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. 03 of 2020

Air Force Naval Housing Board, Air Force Station, Race Course, New Delhi-110003.

.....Appellant

versus

Bhumika Sharma, daughter of Sri Yogesh Sharma, resident of 15, Mahatma Gandhi Nagar, DCM Ajmer Road, Jaipur, Rajasthan.

.....Respondent

Present: Sri S.K. Mittal, Advocate, for the Appellant
Sri Eshwarya Bangwal, Advocate, for the Respondent

JUDGEMENT

Dated: 20th July, 2022

Per: Mr. Rajeev Gupta, Member (A)

This appeal has been filed against the order dated 15.11.2019, passed by Real Estate Regulatory Authority (for short, 'RERA'), Dehradun, in complaint no. 113/2019, Bhumika Sharma vs. Air Force Naval Housing Board. Vide this order, the appellant has been directed to pay to the respondent the delay penalty interest @ 10.20 % on Rs. 41,22,300/- for the period July, 2017, to December, 2017, and on Rs. 44,01,753/- for the period from January, 2018, to February, 2018 and

the defect liability period for the project has been enhanced to be 5 years for all allottees.

2. The appeal briefly states the following:

2.1 The Air Force Naval Housing Board (AFHNB) is a Welfare Society registered under the Societies Registration Act, 1860, with objective of providing residential houses to the serving Air Force and Naval Personnel and widows of these services only on 'No Profit No Loss' basis under Self-Financed Housing Scheme. The appellant does not possess any fund of its own and is completely dependent on the contributions made by the Naval and Air Force personnel and widows who are allottees of various self financed housing schemes launched pan India. The appellant Board is not a business organization, which works for self benefit, rather it is devoted to promote housing schemes only for Air Force and Naval personnel on cost to cost basis without deriving any benefit.

2.2 The appellant, in the year 2009, launched a Group Housing Scheme at Dehradun. The land for this project was allotted to the appellant by Govt. of Uttarakhand. The interested aspirants/ registrants were issued allotment letter in 2009 indicating tentative area and tentative cost of the dwelling unit opted by them. At the time of launching of scheme in 2009, contract was not finalized and hence, actual total cost of the project could not be derived. However, for planning purpose, a tentative cost and area was intimated to the allottees. In the allotment letter and Master Brochure, issued to the allottees, it was categorically mentioned that the cost of each dwelling unit is tentative and subject to change.

2.3 Clause 3 of this allotment letter reads as below:

"….3. The following sub-heads will be charged additional to above basic flat cost:-

(a) Long Term Maintenance Fund (LTMF).

(b) VAT, Service Tax and Parking Area, depending upon type (Covered/ Stilt/ Open/ Basement). As of now 100 % parking has been planned, which shall be allotted in addition to one mandatory parking.

(c) Equalization charges on delayed payments of installments due will be levied as per rules in force.

(d) *Cost of any additional area, terrace or floor option or facility, if offered."*

In the allotment letter, it was also clarified vide its clause 17 that in case of any delay, no compensation shall be payable because the project is self financed and compensation, if any, has to be booked in the project cost, ultimately to be contributed by the allottees as the Appellant Board neither derives any benefit/ profit nor has separate funds to meet such unforeseen expenditure.

2.4 Due to unforeseen circumstances, which were beyond the control of appellant, completion of project got delayed, which was duly communicated to all allottees. The main reasons for delay in completion of project were ban on mining by the Hon'ble Supreme Court as well as inability of the contractor to infuse sufficient funds for the procurement of material and labour. The first reason was beyond the control of the appellant. However, in order to accelerate the progress, appellant gave financial assistance to the contractor to overcome his monetary constraints. Due to Uttarakhand catastrophe in 2013, progress of this project was also affected badly as it is situated on the banks of river Tons.

2.5 The Appellant Board got the project registered in RERA in September, 2017, wherein completion date of the project was reflected as April, 2018. The project was completed within this time and MDDA issued Completion Certificate on 25.04.2018. Thus, the Appellant Board did not violate any of the RERA provisions. Had the Appellant Board failed to complete the project by April, 2018, as reflected in RERA Portal, it would had violated completion date as mentioned in RERA Portal.

2.6 The respondent (complainant before RERA) requested transfer of her allotment from Jaipur to Dehradun scheme on 01.11.2016. Her request was duly considered and allotment letter was issued to complainant/ respondent on 06.03.2017. In this allotment letter, it was clarified that the cost is tentative and cost of Car Parking and LTMF would be over and above this cost. Further, vide Clause 3 (c) of the allotment letter, it was also clarified that equalization charges will also be applicable to bring her at par with existing allottees. The cost of the dwelling unit allotted to the complainant/ respondent with applicable equalization charges was duly communicated to her as Rs. 50.33 lakh. In the allotment letter, tentative date of completion was mentioned as mid 2017 and it was also clarified that no compensation shall be payable if the project gets delayed due to unforeseen circumstances. These terms and conditions were duly agreed with and accepted by the complainant/ respondent.

2.7 When the project was nearly complete, the cost of the A- II category of dwelling unit (which was allotted to the complainant/ respondent) and equalization charges were revised and frozen to Rs. 48.82 lakhs. The complainant/ respondent, vide letter dated 03.06.2017, submitted a representation requesting to reconsider her case as cost for new entrant was Rs. 48.82 lakhs compared to Rs. 50.33 lakhs demanded from her with equalization charges. The request was duly considered by the Appellant Board and accordingly, revised allotment letter and demand letter were issued to complainant/ respondent on 09.06.2017 wherein the revised cost of Rs. 48.82 lakh was reflected.

2.8 In order to avail loan from bank, complainant requested for certificate of cost for availing loan. The said certificate was issued to her on 28.06.2017, which describes the cost of dwelling unit as Rs. 48.82 lakh wherein already paid amount of Rs. 14.15 lakh transferred from Jaipur project was also reflected. Further, the complainant/ respondent, vide letter dated 14.07.2017 accepted the allotment letter dated

09.06.2017 and requested 3 to 4 months time for balance payment. The Appellant Board also signed Tripartite Agreement in favour of the complainant to arrange loan of Rs. 39.50 lakh.

2.9 The complainant, vide letter dated 30.08.2017, again requested rebate on frozen cost of Rs. 48.82 lakh. The Appellant Board to satisfy the complainant again considered her request and the cost of dwelling unit was reworked on old rates and the total cost including equalization charges was recalculated to Rs. 43,86,753/- instead of frozen cost of Rs, 48.82 lakh (since she was a transferee from another project), as charged from other allottees.

2.10 The possession of allotted dwelling unit was handed over to complainant on 26.03.2018. The complainant without any protest accepted the possession as the Appellant Board reduced cost of dwelling unit for the benefit of the complainant. Hence, after availing all benefits, the complainant is estopped to raise any issue subsequently after a period of more than one and a half years.

2.11 The respondent had taken 'No Dues Certificate' on 26.12.2017 after clearing all dues and 'Certificate of Possession' was issued on 26.03.2018 and the sub lease deed was registered on 18.06.2018. Post possession and registration of flat, the complainant/ respondent had filed complaint before RERA, Dehradun, against the appellant in June, 2019. Grievances raised by respondent were in the knowledge of respondent on 26.12.2017 when the respondent willingly accepted the terms of allotment and paid her dues and obtained 'No Dues Certificate'. Filing of complaint after 1.5 years is clearly an afterthought to misuse the process of law.

2.12 RERA, in its impugned order, has held that the Appellate Board is entitled to recover equalization charges for delayed installments/ dues and at the same time is liable to pay compensation for delay. RERA has wrongly arrived at the conclusion that there was delay in offering possession. The certificate of registration of the project, issued by

RERA, clearly mentions the date of completion of project by April, 2018. It is a matter of record that Occupation Certificate for the project was obtained in April, 2018 itself whereas the respondent took possession of her flat in March, 2018. Hence, going by the facts of the matter there is no delay. The tentative date of possession mentioned in para 17 of allotment letter cannot be taken as final date of possession. Para 17 of allotment letter also mentions that no compensation shall be payable if the project gets delayed due to unforeseen circumstances beyond the control of the AFNHB.

2.13 Allowing of relief of delay penalty to respondent at such a later stage after taking possession and registration of sub lease deed would open a pandora box of problems as more and more allottees would approach RERA, Dehradun, to get same relief on the basis of said order. There are 776 allottees, who have paid their dues and taken possession of their dwelling units. Paying of compensation to an allottee in a Self Financed Scheme certainly creates problem to those innocent allottees, who have taken possession by clearing their dues. The amount of compensation is to be booked in the project cost and to be contributed by all the allottees. Thus, to satisfy one allottee, remaining allottees cannot be put to inconvenience and monetary losses. Since the project is complete in all respects and common facilities have been handed over to the Resident Welfare Association (RWA) even before the filing of complaint by respondent so any complaint regarding previous cause of action should not be allowed.

2.14 RERA also failed to consider the fact that the contract for civil work was awarded to civil contractors by appellant in 2010 and as per terms of the Contract, Defect Liability Period (DLP) of the project is one year from the date of recording of Virtual Completion certificate. The contractor at the time of submitting his tender had quoted the lump sum value of contract taking into consideration the cost he would be incurring in providing repair/ maintenance services to the project for the period of one year only. So at this stage if DLP for the project is changed

to five years, it would entail additional cost for providing services for a period of additional four years. The project being self financed, all such expenditure has to be put in the project cost only eventually putting the burden on allottees. In any case, the Long Term Maintenance Fund collected from the allottees is transferred to their RWA, which is responsible to maintain the project after expiry of DLP period.

2.15 RERA failed to consider the fact that Appellant Board is only a facilitator between the contractor and the allottees. AFNHB after acquiring the land and obtaining all the required permissions/ necessary approvals from the concerned authorities, awards contract for civil works to civil contractors through open bid system. The contractor, who has been awarded the work has to carry out the job assigned independently by mobilizing the required resources/ manpower/ material etc. with role of AFNHB limited to supervising whether the work is being carried out as per contract. It is for the contractor to adhere to the time lines as per schedule of contract and make up for the loss of time, if any. Further any shortage of man/ material/ machines is the onus of contractor only. In spite of best efforts by appellant and numerous notices, issued to the contractor to expedite the work, the contractor failed to complete the project within time frame as per contract agreement. In view of the above submissions, RERA wrongly denied to add contractors of the project as necessary party to the RERA proceedings.

2.16 RERA has wrongly concluded that the complainant is not a consumer of the contractor. The explanation of Clause 2 (zk)(vi) of RERA Act, 'in case of any delay, a person who constructs a building or develops a plot and a person who sells apartment or plot are different persons, both of them shall be deemed to be promoters and shall be jointly liable under the Act.' But the RERA without considering the rule position wrongly held Appellate Board responsible for delay and allowed the contractor to be free from any liability. Even if it is considered that there had been some delay, the Appellant Board cannot be solely

responsible for the delay as in case the appointed contractor does not perform then only remedy available with the Appellant Board is to issue notices and then ultimately terminate the contract, which is again a long process and the project would get delayed further and new contract would be awarded at increased cost which ultimately allottees have to pay in a self financed scheme.

2.17 The appeal has sought the following reliefs:

> "(a) To quash the order dated 15.11.2019 passed by the Chairman RERA Dehradun in complaint no. 113/2019.
>
> (b) To order recovery of rebate/ relief given of Rs. 6,24,655/- on frozen cost of Rs. 48.82 lakh.
>
> (c) To pass such order or further order/ orders as this Hon'ble Authority seem fit and proper in the facts and circumstances of the case in the interest of justice."

3. Before entertaining the appeal, the appellant was required to show its bonafide by depositing 50 % of the amount indicated in the operative portion of the impugned order and accordingly the appellant has deposited a bank draft of Rs. 1,42,533/- in favour of this Tribunal after which the appeal has been admitted and photocopy/ scanned copy of the RERA file has been summoned.

4. We have heard the learned Counsel for the parties and perused the record.

5. Relevant facts of the pleadings made before the learned Authority below and its order dated 15.11.2019 are as below:

5.1 According to the complaint filed before the learned Authority below, the complainant (respondent herein) had booked a flat in Jaipur project of AFNHB in 2015 and paid booking amount of Rs. 1,01,000/- and further two installments of Rs. 7,30,000/- and Rs. 6,00,000/-. The Jaipur Development Authority issued notice to the AFNHB to stop the work of the project, which was informed to the complainant in October, 2016. The complainant requested the respondent (appellant herein) to

return the total amount of Rs. 14,30,000/- to her but the respondent refused to return the money and said that the complainant may seek change from the Jaipur project to some other project of the respondent. The complainant requested for change to Dehradun Phase-II project, which was accepted by the respondent and vide allotment letter dated 07.03.2017, the complainant was allotted as new registration no. DUC 0461, flat category A-2 of super area 1917 sq.ft. and cost Rs. 35,10,000/-. According to this allotment letter dated 07.03.2017, the complainant requested for home loan and contacted the AFNHB office for tripartite contract. Vide letter dated 09.06.2017, the complainant was forced to pay Rs. 14,22,000/- extra by increase in the cost to Rs. 48.82 lakhs, for which the complainant had to take personal loan of additional Rs. 10,00,000/- with 12 % interest. Respondent had initially fixed the sale price of A-2 category flat as Rs. 22,00,000/-, which was increased to Rs. 35,00,000/- in 2016. No equalization charges are due on the complainant as she has never delayed the payment and changed to Dehradun project, which is not as per the will of the complainant but because of deficiency of the service of the respondent. In March, 2018, the flat no. N-003 was handed over to the complainant in defective condition having seepage in the walls and common facilities including STP and common areas were incomplete due to which the Residents' Association formed by AFNHB did not take possession of the common areas. The project is not yet complete and work of more than two towers is incomplete. According to Real Estate (Regulation and Development) Act, 2016, (hereinafter referred as 'the Act'), the promoter should inform the carpet area; the railing of the staircases is unsafe; the petitioner had no option but to take the possession of the house as she had paid for the same after taking loan; the complainant made the complaint of seepage to the respondent but he did not take any action; respondent has not stated in which *khasra* no. the flat N-003 allotted to the complainant is constructed; the complainant has suffered great financial loss in the past four years in paying the installments of the loan and in addition, she is paying rent of Rs. 9,500/-

per month for the past four years and paying interest of Rs. 1,15,000/- per annum against the home loan. As relief, the complainant has demanded that the respondent be directed to return the additional amount of Rs. 10,00,000/- taken as equalization charges, to pay interest on the sale price for more than two years of delay in handing over possession, to rectify the defect of seepage, to execute conveyance deed in favour of the complainant, to keep Defect Liability Period for five years for promoter, to put a ban on the sale of open space for parking and to direct the promoter to ensure compliance of the Act.

5.2 In his written reply dated 23.08.2019 to the complaint, the respondent/ promoter has stated that the AFNHB is a registered housing society working on the basis of 'No profit No loss' and that the allotment letter shows that, in addition to the basic cost, LTMF, VAT, service tax, parking area, equalization charges, cost of additional area shall be taken; the cost escalation will also be payable and no compensation will be payable to the allottee for delay in the project; the complainant has taken possession on 08.03.2018, after paying her dues; the respondent is only a facilitator between the contractor and allottees; despite the efforts of the respondent, the contractor could not complete the project within the time limit of the contract; the contractors of the project, M/s N.G. Construction and M/s Umaxe Projects are necessary parties because the construction was to be done by them and for the delay in the completion of the project, according to the contract agreement, suitable penalty shall be imposed on the contractors. The complainant has never requested for return of money; the return of money is governed by master brochure and the conditions of the allotment, in which interest is not payable and deduction of cancellation charges is provided; the complainant herself requested for change from Jaipur Phase-2 project to Dehradun Phase-2 project vide her letter dated 01.11.2016, which was accepted vide e-mail dated 23.12.2016, in which it was clarified that according to master brochure, the cancellation with equalization charges are due and the complainant's consent was sought on the same; the complainant after considering the option and

conditions conveyed her consent of the change vide e-mail dated 18.01.2017, on which respondent vide letter dated 07.03.2017 informed her about the balance amount and the next due installment and also the information about equalization charges as calculated; after fixing equalization charges, allotment letter dated 09.06.2017 was sent to the complainant along with information for balance amount; the complainant vide letter dated 14.07.2017 requested for extension of time for making the balance payment; complainant vide her letter dated 30.08.2017 requested that equalization charges may not be calculated on the amount paid earlier and requested for recalculation of the equalization charges with the request for exemption; considering her request, the respondent recalculated the equalization charges, which were conveyed vide the final demand letter dated 11.12.2017; the occupancy certificate has been received on 25.04.2018 and the allottees after taking possession and registry, have starting living in their flats; the common areas and facilities of all blocks have been handed over; according to clause 17 of the allotment letter for delay in completion of the project, no interest and/ or compensation is payable; in view of project being self financed, if any compensation or charges are declared that shall be borne by the allottees of the project because the respondent is working on the basis of 'No profit No loss'; the contract agreement of the contractor has been signed in 2010 much before the coming of RERA, in which the Defect Liability Period (DLP) was one year which cannot be increased to five years on the demand of the complainant.

5.3 The complainant has filed her rejoinder to the written reply of the respondent stating that AFNHB being non profit welfare organization has no meaning in this matter and the project is governed by the provisions of the Act; the allotment letter is one sided; the complainant was forced to take possession of the flat in incomplete condition (incomplete common facilities and STP) because for not taking possession, the burden of Rs. 1,000/- would have come on her and the respondent had imposed a fine of Rs. 10,000/- per month for not taking

possession; the contractor is not the promoter of the project and the complainant/ allottee is not the consumer of the contractor and the allotment of the dwelling unit has been done by the respondent and the deficiency in service has been by the respondent; the complainant is not a party to the contract and the complainant has not started any suit against the contractor; the respondent has violated the provisions of the Act by enhancing the cost and delaying the possession; the complainant requested the respondent many times for returning the money deposited in Jaipur project (as the respondent failed to complete the Jaipur project) but instead of returning the money, the respondent directed her to give application for change of project; the Master Brochure, 2012, was never given to the complainant by the respondent; on being asked vide e-mail dated 23.12.2016, the respondent had assured that equalization charges will not be imposed on her as they are for new allotment and not for transferred cases; in the allotment letter dated 07.03.2017, there is no mention of equalization charges to be due in the cases of transfer; the respondent has never been transparent in imposing equalization charges; in the tripartite agreement also, the sale price is Rs. 35,10,000/- and the same equalization charges are being taken from the new allottees and the complainant; the completion certificate is conditional; due to deficiency in essential services, part possession has been taken and the Residents' Association is waiting for the rectification of the deficiencies; the possession of flat was handed over to the complainant in defective condition and the mention of the deficiency is recorded in the register kept by the respondent; the key of the flat no. N-003 was given to the respondent on 19.05.2019 for rectification of deficiency but respondent has failed to rectify the deficiency; the allottee is not sure in which *khasra* number her flat is situated; sub lease deed has been done in the favour of the complainant, which does not provide the right of ownership; in the lease given by Uttarakhand Govt., the right to sub lease has not been given and by making sub lease in favour of the complainant, deceit has been made.

6. Regarding the issue of contractors to be the necessary parties, learned Authority below has held that in Section 2(zk) of the Act, the promoter has been defined and in Section 11, work and duties of the promoter have been mentioned. In other provisions of the Act especially in Section 14, 17, 18 and 19, the responsibilities of the promoter have been mentioned. Respondent itself has got the registration of the project in RERA in the form of promoter as is provided under Section 3 of the Act. On the basis of the promoter getting the construction and other works of the project done by the contractor, the work, duties and responsibilities relating to the promoter, mentioned in the Act, cannot be transferred on the contractor. The complainant has mentioned in her rejoinder that the contractor is not the promoter of the project and the complainant/ allottee is not the consumer of the contractor and that the allotment of the dwelling unit has been done by the respondent and that the deficiency of service is of the respondent and the complainant is not a party in the contract. These points have been held to be justified by the learned Authority below. It has consequently been held that the contractor is not necessary party for taking decision on the points mentioned in the complaint and the total responsibility in the form of promoter is on the respondent only.

7. Regarding the delay in handing over the possession, learned Authority below has held that allotment letter dated 06.03.2017 and 09.06.2017 were issued to the complainant for the allotted flat in the Dehradun project, in which the tentative time of handing over of possession is stated as ‘mid 2017’, while the possession of the flat has been handed over to the complainant on 26.03.2018. Therefore, it is clear that there is delay in handing over the possession of the allotted flat to the complainant.

8. On the issue whether the respondent/ promoter has taken more money from the complainant against the flat, the learned Authority below has observed the following:

8.1 The amount of Rs. 14,30,000/- paid for the Jaipur project has been adjusted against the unit allotted to the complainant in the Dehradun project according to letter dated 07.03.2017 of the respondent and according to letter dated 09.06.2017 of the respondent, an amount of Rs. 14,15,000/- has been informed to be adjusted against the cost of Dehradun flat. Regarding equalization charges, the respondent has recalculated them and the final demand letter dated 11.12.2017 has been sent by the respondent according to which the cost of the flat is Rs. 32.80 lakhs, cost of parking is Rs. 2,00,000/-, LTMF is Rs. 30,000/- and equalization charges are Rs. 8,76,753/-. Thus, total due amount for the housing project has been informed as Rs. 43,86,753/-, out of which Rs. 41,07,300/- has been shown as received and balance demand of Rs. 2,79,453/- has been informed. The transfer document has been executed in favour of the complainant on 18.06.2018, in which the cost of the flat has been shown as 34.80 lakhs, which is less than Rs. 35.10 lakhs as mentioned in the allotment letter dated 06.03.2017. According to para 3 of the allotment letter, LTMF/ equalization charges, tax etc. have to be paid extra. In these circumstances, taking extra money for the cost of the flat is not proved. In para 11 of the allotment letter dated 06.03.2017, the provision about equalization charges have been mentioned and the allotment letter has not been denied by the complainant. Therefore, *prima facie*, it cannot be accepted that equalization charges were not payable by the complainant. During the arguments before the learned Authority below, the Advocate of the complainant stated that the equalization charges are for the delayed payments and the complainant was allottee of the Jaipur project from where she has been transferred to Dehradun project and therefore, she cannot be deemed to have been included late in the Dehradun project. On the date of arguments, the detail of calculation of equalization charges was produced on behalf of the respondent before the learned Authority below clarifying the calculations in this regard on which no objection has been presented on behalf of the complainant. In her correspondence with AFNHB, the complainant has said that she should

be deemed to be allottee of 2015. In 2015, cost of dwelling unit was Rs. 25 lakhs and the complainant had paid Rs. 14.30 lakhs (against the Jaipur project) therefore, from 2009, equalization charges, if they are taken, should be imposed on the balance amount of Rs. 10.30 lakhs. AFNHB, vide letter dated 11.12.2017, has sent the final demand letter for flat no. N-003, according to which, with the equalization charges of Rs. 8,76,753/- the total cost of Rs. 43,86,753/- has been informed. The complainant got the possession of the allotted unit on 26.03.2018. It can be presumed that she was satisfied with the recalculation of the equalization charges and in that sequence only, she deposited the balance amount and got possession. Thus, it has been held that the complaint regarding extra money having been charged from the complainant by the respondent/ promoter is not sustainable.

9. Regarding the defect in the flat allotted and handed over to the complainant, the learned Authority below has held that in the certificate of taking over possession of the flat, there is no mention by the complainant about poor quality of the flat, the flat being in defective condition, seepage in the walls and incomplete facilities. The complainant has not produced any proof/ documentary evidence about this complaint. The respondent has filed the completion certificate issued in respect of the project vide letter dated 25.04.2018. Learned Authority below has observed that the defect in the flat can appear even after the taking over of possession and therefore, the responsibility to rectify the defect is of the promoter upto five years of handing over possession under Section 14(3) of the Act. Therefore, if the defect has been noticed subsequently, it cannot be ignored on this basis that it was not mentioned while taking over the possession. Learned Authority below has further held the defect liability to be for five years on the promoter after the handing over of possession according to the Act. Section 2(zn) of the Act defines the Real Estate project and Section 2(zk) defines the promoter. According to the definition of the promoter, AFNHB is the promoter of the project related to this complaint and according to definition of the Real Estate project, the project related to

the complaint is a Real Estate project. Respondent has got the project registered in Uttarakhand RERA whose registration number is UKREP 02180000163 and validity date is 30.04.2018. Section 14(3) of the Act clearly provides that in case any structural defect or any other defect in workmanship, quality or provision of services is brought to the notice of promoter within a period of five years by the allottee from the date of handing over of possession, it shall be the duty of the promoter to rectify such defects without further charges. Section 14(3) of the Act is applicable on the promoter of this project i.e. AFNHB and the responsibility of the promoter does not get transferred to the contractor to whom contract has been given for construction.

10. Regarding the interest to be paid to the complainant for delay in handing over the possession of the flat, the learned Authority below has observed that no clear date or month for handing over possession of the flat has been indicated and in the allotment letter, handing over has been stated to be tentatively in the mid of 2017. The taking over of possession by the complainant on 26.03.2018 is proved. If the meaning of mid 2017 is taken to be the end of June, 2017, then there is delay of 09 months in handing over of possession. According to *proviso* to Sub-Section (1) of Section 18 of the Act, if the 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 possession, at such rate as may be prescribed. Regarding the interest rate, the same is, according to Rule 15 of the Uttarakhand Real Estate (Regulation and Development) (General) Rules, 2017, which provides the interest rate to be 2 % more than the highest cost of marginal lending rate of State Bank of India which works out to be 8.20%+ 2% i.e. 10.20%. Till 14.07.2017, the promoter had received Rs. 41,22,300/- and on 26.12.2017, he received further Rs. 2,79,453/- making the total amount of Rs. 44,01,753/-. The learned Authority below has held interest to be paid on Rs. 41,22,300/- for the period of 06 months from July, 2017, to December, 2017, and interest to be paid on Rs. 44,01,753/- for the two months of January, 2018, and February, 2018, @ 10.20 % per annum. It

has also been ordered that the defect of seepage in the flat be also rectified by the respondent/ promoter without any extra charges.

11. The appellant has sought quashing of the impugned order dated 15.11.2019. Almost all the contentions raised by the appellant in the appeal have also been raised before the learned Authority below on which the learned Authority below has adjudicated and recorded its findings in the impugned order.

11.1 The issue whether the contractors are necessary parties and liability for delay should also be fixed on them has been examined at length in the impugned order. We agree with the finding of learned Authority below that the respondent (appellant herein) has got itself registered as promoter of the project and by getting the construction and other works done by contractors, the duties and responsibilities of the promoter cannot be shifted on the contractor. The complainant has been allotted flat by the respondent and she can in no way be deemed to be the consumer of the contractors. The allottee/ complainant is in no way a party in the contract between the contractor and the respondent. The appellant has tried to project a picture as if it is a matter between the contractors and the allottees and that the appellant/ respondent is a mere intermediary who just has to supervise the work of the contractors, which is false and misleading. Reference to the explanation to clause 2(zk)(vi) of the Act is also misleading. This explanation reads as under:

> **Explanation**.—For the purposes of this clause, where the person who constructs or converts a building into apartments or develops a plot for sale and the person who sells apartments or plots are different persons, both of them shall be deemed to be the promoters and shall be jointly liable as such for the functions and responsibilities specified under this Act or the rules and regulations made thereunder;

In this explanation, the person who constructs or converts a building or apartment or develop the plot for sale is the developer of the

project and not a mere contractor of the promoter. The contractors as engaged by AFNHB were mere contractors for construction and other works and can by no stretch of imagination be deemed to be developers or promoters of the project.

11.2 Regarding the interest to be paid for the delay in handing over of the possession, Section 18 of the Act is applicable, which reads as below:

> **"18. Return of amount and compensation**.—(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—
>
> (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
> (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,
>
> he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:
>
> Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.
>
> (2) ……
>
> (3) ……..."

11.3 The learned Authority below has held that the flat was to be handed over by 'mid 2017' according to the allotment letters and correctly interpreted the same to be the end of June 2017. Though specific date or month has not been mentioned in the allotment letters and 'mid 2017' has been mentioned as the time when the dwelling units are expected to be ready for possession, it is reasonable to assume the expected time for handing over of the possession to be end of June, 2017, as it falls in the middle of the calendar year 2017. The mention in clause 17 that 'due to unforeseen circumstances beyond the control of AFNHB if the completion of project gets delayed, no interest and/ or compensation shall become payable' cannot override the mandatory provisions of the Act, which clearly lay down that the allottee 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. The rate of such interest has been prescribed vide Rule 15 of the Uttarakhand Real Estate (Regulation and Development) (General) Rules, 2017, to be State Bank of India highest Marginal Cost of Lending Rate plus 2 %. The learned Authority below accordingly has ordered the rate of interest to be 10.20 % p.a. as at the time of the order, the State Bank of India's Highest Marginal Cost of Lending Rate was 8.20 %.

11.4 The appellant's contentions mentioned in para 2.1 and 2.13 above do not absolve from the responsibility of paying interest for delay in handing over of the possession because the appellant falls into the definition of promoter as mentioned in Section 2(zk) of the Act and has got itself registered as the promoter of the project in question with RERA under the provisions of the Act. The law laid down under the Act is equal for all the promoters whether they are individuals or societies or working for profit or on cost to cost basis. As stated in para 2.13 above, the appellant's contention is that allowing of relief of delay penalty to respondent at such a later stage would open a pandora box of problems as more and more allottees would approach RERA to get same relief and that paying of compensation to an allottee in a self financed scheme will create problems for other allottees as the amount of compensation is to be booked in the project cost and to be contributed by all the allottees. The Tribunal observes such contention to be highly irresponsible as there is no provision to keep burdening the allottees with such additional demand of funds. Under law, AFNHB is bound to pay interest for delay in handing over of the possession to the allottee and to put burden of the same on other allottees is highly preposterous. It is not for this Tribunal to suggest how such money should be arranged but some sources for the same can be delay penalty on the contractors, recovery from the functionaries of AFNHB responsible for delay, selling of other assets of AFNHB etc.

11.5 The appellant's contention that according to the registration of the project in RERA, the date of completion of the project was April, 2018 and within this time, the project was completed. The possession of the flat was handed over to the respondent on 26.03.2018, thus, no delay has been caused in the project, is also not acceptable. As Section 18 of the Act refers to the handing over of the possession in accordance with the terms of agreement for sale and in the instant case, the allotment letters shall be deemed to be the agreement for sale and the date specified in such letters shall be deemed to be the date of completion immediately after which the possession should be given to the allottee and for further delay, interest shall be paid by the promoter till the handing over of the possession.

11.6 The appellant's contention that the defect liability period cannot be increased to five years as in the contract agreement with the contractors, they had kept such period to be one year, is also not acceptable in view of Section 14(3) of the Act, which is reproduced below.

> "**14(3)** In case any structural defect or any other defect in workmanship, quality or provision of services or any other obligations of the promoter as per the agreement for sale relating to such development is brought to the notice of the promoter within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge, within thirty days, and in the event of promoter's failure to rectify such defects within such time, the aggrieved allottees shall be entitled to receive appropriate compensation in the manner as provided under this Act."

According to the above, if any structural defect or any other defect in workmanship, quality or provision of services is brought to the notice of promoters within a period of five years by the allottee from the date of handing over possession, it shall be the duty of the promoter to rectify such defects without further charge. The learned Authority below has correctly held that the Section 14(3) of the Act is applicable on AFNHB, the promoter of this project.

11.7 The appellant also seeks recovery of rebate/ relief given of Rs. 6,24,655/- on frozen cost of Rs. 48.82 lakhs to the respondent. The Tribunal observes that this rebate/ relief was willingly given to the respondent/ allottee by the appellant/ promoter and is based on the revised calculation of equalization charges by the appellant. It was not a rebate/ relief ordered to be given by the learned Authority below but a voluntary rebate/ relief given on the basis of recalculation of equalization charges by the appellant/ promoter. In any case, it is as per the agreed cost of the flat between the promoter and the allottee and the Tribunal finds no nexus of the same with the proceedings in RERA or the delay penalty imposed on the appellant/ promoter. In the revised calculations of the equalization charges and the cost of the flat, nowhere it has been stated that this rebate/ relief is being given as compensation for the delay in handing over of the possession. It has been simply the rationalization of the calculations according to which the revised cost has been worked out. Therefore, no relief can be given to the appellant on this ground.

12. From the above, it is clear that the appellant is not entitled to any relief and the appeal is hereby dismissed. No order as to costs.

13. The amount of Rs. 1,42,533/- deposited by the appellant-promoter under *proviso* to sub-section (5) of Section 43 of the Real Estate (Regulation and Development) Act, 2016, be remitted to RERA. This amount may be deemed to have been realized from the appellant-promoter while securing compliance of the impugned order.

14. 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: 20th July, 2022
DEHRADUN
RS