BEFORE THE UTTARAKHAND REAL ESTATE APPELLATE TRIBUNAL
AT DEHRADUN

Present: Hon'ble Mr. Justice U.C.Dhyani

------ Chairperson

Hon'ble Mr. Rajeev Gupta

------Member

APPEAL NO. 35 of 2019

M/s Resizone Buildwell Pvt. Ltd. **..... Appellant**

vs

Mr. Santan Singh. **.....Respondent**

Present: Sri Bhupesh Kandpal, Advocate for the Appellant-Promoter.
Sri Santan Singh, Respondent-Homebuyer.

JUDGMENT

DATED: JUNE 23, 2021

Per: Justice U.C.Dhyani

1. Present appeal has been filed by the appellant-promoter being aggrieved against the judgment and order dated 05.08.2019, rendered by the Real Estate Regulatory Authority (for short, 'RERA'), in online Complaint No. 26/2019, whereby learned Authority below directed the appellant-promoter to pay a sum of Rs. 26,98,381/- to the complainant-homebuyer with simple interest @ 10.25+2% per annum within 45 days of the order. The interest shall be calculated from different dates, on which the complainant-homebuyer paid the installments to the promoter. The appellant-promoter was also directed to deposit a sum of Rs. 20,000/-, as penalty, in the bank account of RERA.

2. The complainant-homebuyer booked a 3 BHK flat in F Tower Unit No. F-502, area 1490 sq.ft. in the upcoming project, known as Resizone Residency, with the appellant-promoter on 15.04.2014. A total sum of Rs. 53,80,588.35 (sale consideration Rs. 52,35000 excluding service tax) was

to be paid by the homebuyer to the promoter. An agreement was entered into between the complainant-homebuyer and the promoter on 09.05.2014. As per the agreement, the possession of the flat was to be given to the homebuyer within 30 months from the date of signing (the agreement), which may vary plus-minus 6 months. Homebuyer adopted payment plan-cash down (50:50). In other words, the flat, duly completed was to be handed over to the homebuyer latest by May, 2017. The homebuyer filed a complaint with RERA with the averment that there has been a delay of two years in construction of the flat, and there is no chance of its completion within a further period of 3-4 months. The homebuyer retired in July 2017. He is living in a rented house and has to pay installments of home loan. The complainant-homebuyer has deposited a sum of Rs. 26,98,381.00 with the appellant-promoter, between April, 2014 to September, 2014. As per the agreement between the parties, 50% of the cost will be paid at the time of booking and balance shall be paid at the time of delivery of possession. The promoter had promised to handover the possession of the flat by May, 2017 and that was the reason, the homebuyer booked a flat with the promoter (the date of superannuation of homebuyer was July, 2017). The homebuyer is paying Rs. 12,000/- as rent for his shelter and has also to repay home loan of Rs. 35 Lacs. He visited the project site, only to find that it is very difficult for the homebuyer to get a house in the project in near future. The payments were made by the homebuyer, as per the agreement. There is no default in payment of installments. No possession letter has been offered by the promoter to the homebuyer.

3. The promoter contested the complaint of the homebuyer by filing Counter Affidavit. The promoter raised objections that the complaint was not maintainable before learned Authority below. Even if it was maintainable, the same was likely to be dismissed. RERA has given a certificate to the promoter, permitting it to complete the project by September, 2019. The promoter offered the homebuyer to opt for another flat which is complete, either in Tower-A or Tower-B. A Civil Suit

was pending relating to this project and therefore, it was not possible for promoter to complete the project on time. The promoter admitted, in para 72 of the Counter Affidavit, that no construction was possible in the project for three years. According to the promoter, there is a provision in the agreement to settle the matter through Arbitrator. 90-95% of the construction is complete.

4. Both the parties filed the documents in support of their submissions before leaned Authority below, who found that since there is delay in handing over the possession of the flat in question to the homebuyer, the homebuyer wants to withdraw from the project, the complaint was maintainable and, therefore, the promoter was liable to return the principal and to pay interest to the homebuyer from the date, the installments were paid by the homebuyer to the promoter, within 45 days.

5. Written submissions have been filed by the parties. Such submissions are taken on record.

6. Payment of Rs. 26,98,381.00 by the homebuyer to the promoter (between April, 2014 to September, 2014) is a matter of record and is not denied. Non-completion of the flat and thereby non-delivery of possession of the flat in question to the homebuyer by the date agreed upon between the parties, is also a matter of record and is not denied.

7. The question, therefore, for consideration of this Tribunal is- whether the appeal should be allowed on the basis of the grounds taken up in the appeal, as projected in the written arguments?

8. In the written arguments, the appellant has taken following pleas:

(a) The complaint is not maintainable before learned Authority below in view of the provisions of the Act and Rules framed thereunder. Plea has also been taken that the complaint is not

maintainable in view of Arbitration Clause (Clause-32) of the allotment agreement.

(b) The complainant-homebuyer approached learned Authority below even without paying the entire sale consideration. Learned Authority below was not justified in imposing the penal interest upon the promoter.

(c) The delay in completion of the project was beyond the control of the appellant-promoter. The reason for delay is attributed to *'force majeure'.* The delay on the part of the appellant was *bonafide*, on account of pendency of Civil Suit in the Court.

(d) There is no violation of the Sections 18 and 19 of the Real Estate (Regulation and Development) Act 2016 (for short, 'the Act') and the Rules framed thereunder.

9. The grounds taken in the appeal have been reiterated in written submissions, among others.

10. The respondent-homebuyer, on the other hand, has submitted that the appeal has been filed by the promoter on false excuses and, therefore, the same has no legs to stand. According to the homebuyer, the project is still incomplete. The promoter, even on the date, has failed to procure Occupancy Certificate (OC) and Completion Certificate (CC). Due to inordinate delay of approx four years from due date of possession, he (homebuyer) wants to withdraw from the project.

11. On the basis of pleadings of the parties, documents filed by them and rival submissions, the following points for determination arise for proper adjudication of present appeal:

(i) Whether the complaint filed by homebuyer before the learned Authority below was not maintainable, as per the provisions of the Act and Rules framed thereunder, as alleged?

(ii) Whether the complaint was not maintainable in view of Clause 32 (Arbitration Clause) of the allotment agreement?

(iii) Whether the homebuyer is mandated to pay the entire sale consideration before filing complaint?

(iv) Whether the promoter was prevented by '*force majeure*' in completing the project and handing over the possession of the flat in question to the homebuyer on time?

(v) Whether the delay on the part of the promoter was *bonafide* on account of pendency of the Civil Suit?

(vi) Whether the appellant is entitled to any relief?

12. Since there is no variation in any other material proposition of law or fact in this appeal, therefore, no other point for determination arises, nor pressed.

FINDINGS

POINT NO. (i)

13. It is the submission of learned Counsel for the appellant that the complaint filed by the homebuyer before learned Authority below is not tenable in the eyes of law. A reference of certain provisions of the Act and Rules framed thereunder has been given to argue that the complaint was not maintainable before RERA. The same could have been filed before Adjudicating Officer. Learned Counsel for the appellant also argued that the order impugned has been passed by the RERA and not by the Adjudicating Officer. In other words, according to learned Counsel for the appellant, the claim for refund with interest and compensation, will be adjudged by the Adjudicating Officer. No such complaint could be entertained by learned Authority below and, hence, the complaint before RERA was without jurisdiction.

14. This Tribunal is unable to subscribe to such argument of leaned Counsel for the appellant, for the reason that it is within jurisdiction of learned Authority below to direct the promoter to return the amount received by it in respect of any apartment or building, with interest at such rate, as may be prescribed in this behalf. The homebuyer may also claim for compensation, which shall be adjudicated by the Adjudicating

Officer. No Adjudicating Officer has been appointed in this State so far. The claim for compensation and grant thereof by Adjudicating Officer is over and above the return of amount, received by the promoter, in respect of the apartment, along with interest.

15. Sub section (1) of Section 31 of the Act reads as below:

> *"31(1) Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of this Act or the rules and regulations made thereunder against any promoter allottee or real estate agent, as the case may be.*
>
> *Explanation.-- For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force."*
>
> *[Emphasis supplied]*

16. Sub section (1) of Section 71 of the Act may also be reproduced herein below for use:

> *"71. **Power to adjudicate**- (1) For the purpose of adjudging compensation under sections 12, 14, 18 and section 19, the Authority shall appoint in consultation with the appropriate Government one or more judicial officer as deemed necessary, who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard:*
>
> *Provided that any person whose complaint in respect of matters covered under sections 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986, 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."*
>
> *[Emphasis supplied]*

17. Section 18 of the Act is the most important provision and, is therefore, reproduced herein below for convenience:

> ***"Title:** Return of amount and compensation.*
>
> ***Description:** (1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—*

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

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

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

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

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

[Emphasis supplied]

18. **It, therefore, follows that if the promoter is unable to give possession of an apartment in accordance with the terms of agreement for sale, for any 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, with interest at such rate as may be prescribed in this behalf including compensation. If there is any inconsistency in any of the terms of the agreement and the Act, it is the Act, which will prevail**.

19. The next question, which arises for consideration of this Tribunal is, what will be the rate of interest?

20. According to Rule 15 of the Uttarakhand Real Estate (Regulation and Development)(General) Rules, 2017 (for short, 'the Rules'), the rate of interest payable by the promoter to the allottee shall be the State Bank of India highest marginal cost of lending rate+2%.

21. It is also provided in Rule 16 that the interest shall be payable by the promoter to the allottee within 45 days from the date on which such refund along with applicable rate and compensation, if any, becomes due.

22. Chapter-V, which contains Rules 15 and 16, are being reproduced herein below for convenience:

> *"**15. Rate of interest payable by the promoter and the allottee-** The rate of interest payable by the promoter to the allottee or by the allottee to the promoter, as the case may be, shall be the State Bank of India highest Marginal Cost of lending Rate plus two percent. Provided that in case the State Bank of India Marginal Cost of Lending Rate is not in use, it would be replaced by such benchmark lending rate which the State Bank of India may fix from time to time for lending to the general public.*
>
> ***16.Timelines for refund-** Any refund of monies along with the applicable interest and compensation, if any, payable by the promoter in terms of the Act or the rules and regulations made there under, shall be payable by the promoter to the allottee within forty-five days from the date on which such refund along with applicable interest and compensation, if any, becomes due."*
>
> *[Emphasis supplied]*

23. It therefore, does not lie in the mouth of promoter to say that the complaint before learned Authority below was not maintainable and it was not within the jurisdiction of RERA to direct the appellant-promoter to make refund with interest to the homebuyer. The complaint was not only maintainable before learned Authority below, the order impugned is within the scheme of Section 18 of the Act read with Rules 15 and 16 of the Rules framed thereunder, as discussed above.

24. The point for determination is thus answered in favour of complainant-homebuyer and against the appellant-promoter.

POINT NO. (ii)

25. Learned Counsel for the appellant-promoter has argued that there is Clause No. 32 (Arbitration clause), in the allotment agreement and therefore, the complaint before learned Authority below was not maintainable. Learned Counsel for the appellant has also cited a judgment, rendered by Hon'ble Apex Court in *Civil Appeal No. 2402/2019, Vidya Drolia and others vs. Durga Trading Corporation,* dated 14.12.2020. We have the advantage of reading the complete text of the decision, copy of which has been supplied to the Bench by learned Counsel for the appellant.

26. There is an arbitration clause in the allotment-cum-flat buyer agreement dated 09.05.2014. When we were studying the terms of agreement, we were quite surprised to notice Clause No.28 in the agreement to find how the needy homebuyer is forced to sign the agreement at the instance of the builder. Clause 19 (C) of the agreement also runs contrary to the provisions of the RERA Act. It is just as a matter of passing reference. We do not feel it necessary to discuss the same.

27. According to learned Counsel for the appellant, even if the issue of delay is raised (in completion of project), it ought to have been resolved as per arbitration clause 32 of the agreement. According to him, the matter should have been referred to the Arbitrator and the complaint was not maintainable before learned Authority below.

28. A perusal of the file of learned Authority below reveals that the complaint was listed for amicable settlement *vide* order dated 14.05.2019, on 25.05.2019, 04.06.2019, 18.06.2019, 04.07.2019, 12.07.2019 and 19.07.2019, but the efforts for reconciliation failed. No application for taking recourse to arbitration was moved. We do not find any such move on perusal of RERA record.

29. Now, let us discuss legal provisions on this aspect.

30. Hon'ble Supreme Court in Vidya Drolia's decision (*supra*) considered two aspects, namely:

(i) Meaning of non-arbitrability and when the subject matter of the dispute is not capable of being resolved through arbitration; and

(ii) The conundrum- "who decides"-whether the court at the reference stage or the arbitral tribunal in the arbitration proceedings would decide the question of non-arbitrability.

31. The second aspect also relates to the scope and ambit of jurisdiction of the Court at the referral stage when an objection of non-arbitrability is raised to an application under section 8 or 11 of the Arbitration and Conciliation Act, 1996.

32. If the issue is said to be arbitrable, the question which generally crops up is- whether the dispute would be triable by Civil Court or by Arbitrator? If there is existence of an arbitration clause in the agreement, validity of the same would not to be examined by the referral Court. Right in personam is referable to arbitration. Arbitration is a private dispute resolution mechanism, whereby two or more parties agree to resolve their disputes by an Arbitral Tribunal, as an alterative to adjudication by the Courts or a public forum, established by law. Parties by mutual agreement forgo their right in law, to have their disputes adjudicated in the Courts/public forum.

33. Para 22 of the decision of the Vidya Drolia (*supra*) assumes significance, which says -Landlord-tenant disputes governed by rent control legislation are not actions in rem, yet they are non-arbitrable..... As arbitrator is appointed by the parties and not by the State, Arbitrator cannot impose fine, give imprisonment, commit a person for contempt or issue a writ of *subpoena* nor can he make an award binding on third parties and affect public at large, such as a judgment in rem……. Booz Allen & Hamilton Inc. vs. SBI Home Finance Ltd., 2011 (5) SCC 532, refers

that eviction or tenancy matters are governed by special statutes where the tenant enjoys statutory protection against eviction and only the special Courts are conferred jurisdiction to grant eviction or decide the disputes.

34. Para 26 of the Vidya Drolia's decision (*supra*) is very important in the context of this point for determination. The said paragraph (26) is reproduced herein below for convenience:

> *"26. In Emaar MGF Land Limited, the Division Bench referred to the object and the purpose behind the Consumer Protection Act, 1986 as a law that meets the long-felt necessity of protecting the common man as a consumer against wrongs and misdeeds for which the remedy under the ordinary law has become illusory as the enforcement machinery does not move, or moves ineffectively or inefficiently. Thus, to remove helplessness and empower consumers against powerful businesses and the might of the public bodies, the enactment has constituted consumer forums with extensive and wide powers to award, wherever appropriate, compensations to the consumers and to impose penalties for non- compliance with their orders. The Consumer Protection Act has specific provisions for execution and effective implementation of their orders which powers are far greater than the power of the ordinary civil court. After referring to the amendments made to Sections 8 and 11 of Arbitration Act by Act No. 3 of 2016, it was observed that the amendments cannot be given such expansive meaning so as to inundate entire regime of special legislation where such disputes are not arbitrable. This amendment was not intended to side-line or override the settled law on non-arbitrability. Reference was made to an earlier decision in Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke of Bombay and Others, (1976) 1 SCC 496 wherein examining Section 9 of the Code of Civil Procedure in the context of rights and remedies under Industrial Disputes Act, 1947 it was observed that the legislature has made provisions for the investigation and settlement of industrial disputes between unions representing the workmen and the management. The authorities constituted under the Act have extensive powers in the matter of industrial disputes. Labour Court and Tribunal can lay down new industrial policy for industrial peace and order, or reinstatement of dismissed workmen, which no civil court can do. For this, the provisions of Industrial Disputes Act completely oust the jurisdiction of the civil court for trial of the industrial disputes.*
>
> *The intent of the legislature is to protect the interest of workmen and consumers in larger public interest in the form of special rights and by constituting a judicial forum with powers that a civil court or an arbitrator cannot exercise. Neither the workmen nor consumers can waive their right to approach the statutory judicial forums by opting for arbitration."*
>
> *[Emphasis supplied]*

35. Para 36 of the said decision is also important. The same reads as below:

> *"36. In Transcore, on the powers of the Debt Recovery Tribunal (DRT) under the DRT Act, it was observed:*
>
> *"18. On analysing the above provisions of the DRT Act, we find that the said Act is a complete code by itself as far as recovery of debt is concerned. It provides for various modes of recovery. It incorporates even the provisions of the Second and Third Schedules to the Income Tax Act, 1961. Therefore, the debt due under the recovery certificate can be recovered in various ways. The remedies mentioned therein are complementary to each other.*
>
> *The DRT Act provides for adjudication. It provides for adjudication of disputes as far as the debt due is concerned. It covers secured as well as unsecured debts. However, it does not rule out the applicability of the provisions of the TP Act, in particular, Sections 69 and 69-A of that Act. Further, in cases where the debt is secured by a pledge of shares or immovable properties, with the passage of time and delay in the DRT proceedings, the value of the pledged assets or mortgaged properties invariably falls. On account of inflation, the value of the assets in the hands of the bank/FI invariably depletes which, in turn, leads to asset-liability mismatch. These contingencies are not taken care of by the DRT Act and, therefore, Parliament had to enact the NPA Act, 2002." Consistent with the above, observations in Transcore on the power of the DRT conferred by the DRT Act and the principle enunciated in the present judgment, we must overrule the judgment of the Full Bench of the Delhi High Court in HDFC Bank Ltd. v. Satpal Singh Bakshi,32 which holds that matters covered under the DRT Act are arbitrable. It is necessary to overrule this decision and clarify the legal position as the decision in HDFC Bank Ltd. has been referred to in M.D. Frozen Foods Exports Private Limited, but not examined in light of the legal principles relating to non-arbitrability. Decision in HDFC Bank Ltd. holds that only actions in rem are non-arbitrable, which as elucidated above is the correct legal position. However, non-arbitrability may arise in case the implicit prohibition in the statute, conferring and creating special rights to be adjudicated by the courts/public fora, which right including enforcement of order/provisions cannot be enforced and applied in case of arbitration. To hold that the claims of banks and financial institutions covered under the DRT Act are arbitrable would deprive and deny these institutions of the specific rights including the modes of recovery specified in the DRT Act. Therefore, the claims covered by the DRT Act are non-arbitrable as there is a prohibition against waiver of jurisdiction of the DRT by necessary implication. The legislation has overwritten the contractual right to arbitration."*
>
> *[Emphasis supplied]*

36. Section 89 of the RERA Act provides that the Act shall have overriding effect, as below:

> *"The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force."*
>
> *[Emphasis supplied]*

37. According to Section 38 of the Act, the authority shall have the powers to impose penalty or (interest), in regard to any contravention or obligations, which an arbitrator, probably, cannot.

38. Section 40 of the Act provides for recovery of interest or penalty or compensation and enforcement of order etc., in such manner as may be prescribed, as an arrears of land revenue. An Arbitral Tribunal, probably, does not have such power.

39. The Long Title of the Act itself speaks about RERA and Appellate Tribunal, as adjudicating mechanism for speedy dispute redressal, as below:

> "An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto."

Although Arbitral Tribunal is also a mechanism for speedy dispute resolution, but Real Estate (Regulation & Development) Act, 2016 is a special legislation governing the field.

40. RERA is established under Section 20 of the Act. Its functions have been delineated in Sections 32 and 34 of the Act, which an arbitral tribunal adjudicating dispute does not have. The dispute should not be referred to an arbitrator, when there is specialized forum setup for the same. RERA is better equipped to effectively adjudicate promoter-buyer

disputes. So, why should the matter be referred to the arbitrator, when the Act No. 16/2016 is a complete code in itself and provides for adjudicating mechanism for speedy redressal of promoter-homebuyer disputes.

41. RERA was unable to subscribe to such submission of leaned Counsel for the appellant in view of Section 89 of the Act, which has been quoted above.

42. The dispute between the parties can be adjudicated as per the provisions of the Act and even if there is arbitration clause between the parties, the provisions of The Real Estate (Regulation and Development) Act, 2016 have overriding effect (Section 89 of the Act). It is a complete Code in itself. It, therefore, cannot be held that the complaint before learned Authority below was not maintainable, simply because there was an arbitration clause in the allotment agreement. Hon'ble Supreme Court has held, in the context of Consumer Protection Act and Debt Recovery Tribunal, that the disputes triable by such special fora are non-arbitrable.

43. This point for determination is also answered against the appellant-promoter and in favour of the respondent-homebuyer.

POINT NO. (iii)

44. Learned Counsel for the appellant argued that the respondent-homebuyer had no right to approach learned Authority below without paying the entire sale consideration and therefore, learned Authority below was not justified in entertaining the complaint filed by the homebuyer.

45. We do not find any provision in the Act to indicate that the homebuyer is mandated to pay entire sale consideration before filing his complaint before RERA. The entire edifice of the Act would collapse, had there been such provision in the Act, which would have been contrary to the interest of the homebuyer. In the absence of such provision, we are unable to accept the contention of learned Counsel for the appellant that

the complaint was not maintainable for non-payment of the entire sale consideration before learned Authority below.

46. This point is also replied against the appellant-promoter and in favour of the respondent-homebuyer.

POINTS NO. (iv) & (v) are taken together for the sake of brevity and convenience.

47. The concept of '*force majeure*' has been reproduced by the appellant itself, in written submissions, the substance of which is, as below:

> *As per the Black's Law Dictionary, 'force majeure' is an event or effect that can be neither anticipated nor controlled. A force majeure clause may include acts of Government, war, acts of God or any other events or circumstances as may be incorporated by the parties in the contract prior to its execution. The doctrine of frustration, as provided in Section 56 of the Indian Contract Act can be said to be the basis of 'force majeure'. The 'force majeure' events may include fire, civil unrest or terrorist attack. 'Force majeure' is a term used to discuss a 'superior force'. While doctrine of frustration is a common law principle, the 'force majeure' clause is a creation of contract.*

48. Reference of a decision rendered by the Hon'ble Apex Court in Civil Appeal No. 5399-5400 of 2019, Energy Watchdog vs. Central Electricity Regulatory Commission and others, decided on 11.04.2017, has been given to show that there is no fault of the appellant for the delay caused in completion of the project on account of 'force majeure' conditions, which were out of control of the developer-promoter. The delay is also attributed to the fact that the O.S. No. 2896/2014, M/s Brij View Estate vs. Mayur Vihar Kalyan Samiti & others was pending in the Court of Civil Judge, Dehradun, since 2014. The work could be resumed only after settlement of such dispute with society on 02.01.2017.

49. Filing of Civil Suits, in Civil Courts, is more often than not, not uncommon. The appellant was not prevented by war, acts of government, acts of God, fire, civil unrest, earthquake or natural calamity etc. to complete the project. In other words, the appellant was not prevented by

the 'superior force' to complete the project. Non-performance, as in the instant case, does not come within the definition of 'frustration of contract' either. The appellant has not been able to make out a case that it could not complete the project on account of '*force majeure'*. Whatever happened with the promoter, in not completing the project, on time, was business exigency. Further, if there were stay notices by the Mayur Vihar Society, the homebuyer could not, in any way, be held responsible for the same. Respondent-homebuyer was not a party to that Civil Suit. Most important is, use of words, 'for any other reason', in Clause (b) of sub-section (1) of Section 18 of the Act renders possible excuses by the promoter, while expressing inability to give possession of the apartment, on time, as meaningless.

50. These points, are accordingly replied against the appellant-promoter and in favour of the respondent-homebuyer that the appellant was not prevented by '*force majeure'* to complete the project on time. Pendency of Civil Suit has no bearing on the merits of this case.

51. In Civil Appeals No. 3207, 3208/2019, *Marvel Omega Builders Pvt. Ltd. vs Shrihari Gokhale and others*, the Hon'ble Apex Court has held that the builder cannot force the buyer to take possession after extraordinary delay and the buyer is justified to take a refund after such inordinate delay. According to Hon'ble Apex Court, "even assuming that the villa is now ready for occupation (as asserted by the appellant), the delay of almost five years, is a crucial factor and the bargain cannot now be imposed upon the respondents. The respondents were therefore, justified in seeking a refund of the amounts that they had deposited with reasonable interest on said deposited amount. The findings rendered by the Commission, cannot, therefore, be said to be incorrect or unreasonable on any count."

POINT NO. (vi)

52. Learned Counsel for the appellant has filed rejoinder-argument dated 18.06.2021, to submit that:

(a) The flat of the respondent was already ready, but he has not even paid the entire amount. Rather, when the appellant submitted before the Tribunal that respondent may take the flat, respondent denied the same. The appellant is submitting the latest photographs of the flat, as relevant document, in order to show that the flats are already ready. The respondent is making the false statement that the flat is not ready. Rather, the statement of the respondent that even the said tower was not ready, is false and misleading. Photographs and documents have been filed by the appellant along with the rejoinder-argument.

(b) Respondent has no right to claim the refund, as he has not even paid the entire cost of the flat and the action of the respondent is just to harass the appellant.

Submission of the appellant that the flat was already ready, is clearly an afterthought. The reason is that when preliminary objections were filed to the complaint, on their behalf, before learned Authority below, the promoter has stated, in para 9 of such objections, that, 'the construction was delayed (because of) issue of various approvals from statutory authorities and huge cost escalation with steep increase in the cost of building material. As per the agreement of sale, the opposite party is not liable for their inability to complete the construction and deliver possession of the property within stipulated time for reason beyond their control.'

Further, in para 12 of the objections, it has been stated that 'no claim by way of damaged compensation shall lie against the developer in case of delay in handing over the possession on account of '*force majeure'* conditions and the developer shall be entitled to reasonable time extension of the flat to the allottee.'

In para 13 of the preliminary objections, it has been stated that, '.....due to scenario of Real Estate market, the respondent-company was

not able to get the monetary assistance from financial institutions at the relevant time which further delayed the project.'

In additional pleas/parawise reply of preliminary objections filed on 14.05.2019, it was stated that, the work on the site was stalled for 2-3 years, which was beyond the control of the respondents till the time dispute was resolved in the Court. Thus the delay was caused due to the above mentioned '*force majeure'* conditions even though, the respondents were ready and eagerly willing for the issue to be resolved and restart the construction, which they have successfully achieved. Hence, at that time, respondents were unfortunately bound to stop the construction.

In additional pleas/parawise reply, it was also stated that, unlike other projects, which have been delayed due to market condition and unforeseen market slump, the respondent-company has been efficiently working to fill the gap.....but the project got delayed due to '*force majeure'* conditions. .....the respondent will soon offer possession to the complainant.

It was further stated on behalf of the promoter that, the delay is approx. of two years.....that too because of unforeseen '*force majeure*' circumstances.....

It was also mentioned that any delay has been caused due to the reasons, as stated in the reply, which was clearly not under the control of the respondent. Block-A and B of the project are in the finishing stage.

If the flat, to be allotted to the homebuyer, was ready within the time period, as mentioned in the agreement, why such offer was not given by the promoter to the homebuyer, on time, in writing?

Learned Authority below has drawn the inference, while deciding the *lis,* that the project itself is not complete. The promoter has not even obtained the Completion Certificate (C.C.).

Had the project been completed and possession of the flats was worth handing over to the homebuyer, the promoter would have obtained Completion Certificate (C.C.) of the project.

Had the flat been ready, on time, the promoter would not have taken the excuses of '*force majeure'*, frustration of contract, pendency of the case before Civil Court etc., in its pleas and submissions before learned Authority below and before this Tribunal. Further, if the flat was ready, why an option was given to the homebuyer to take another flat, construction of which was complete?

As per the scheme of the Act, the homebuyer is entitled to claim for refund along with interest, if the flat/apartment is not provided to him on time. The appeal has, therefore, no legs to stand.

53. On the basis of above mentioned findings, the appellant is not entitled to any relief. There is no infirmity in the order impugned, which does not call for interference and therefore, deserves to be affirmed. The appeal is liable to be dismissed.

54. The logic is very simple. Homebuyer has paid the money to the promoter. Anybody who would have deposited the amount anywhere, much less in any nationalized bank, would have got the interest on such deposition. In the instant case, as per Section 18 of the Act, read with Rules 14 and 15, the homebuyer is entitled to State Bank of India highest marginal cost of lending rate+2%, which has been done by the learned Authority below. If something did not proceed, as per the liking of the promoter, in completing the project, on time, the same is neither '*force majeure',* nor comes within the scope of 'frustration of contract'. It is 'business-exigency'. Homebuyer cannot be put to blame for the same. The impugned order is as per the scheme of the Act/Rules and is, accordingly, affirmed.

55. The appeal therefore, fails and is dismissed.

56. Amount deposited by the appellant-promoter under sub-section (5) of Section 43 of the Real Estate (Regulation and Development) Act, 2016 be remitted to RERA. Such amount shall be deemed to have been realized from the promoter while securing compliance of the impugned order. Copy of this order be sent to learned Authority below for compliance.

(RAJEEV GUPTA)
MEMBER

(JUSTICE U.C.DHYANI)
CHAIRPERSON

DATE: JUNE 23, 2021
DEHRADUN
KNP