granted. They have filed copy of the letter dated 30.11.2012, issued by MDDA in this regard, with the appeal as Annexure: 6. After completion of the construction on the said project, the appellants got the sale deed executed and registered in favour of the majority of the buyers and also handed over possession of the flats to them. The accounts between the respondents and appellant no.1 stood settled on 31.03.2013, as per settlement letter of this date. The possession letter of the flat was also issued on 10.01.2014. According to the appellants, their project was completed much before coming into force of the Act and Rules made thereunder, therefore, the said project is not required to be registered with RERA under Section 3 of the Act. The appellants had specifically submitted that the RERA has no power and jurisdiction to entertain the complaint. The provisions of the Act cannot apply retrospectively to a contract which was executed before coming into force of the Act and the transaction was completed between the parties in all respect. RERA has only given consideration to the facts that since the completion certificate of the project was not obtained, hence, the provisions of the Act shall be applicable. RERA erroneously assumed the jurisdiction against the provisions of Section 3 of the Act, where under this Section, the project of the appellants was not required to be registered with RERA and consequently the provisions of the Act and the Uttarakhand Rules made thereunder are not applicable to this project of the appellants. It is also submitted without prejudice that even under Section 71 of the Act, read with Rule 15 of the Rules, RERA does not have the power to pass the order in the complaint filed by the complainants and the impugned order is completely erroneous.

7. The appellants placed two documents before the Bench on 12.03.2020. The first one being an application dated 19.07.2017, for registration of project with RERA, showing that they have successfully completed Phase-I in the name of Forest and Hills and Phase-II in the name of Forest Lavana, is ongoing. The second documents is a Govt. order dated 13.09.2019 of the Housing Department of Uttarakhand, enabling issuance of part completion certificates.

8. During the arguments, Ld. Counsel for the appellants has placed certain rulings of National Consumer Disputes Redressal Commission, which basically state that, once the possession of the house with an open eye has been taken, without any pre condition/ objection, after getting the possession it does not lie in the mouth of anybody to say that the house is not in a habitable condition or to make allegation about its location and deficiencies etc.

9. Ld. Counsel for the respondents has also produced an order dated 03.06.2019 of the State Consumer Disputes Redrressal Commission, Uttarakhand, passed in Consumer

Complaint No. 16/2015, Col. V.K.Pant vs. M/S. GTM Builders & Promoters Pvt. Ltd and others, in respect of another Flat No. FH-2(302) of the same project. In this case, as per Para 3 of this order, upon being served with the notice of the consumer complaint, the opposite parties put in appearance before the Commission, but in spite of being granted sufficient opportunity, did not file any written statement and later, also failed to appear before the Commission and neglected the proceedings of the consumer complaint. Consequently, the consumer complaint was directed to proceed *ex-parte* against the opposite parties and an order was passed that in case the opposite parties fail to turn up, the consumer complaint shall be heard in their absence and decided as per law.

10. As per Para 2 (e) of this order, according to the consumer complaint, the flat is still incomplete and is not in habitable condition and the following works are still to be completed:

(i) Sanitary fitting in bathroom.
(ii) Modular kitchen and wood work in bedrooms.
(iii) Door and windows.
(iv) Installation of lift.
(v) Electricity fitting.
(vi) Fire-fighting system is incomplete.
(vii) Work of club house not started.

The above works also include installation of lift, firefighting system and work of club house, which do not pertain to the flat alone but pertain to the respective Tower and the project as such. The respondents had the opportunity to rebut these allegations before the Commission, but they have not done the same. It is unexplainable as to why the appellants chose not to participate in the proceedings of the Commission and rebut the allegations. <u>This goes to show that the project was not complete as far as the flats of this Tower were concerned. The flat involved in the impugned order and the present appeal is of Tower No. FH 09, which is a similar Tower and, therefore, there are sufficient reasons to believe that the so called Phase-I of the appellants' project was not complete till the Act came into force</u>.

11. It has also been argued on behalf of the appellants that their request for issuance of part completion certificate for the project was turned down by MDDA *vide* letter dated 30.11.2012, as in the Development Authority byelaws, there was no provision of giving part completion certificate. Letter issued by Secretary, MDDA, addressed to Director G.T.M., Builders and Promoters Pvt. Ltd, has been annexed as Annexure: 6 to this appeal, which translated to English, reads as under:

"Please refer to your letter dated 28.11.2012 by which you have demanded part completion certificate. You have done construction of 31 thousand sq.mts on the site, but on the site, construction of two bed room flats and finishing work of three bedroom flats remains.

Therefore, it is not possible to give completion certificate and Authority byelaws have no provision for giving part completion certificate."

12. It is clear that this reply of MDDA is in cursory manner, without verification of actual completion of construction work and cannot be deemed to be any sort of verification of the completion as stated by the builder. We gave time verbally to the appellants to show any document of MDDA officials having visited the project to verify the construction before issuance of the letter dated 30.11.2012. No such document has been placed before us.

13. It is clear from the above that even part project was not complete at that point of time, as such this should be treated to be an ongoing project on the date of the commencement of the Act. The completion certificate of the part project has been issued on 02.03.2020 by the MDDA. As per the first *proviso* to Section 3, projects that are ongoing on the date of commencement of this Act, and for which the completion certificate has not been issued, are covered under Section 3 of the Act. In view of this, we hold the project in question to be covered under Section 3 of the Act and Ld. Authority below has correctly held that it has jurisdiction to hear the complaint regarding the same.

14. It is also of academic interest to analyze whether RERA has jurisdiction to hear complaint about projects, which have been completed before the commencement of the Act. Section 71(1) of the Act of 2016 reads as follows:

"71. (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, 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.

15. The above proviso to sub-section (1) of Section 71 provides that any person whose complaint in respect of matters covered under Sections 12,14, 18 and 19 of the Act is pending before the Consumer Disputes Redressal Forum/ Commission, on or before commencement of the Act, he may with the permission of such Forum/ Commission, withdraw the complaint pending before it and file an application before the

> adjudicating officer under the Act. Complaints pending before the Consumer Forum/ Commission, before the commencement of the Act can also be regarding the projects which have been duly completed before the commencement of the Act. This Section clearly authorizes the adjudicating officer of RERA to hear such complaints. This goes to show that the jurisdiction of RERA also extends in respect of matters covered under Sections 12,14,18 & 19 of the Act to the projects completed before the commencement of the Act. Section 3 of the Act deals only with the requirement of prior registration of real estate projects with RERA. It specifies which projects are required to be registered with RERA but does not make any mention of exclusion of already completed projects from the overall jurisdiction of RERA. The implication is that registration of already completed projects is not required with RERA, but as far as the obligations of promoters or rights and duties of the allottees are concerned, the jurisdiction of RERA extends to such projects as well. It is also to note that definition of allottee, promoter, project etc. are not confined to the time subsequent to the coming into force of the Act.
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> 16. A question arises here that, according to this interpretation, even complaints regarding projects, which have been completed decades back, would start pouring in before RERA. We feel while such complaints cannot be rejected on the ground of RERA not having jurisdiction, there will be other causes for rejection of many of them, like delay and laches or non-maintainability etc.
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> 17. In the instant appeal, we have already held that RERA had jurisdiction to hear the complaint, as stated in Para 13 above. ”

4. This Tribunal had earlier directed the appellants to show their bonafide before the appeal is entertained, by depositing 50% of the amount indicated in the operative portion of the impugned order dated 29.07.2019, according to the proviso to Section 43(5) of the Act. Consequently, the appellants had deposited a Demand Draft of Rs.18,23,819/-, pursuant to which the appeal was admitted and photocopy/scanned copy of the RERA file was summoned.

5. Apart from the point of jurisdiction, which has already been adjudicated as above, the appeal briefly states the following:

5.1 Vide impugned order dated 29.07.2019, the RERA has directed the appellants/builders to pay interest for 67 months and 15 days calculated on the amount of Rs.37,94,250/- @ 10.60% per annum as prescribed under Rule 15 of the Uttarakhand Real Estate

(Regulations and Development) (General) Rules, 2017 (hereinafter referred to as 'the Rules'), reimbursement of the alleged housing loan EMI of Rs. 12,29,716/- alongwith interest @ 8.60%, Refund of alleged excess amount of Rs. 3,61,750/- alongwith interest @10.60% computed from 31.03.2013 and refund of alleged excess consideration of Rs. 2,45,100/- for 114 square feet of the carpet area etc.

5.2 The Respondents jointly booked a 3 Bed Room flat bearing number 302, 3rd Floor, Tower No.- FH-09 for a basic sale price of Rs. 33,82,500/- vide Agreement dated 26.11.2006 (Hereinafter referred to as "the agreement"). It has been provided under the agreement that the possession of the flat was due within 18 months in case of loan obtained by the allottee from UTI Bank and in other cases within 30 months from the date of the Flat Buyer Agreement. It was further provided under the Agreement if the construction is delayed due to *force majeure* circumstances, the delivery time will be extended and Developer due to such contingency reserves the right to alter or vary the terms of the Agreement or may also suspend the scheme and no compensation of any nature whatsoever shall be claimed by the allottee for the period of delay or suspension. No pre-determined damage was provided under the Agreement in case of delay in delivery of possession.

5.3 The respondents obtained the housing loan from UTI Bank (Now Axis Bank Ltd.) under No Pre-EMI for 18 months only and under the said scheme the appellant had paid the amount equivalent to the EMI of 18 installments i.e. Rs.3,48,249/- to the UTI Bank immediately after the disbursal of the loan amount by the bank. There was no agreement between the Appellants and the Respondents for payment of Pre-EMI in case of delay in possession of the flat to the Respondents.

5.4 The construction in the first phase of the project was completed in the year 2012 with some delay occasioned due to various *force majeure* circumstances. After completion of construction work in the flat, the Appellant No. I by letter dated 07.05.2012 informed

Respondents to take possession of the flat by making payment of the balance sale consideration. The Appellant No. 1 also sent a final possession demand notice dated 30.06.2012 requesting the Respondents to make the payment of Rs. 17,72,681/-plus applicable service tax as per the terms of agreement so that possession related process could be commenced. The accounts between the Respondents and the Appellant No. 1 stood settled on 31.03.2013. As per settlement letter dated 31.03.2013, nothing is to be paid to the appellants by the respondents nor the respondents had to receive any amount on account of delay or pre-EMI or otherwise from the appellants. The Respondent No. 2 specifically requested the Appellants to get the sale deed executed in favour of his wife i.e. the Respondent No. 1 only and accordingly the sale deed of the flat was executed on 13.05.2013 in favour of the Respondent No.1 and possession letter of the flat was issued on 10.01.2014.

5.5 Respondent No. 1 sent a legal notice dated 05.02.2014 disputing that the flat was incomplete on the date of execution of the sale deed and as such there was delay of 68 months at time of offer of possession and the specifications are poor and demanded for Rental loss for 68 months @18000/- per month besides of Rs. 2,50,000/- on account of non-provisioning of wooden flooring, wardrobes and modular kitchen in the flat and a total demand of Rs. 14,74,000 was made from Appellant No. 1.

5.6 The above mentioned legal notice was denied by the Appellant No. 1 vide reply dated 05.03.2014 sent by its legal Counsel which stated that the payment against the final demand notice dated 30.06.2012 was settled on 31.03.2013 and due to delay in settlement/payment, the execution of the Sale Deed and possession was delayed. The possession letter was also sent on 06.11.2013 but the respondent took possession on 10.01.2014 only. It was also stated in the reply that the delay was caused due to more than normal rainfall between 2006 to 2012 and that affected the progress of the work for

14 months. It was also stated in the reply that the Respondents and the Appellant had settled all the issues regarding damage and claims in the full and final settlement entered into between the parties on 31.03.2013. It was also stated in the reply that due to moist condition in the area, the wooden flooring was not a right choice and after informing the Respondents, it was changed to vitrified titles and towards the cost of wardrobes, a sum of Rs. 65,000/- was refunded to the Respondents. It is further submitted that had there been no full and final settlement arrived between the parties on 31.03.2013, the respondents were liable to make payment of Rs. 17,72,681/- plus applicable service tax.

5.7 The Respondent No. 1 thereafter filed a consumer complaint No. 173/2014, titled as Shobha Malhotra Vs M/s GTM Builders & Promoters Pvt. Ltd. before District Consumer Disputes Redressal Forum. North-East, Nand Nagri, Delhi in March 2014 claiming a compensation for delay in possession for 68 months @Rs. 18,000/- per month from July 2008 till march 2014 for a total amount of Rs. 12,24,000/-, Rs. 2,50,000/- for wardrobes/modular kitchen/wooden floor and Rs. 50,000/- for mental harassment and punitive damage. The Respondent No, 1 withdrew the said consumer complaint for want of pecuniary jurisdiction and the same was dismissed as withdrawn with liberty to file the same with the State Consumer Disputes Redressal Commission vide order dated 07.05.2018.

5.8 The Respondents thereafter filed an online complaint dated 30.10.2018 before Uttarakhand Real Estate Regulatory Authority on the false premises that the booking was done on the no Pre-EMIs scheme in which home loan of Rs. 22 lacs was to be arranged from UTI Bank and the Appellants except few EMIs did not pay any interest/EMI. Theclaim was made on the ground that the delivery of the flat was delayed for a period of 68 months.

5.9 The relief sought in the complaint before the RERA was for interest amount for the delayed possession period as per Section 18(1)

of the Act, reimbursement of the housing loan EMI, Rs. 1,39,650/- for modular kitchen. Rs. 1,19,340/- for vitrified tiles, Rs. 1,29,600/- for promised wardrobe, refund of excess consideration for 114 square feet of the carpet area etc.

5.10 The Appellant No. 1 filed its reply to the said Complaint that since the title in the flat has already been transferred on 13.05.2013 after settlement of the entire accounts, no claim can be entertained. The Appellant No. 1 also denied the Pre- EMI liability by submitting that the scheme was only for payment of Pre-EMI of 18 months from the date of disbursal of the loan account and which was paid by the appellants to the bank immediately after the loan amount was disbursed in one go.

5.11 The RERA by erroneously disregarding the submissions of the Appellants regarding the execution of the sale deed much before the commencement of the Act and without considering the full and final settlement arrived between the parties and without appreciating any evidence as to any understanding/agreement for Pre-EMI payment till possession passed its order dated 29.07.2019 impugned directing for payment of interest @ SBI MCLR + 2% for 67 months and 15 days period from 25.06.2008 till 14.01.2014. The RERA also completely misunderstood the super area of 1650 sq. feet as the carpet area and held that the Appellants had transferred 114 square feet lesser area to the Complainants (Respondents herein) and directed for refund of extra consideration of Rs. 2,45,100/- to Respondents. The RERA erroneously also considered the false affidavit filed by the Respondents wherein the Respondents have stated on oath that they had paid an amount of Rs. 7,00,000/- in cash to the Appellants and the cost of the flat, therefore, amounts to Rs. 37,94,250/- which amount was paid by them to the Appellants. It is submitted that the Respondents never mentioned the payment of cash amount to the Appellants at any stage and first time submitted so by way of the affidavit dated 06.06.2019 just before passing of the impugned order.

5.12 The RERA vide impugned order dated 29.07.2019 allowed the complaint without having any authority and jurisdiction under the Act and applicable rules and further without considering the evidence on record in right perspective. RERA is not the Adjudicating officer appointed under Section 71 of the Act read with Applicable Rules and as such it is not competent to adjudicate upon the alleged complaint under the Act and applicable Rules. Only an Adjudicating Officer, who has to be a judicial officer and appointed as per Section 71 of the Act, can adjudicate complaints under Section 12, 14, 18 and 19 of the Act read with Rule 34 of the Rules. The Rule 35 of the Rules does not empower the RERA to award interest prescribed under Rule 15 of the Uttarakhand Rules and it is only the adjudicating officer appointed under section 71 of the Act who is empowered to award interest prescribed under Rule 15. RERA erred in relying on the false affidavit submitted by the respondents wherein they falsely deposed about making payment of Rs. 7 lacs in cash.

The appellants have prayed for setting aside/quashing the order dated 29.07.2019 or pass any other order or direction as this Tribunal may deem fit.

6. We have heard learned Counsel for the parties and perused the record and photocopy/scanned copy of the RERA file. Learned Counsel for the appellants have also filed written arguments.

7. A perusal of the impugned order dated 29.07.2019 of the learned Authority below shows that apart from the first issue about the complaint being time barred and the jurisdiction of RERA, the following five issues were considered and decided by the learned Authority below.

(2) Whether promoter had completed the construction of the flat and handed over its possession to the complainants by the date mentioned in the Agreement? If not, then its effect?

(3) Did the respondents make timely payment of interest part of the EMI of the home loan to the concerned bank? If not, then its effect?

(4) Have the respondents realized more than the cost of the flat as per the Agreement, from the complainants? If yes, then its effect?

(5) Whether this Regulatory Authority has the jurisdiction to get the cost/reimbursement provided to the complainants by the respondents for not providing modular kitchen, wardrobe and wooden floor according to the Agreement?

(6) Have the respondents given lesser area to the complainants than the area of the flat according to Agreement? If yes, then its effect?

On the first issue, learned Authority has held that the complaint is not time barred and that it has the jurisdiction to hear it and this Tribunal has upheld the same *vide* its order dated 19.04.2021 as reproduced in para 3 of this judgment.

On the second issue, it has been held by the learned Authority below that according to the Agreement date 26.11.2006, the possession of the flat was to be handed over to the complainants within 18 months *i.e.* upto 26.05.2008. The Sale Deed has been executed on 13.05.2013 but the possession letter has been given by the respondents to the complainants on 10.01.2014. During the arguments, it was contended on behalf of the complainants that this possession letter was handed over in Delhi and the flat was seen by the complainants afterwards and then they came to know of the shortcomings of the flat. It has also been contended on behalf of the complainants that the possession has been given without obtaining occupancy certificate and completion certificate from the MDDA about which nothing has been stated by the respondents (Appellant herein). According to the letter dated 30.11.2012 of MDDA which is available on the file, part competition certificate of the project has been refused to be given to the respondents. Thus, respondents could neither complete the construction of the flat by the fixed date 26.05.2008 nor could give its

possession to the complainants. According to para 16 of the Agreement, if there is delay in construction due to *force majeure* circumstances then the period for handing over possession would accordingly be extended. The respondents have not stated any specific reasons for the delay in completion of the construction and handing over possession. They have not stated any reason like war, flood, drought, fire, cyclone, earthquake or other calamity caused by nature which are mentioned as '*force majeure*' in Section 6 of the Act. Therefore, the statement of the respondents of the delay in construction and handing over possession due to '*force majeure*' circumstances, is baseless and not acceptable. The respondents are liable to pay interest for every month of delay for the period from 26.05.2008 to 10.01.2014 according to Section 18(1) of the Act. This period comes to 67 months and 15 days and, therefore, the respondents are required to pay interest for 67 complete months to the complainants. The rate of interest has been held to be the highest marginal cost of lending rate of SBI (8.60%) + 2% i.e. 10.60% per annum according to Rule 15 of the Rules. The amounts deposited by the complainants are as below:

1. Dated 10.10.2006- Rs. 3,30,00/-
2. Dated 21.11.2006- Rs. 22,00,000/-
3. Dated 14.07.2008-Rs. 5,64,250/-
4. Dated 31.03.2013-Rs. 7,00,000/-

Total Rs. 37,94,250/-

On the third issue about the interest part of the EMI, the learned Authority below has held that the respondents have the liability to return the amount of Rs. 12,29,716/- paid as interest to the bank on the EMI of the home loan by the complainant along with interest @ 8.60%.

On the fourth issue, the learned Authority below has held that in the Agreement dated 26.11.2006, the basic sale price of the flat has been mentioned as Rs. 33,82,500/- and in the summary of dues, Rs. 25,000/- each has been mentioned for open parking and club membership. Thus, total cost of the flat is Rs. 34,32,500/- while Rs. 37,94,250/- has been

taken for the flat by the respondents, and thus Rs. 3,61,750/- have been taken extra for the cost of the flat by the respondents for which no satisfactory reason has been given by the respondents. Therefore, this excess amount be returned to the complainant along with interest @ 10.60% per annum.

On the fifth issue, learned Authority below has held that the power to adjudge compensation under Sections 12,14,18 and 19 of the Act is with the Adjudicating Officer. The relief demanded in this issue is covered by Sections 12 and 14 of the Act. Only the Adjudicating Officer can decide this issue. After the appointment of the Adjudicating Officer in RERA, the complainant can file a complaint/claim before him.

On the issue no. 6, the learned Authority below has held that in the Agreement, the carpet area of the flat has been mentioned as 1650 Sq.Ft. while in the Sale Deed, the carpet area is 1536 Sq.ft., thus, 1650 minus 1536=114 Sq.ft. carpet area has been given less to the complainant whose cost, according to the Agreement comes to 114x2150= Rs. 2,45,100/- and the respondents are liable to return this amount with interest to the complainant according to the Agreement.

8. Learned Counsel for the appellants have vehemently argued that the respondents (complainant before learned Authority below) have issued full and final settlement dated 31.03.2013 which has been accepted by the appellants herein in full and final settlement of all dues payable by the respondents to the appellants and vice-versa. Pursuant to the full and final settlement, no issue/dispute survived for consideration of learned Authority below in any manner whatsoever and the learned Authority below has not paid any heed to this full and final settlement between the parties against the final demand of Rs. 17,72,681/- otherwise payable by the respondents to the appellants. Pursuant to the full and final settlement, Sale Deed was executed and registered by the appellant in favour of the respondent, Smt. Shobha Malhotra on 13.05.2013. Learned Counsel for the appellants have further argued that the parties without demur, objections, disputes, undue favour, coercion etc. have acted upon

the settlement and got the Sale Deed executed in favour of the respondent no. 1 simultaneously with handing over of the physical possession. Learned Counsel for the appellants have also quoted various rulings of Hon'ble Supreme Court and National Consumer Disputes Redressal Commission in support of their contention.

The Tribunal observes that on 31.03.2013, the GTM Builders and Promoters wrote a letter to the appellant, Mr. Prem Nath Malhotra (respondent no.2) with reference to the full and final settlement stating the following:

> "This is in reference to the full and final settlement against the booking of Flat No-302/FH- 09 in the aforesaid Project.
> We hereby confirm that the full and final amount has been received by us along with service tax applicable on it. The received amount is excluding of Registration/Stamp paper charges and other government charges.
> The charges of interest free maintenance security (IFMS) of Rs. 75000/- via cheque no 731853 dated 31/3/2013 drawn on Oriental Bank of Commerce and Maintenance Charges of Rs 36000/- via cheque no 731854 dated 31/3/2013 drawn on Oriental Bank of Commerce including one year water charges as an advance has also been received by us.
> The PRE-EMI as per the commitment is also adjusted against the settled amount therefore no further amount on account of PRE-EMI is payable to you.
> Further we hereby mention that the flat will be handed over to you within 45 days of issuing of this letter."

Mr. Prem Nath Malhotra (respondent no. 2) has also written letter dated 31.03.2013 to the GTM Builders and Promoters stating the following:

> "This is in reference to the full and final settlement against the Flat No-302/FH-09 has been settled along with the service tax.
> It is further to confirm you that the settled amount is excluding of interest free maintenance security (IFMS) of Rs 70000/- and one year advance maintenance charges of Rs 36000/-which has also been paid by me.
> I hereby also confirm that all the adjustment for PRE-EMI has been done in the full and final amount therefore no further amount is payable from GTM Builders & Promoters Pvt Ltd to me on account of PRE-EMI.
> It is also to confirm that there is no further due pending against the aforesaid flat except registration/stamp paper charges or any other government charges."

While both these letters mention that all the adjustment of Pre-EMI has been done in full and final amount and no further amount on account of Pre-EMI is payable from the GTM Builders to Mr. Prem Nath

Malhotra, there is no specific mention of the claim of interest due to delay in handing over possession having been waived off. Moreover, the full and final settled amount has not been mentioned in any of these letters. The Tribunal also notes that while the Sale Deed executed in May, 2013 mentions the year of construction as 2012 and also mentions that the actual vacant and physical possession of the property has been handed over to the vendee on the spot simultaneously with the signing and executing of the Sale Deed, the possession letter has been issued actually on 10.01.2014. Definitely, the year of construction of the flat cannot be said to be 2012 as it was incomplete at that time nor the possession of the flat can be said to be given in May 2013. Therefore, the Sale Deed is based on false premises. The following extract of this Tribunal's order dated 19.04.2021 is again quoted below:

> "...........The respondents, without obtaining occupancy certificate and completion certificate from the competent authority, gave letter/ proposal to the complainants for taking possession. The respondents in the *mala fide* way and for threatening the complainants sent a final demand note dated 30.06.2012 for Rs.17,72,681/- plus service tax, while the complainants had paid an amount exceeding the full cost of the flat including bank interest. The complainants were afraid that their entire amount will be seized by the respondents and, therefore, under duress and pressure of the respondents, they had to get the sale deed of the flat executed. Ld. Authority below, on observation of the documents filed before it, has found force in the contention of the complainants that they had the fear of their money being seized by the respondents. Ld. Authority below has also observed that till the time of the registration of the sale deed of the flat, respondents had not obtained the occupancy certificate or completion certificate from MDDA and without obtaining occupancy certificate, they have illegally handed over the possession of the flat to the complainants............."

Therefore, the rulings quoted by the learned Counsel for the appellants are not applicable in the instant case. In view of the above, right of the respondents to claim interest due to delay in handing over of possession is not extinguished.

It is only for regulation and promotion of the real estate sector and to ensure sales of the flats, apartments etc. in an efficient, transparent manner and to protect the interest of consumers in the real

estate sector that the Act has been promulgated. Section 18(1) of the Act, is as below:-

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

According to proviso of this Section of the Act, learned Authority below has rightly held that the possession of the flat has been handed over after 67 months and 15 days of delay and has ordered interest to be paid for 67 complete months of delay at the rate prescribed in the Act which according to Rule 15 of the Rules is the highest marginal cost of lending rate of SBI + 2%. The contention of learned Counsel for the appellants that only the adjudicating officer appointed by RERA under Section 71 of the act, could order such payment of interest is not correct as no adjudgment of compensation is involved here. Hon'ble Apex Court in Newtech Promoters and Developers Pvt. Ltd. Vs. State of U.P. and Ors, 2021 (11) ADJ 280, decided on 11.11.2021, has held the following in this regard:

> "86. From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections

> 12, 14, 18 and 19, the adjudicating officer exclusively has the power to determine, keeping in view the collective reading of Section 71 read with Section 72 of the Act. If the adjudication under Sections 12, 14, 18 and 19 other than compensation as envisaged, is extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act 2016."

The Tribunal further observes that in his letter dated 31.03.2013, the respondent no.2 has categorically stated that all the adjustment of Pre-EMI has been done for full and final adjustment, therefore, no further amount is payable from GTM Builders Pvt. Ltd. to him on this account. Therefore, the Tribunal does not agree with the finding of the learned Authority below on this issue and holds that nothing is due to the respondents on this account.

The Tribunal further observes that by 14.07.2008, the respondents had paid Rs. 30,94,250/- to the appellants and they have claimed to have paid Rs. 7 Lacs further on 31.03.2013 in cash according to an affidavit dated 06.06.2019 filed by them before the learned Authority below. Para 7 of this affidavit reads as under:-

> *"7. That further an amount of Rs. 700000/- (Seven Lakh only) in cash for full & final settlement, Rs. 75000/- (Seventy Five thousand only) through Cheque for maintenance security & Rs. 36000/- (Thirty Six thousand only) through Cheque for Maintenance charges, were paid to M/s GTM Builders and Promoters Pvt. Ltd. against Final demand note dt:-30/06/2012, raised by them, for the aforesaid flat."*

This affidavit has been annexed to their submissions dated 07.06.2019 before the learned Authority below. A perusal of the order sheet of the RERA file shows that on 07.06.2019 both the sides filed papers whose copies were provided to other party; the Advocate for the respondents (appellants herein) sought time to file objections on the papers produced by the complainants (respondents herein) and 24.06.2019 was fixed for objections of the respondents (appellants herein). Thereafter, objections have been filed by the Counsel for the respondents (appellants herein) on 24.06.2019. A perusal of these objections dated 24.06.2019 show that this cash payment of Rs. 7 lacs

has not been specifically denied in these objections. Reply dated 05.03.2014 sent by the Advocate for the appellant no. 1 (M/s GTM Builders and Promoter Private Ltd.) to the Advocate of M/s Shobha Malhotra, w/o Sri Prem Nath Malhotra (respondent no.1) in response to his legal notice dated 05.02.2014 *inter-alia* states in para 1(a) 'that entire payment as per final demand note dated 30.06.2012 was paid to my client on 31.03.2013'; meaning thereby, that the respondents had paid the entire payment as per final demand note dated 30.06.2012 to the appellants. This demand note dated 30.06.2012 was for Rs. 17,72,681/- + service tax. The appellants have argued that learned Authority below failed to consider that the legal notice dated 05.02.2014 sent on behalf of the complainants (respondents herein) nowhere states in regard to the payment of Rs. 7 lacs in cash to the appellants. The affidavit is only a statement and not evidence under law and the learned Authority below has lost sight of the basic principle of law that affidavit cannot be read as an evidence, unless deponent is put to cross-examination. The Tribunal observes that the appellants did not object to this affidavit before the learned Authority below nor did they demand any cross-examination of the deponent and the reply of their Advocate dated 05.03.2014 states that entire payment as per final demand note dated 30.06.2012 for Rs. 17,72,681/- + service tax was paid to his client on 31.03.2013. In such circumstances, it is unbelievable that the appellants did not receive this cash payment of Rs. 7 lacs from the respondents, which was much less than the amount mentioned in the final demand note.

The appellants are now stating in the appeal that this cash payment of Rs. 7 lacs was not made to them while they have not denied the same in their objections before the learned Authority below and according to the letter dated 05.03.2014 of their Advocate, the entire payment as per final demand note dated 30.06.2012 was paid to the appellants on 31.03.2013. There is no reason to disbelieve that Rs.7 lacs cash for full and final settlement has been paid by the respondents to

the appellants on 31.03.2013, as has been held by the learned Authority below and the appellants are liable to pay interest on this amount also for the delay in handing over the possession.

Regarding the difference in the area of the flat, the Tribunal observes that in the Agreement dated 26.11.2006, the area of the flat has been written as 1650 sq.ft. It is not mentioned whether it is super area or carpet (covered) area. The Sale Deed dated 13.05.2013 mentions the flat to be having super area of 2000 sq.ft and covered area of 1536 sq.ft. Learned Authority below has taken the mention of 1650 sq.ft in the Agreement to be the mention of covered (carpet) area and has thereby held that 1650-1536=114 sq.ft. carpet area has been given less by the appellants to the respondents and has ordered for refund of corresponding amount of Rs. 2,45,100/- to the complainants (respondents herein). The Tribunal observes that the issue of the area of the flat being less has not been raised by the respondents in their legal notice dated 05.02.2014, nor this issue has been raised by them in the complaint filed before the District Consumer Redressal Forum. The final demand note dated 30.06.2012 issued to the respondents shows enhancement/difference of area of 350 sq.ft. and a corresponding demand of Rs. 7,17,500 on this account. This 350 sq.ft. is the difference between super area of 2000 sq.ft. and 1650 sq.ft. Therefore, the Tribunal holds that the area of 1650 sq.ft. mentioned in the Agreement was intended and understood to be super area and not covered/carpet area and, therefore, no refund is payable to the respondents by the appellants on this account. This Tribunal also holds that since this flat was of bigger area than what was mentioned in the Agreement, therefore, the finally and mutually settled and paid amount of Rs. 37,94,250/- was reasonable cost of the flat and the Tribunal disagrees with the finding of the learned Authority below that Rs. 3,61,750/- have been realized extra towards the cost of the flat and no refund is due to the respondents on this account.

About the issue of modular kitchen, wooden flooring and wardrobe, learned Authority below has correctly held that the power of adjudgment of compensation is with the Adjudicating Officer and the complainants, if they wish, can file a complaint/claim before the adjudicating officer in this regard.

9. To sum-up, the Tribunal upholds the decision of learned Authority below on points no. 2 and 5 and the reliefs granted on points no. 3,4 and 6 by the learned Authority below are set aside. The impugned order dated 29.07.2019 of learned Authority below shall be deemed to be modified accordingly.

The appeal is disposed of as above. No order as to costs.

The amount of Rs. 18,23,819/- deposited by the appellants with this Tribunal be remitted to RERA and the same shall be deemed to have been realized from the appellants in compliance of its order dated 29.07.2019.

Let a copy of this order be sent to RERA for information and necessary action, in terms of Sub Section (4) of Section 44 of the Act.

(RAJENDRA SINGH)
MEMBER (J)

(RAJEEV GUPTA)
MEMBER (A)

DATE: DECEMBER 22, 2022
DEHRADUN
KNP