BEFORE THE UTTARAKHAND REAL ESTATE APPELLATE TRIBUNAL AT DEHRADUN

APPEAL NO. 02 OF 2018

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

------ Chairman

Hon'ble Mr. D.K.Kotia

------Member

Mussoorie Dehradun Development Authority, Transport Nagar, Saharanpur Road, Dehradun through its Vice Chairman.

..... Appellant

vs.

1. Shri Abhimanyua Gupta S/o Shri Mukesh Kumar Gupta,
2. Smt. Sarita Gupta W/o Shir Mukesh Kumar Gupta
   (Both residents of A-37, Jal Nigam Colony, Indira Nagar, Dehradun)

.....Respondents

&

APPEAL NO. 03 OF 2018

1. Shri Abhimanyua Gupta S/o Shri Mukesh Kumar Gupta.
2. Smt. Sarita Gupta W/o Shir Mukesh Kumar Gupta
   (Both residents of A-37, Jal Nigam Colony, Indira Nagar, Dehradun)

..... Appellants

vs.

Secretary/Vice Chairman, Mussoorie Dehradun Development Authority, Transport Nagar, Saharanpur Road, Dehradun.

.....Respondent

Present: Sri Amit Chaudhary, Ld. Counsel for MDDA.
Sri Mukesh Kumar Gupta, General Power of Attorney Holder for allottees.

JUDGMENT

Dated: JULY 30, 2018

Justice U.C.Dhyani (Oral)

Appeal No.02/2018 has been preferred by Mussoorie Dehradun Development Authority (for short, MDDA), being aggrieved against the judgment and order passed by Joint Chief Administrator, Uttarakhand Urban Housing Development Authority for Real Estate Regulatory Authority (for short, RERA) in Complaint No. 20/2017, which was filed by Sri Abhimanyu Gupta and Smt. Sarita Gupta against MDDA, for quashing and setting aside the impugned order dated 30.01.2018 passed by the Uttarakhand Real Estate Regulatory Authority in Complaint No. 20/2017, Shri Abhimanyu Gupta/Smt. Sarita Gupta vs. Mussoorie Dehradun Development Authority.

Likewise, Appeal No. 03/2018 has been filed on behalf of Sri Abhimanyu Gupta and Smt. Sarita Gupta, being aggrieved against the selfsame order for the following reliefs:

(a) To refund the whole sum deposited by the appellants for the HIG type-a flat No. F 203 in the MDDA's ISBT housing scheme, without any deduction.

(b) To pay interest as per the SBI highest MCLR plus 2% on the whole amount deposited with respondent.

(c) To compensate the variation in the cost according to the National Cost Index over the full cost of the flat.

(d) Payment of the expenditure occurred during the sanction of loan by the Bank with the stamp papers and other fees.

(e) Financial compensation against the expenses occurred during the case with Hon'ble Uttarakhand Real Estate Regulatory Authority and with Hon'ble Appellate Tribunal.

(f) Compensation for harassment and mental torture to the appellants.

(g) Cancellation of registration of MDDA in RERA and debar to perform the real estate business.

2. Since both the appeals have been filed by the parties against a 'common judgment, therefore, appeal and cross appeal, filed against the same, are being decided together for the sake of brevity and convenience. Appeal No. 02/2018 shall be the leading case.

3. Facts giving rise to present appeals are as follows:

ISBT Housing Scheme was launched by MDDA. Sri Abhimanyu Gupta applied for registration of one HIG type-A flat and deposited a sum of Rs. 1 lakh, as registration amount. He also submitted an affidavit before MDDA, stating that he has read and understood all the terms and conditions of the scheme, as laid down in the brochure. Sri Abhimanyu Gupta (respondent No.1 in Appeal No. 02/2018) also undertook to abide by various terms and conditions as stated therein.

Some of the conditions of the advertisement/ brochure were as follows:

(i) The flats were to be allotted by way of lottery draw (Clause No. 8 of the brochure).

(ii) In case any applicant wishes to withdraw his registration amount before the lottery draw, the same will be refunded without any deduction and without interest within a period of 60 days from the date of application of withdrawal (Clause No.10.10 of the brochure).

(iii) In case the applicant surrenders his reservation/ allotment before possession, then in that event, the amounts deposited by him, will be refunded without any interest after deduction of 10% from registration amount (Clause No. 10.12 (i) and 10.13 of the brochure).

(iv) Proposed completion time of the scheme was 24 months from the date of registration, which period might be extended due to unforeseen circumstances, to which the applicant shall have no objection (Clause No. 16.17 of the brochure).

(v) All taxes payable were required to be paid by the allottee/ applicant (Clause No. 16.18 of the brochure).

As per list No.1 of the brochure, timely payment, which was required from the applicant, was as under:

i	Registration amount at the time of application	Rs.1,00,000.00
ii	Reservation amount on allotment of flat after Lottery Draw	Rs.6,50,000.00
iii	On completion of foundation	Rs.9,75,000.00
iv	On completion of first floor	Rs.9,75,000.00
v	On completion of fourth floor	Rs.9,75,000.00
vi	On completion of eighth floor	Rs.9,75,000.00

Sri Abhimanyu Gupta, being a successful allottee of flat No. F-203 HIG type A was informed *vide* letter dated 15.3.2016 to deposit an amount of Rs.6,50,000/- towards reservation amount, within a period of one month from the date of issuance of the letter. He was also apprised with the schedule of payment. Sri Gupta made payment of Rs.6,50,000/- on 16.04.2016.

Sri Gupta, *vide* letter dated 25.05.2016 made a request to array his wife Smt. Sarita Gupta (respondent No.2) as co-applicant/ co-allottee of the flat, which request was acceded to MDDA under information to respondent No.1 on 03.06.2016.

On completion of foundation work, MDDA, *vide* letter dated 23.09.2016 requested the respondents to deposit an amount of Rs.9,75,000/- + Service Tax Rs. 77,625/-, totaling Rs.10,52,625/-, which the respondents deposited by Challan dated 19.11.2016.

All of a sudden, respondents, *vide* their letter dated 21.08.2017, sought refund of their deposit, on the premise that progress at site was not satisfactory. MDDA, in reply there to, *vide* letter dated 14.09.2017 informed the respondents to present original receipts. It was also informed to them that the amount paid towards Service Tax, can be refunded by the department concerned and MDDA will only issue proper communication.

Respondents *vide* letter dated 16.09.2017, insisted for refund of entire amount with interest. They moved an application before RERA on 18.09.2017.

M.D.D.A., *vide* letter dated 08.11.2017, while cancelling allotment of the flat, instructed Bank of Baroda (BOB), Transport Nagar, Dehradun, with a copy of the respondents to release payment after deducting a sum of Rs.10,000/- towards 10% deduction as per Clause 10.12 (i) of the brochure. For refund of Rs.77,625/-, towards payment of Service Tax, it was stated that, a separate letter is being issued to the concerned department. As has been stated above, on 23.10.2017 respondents filed a complaint before RERA, seeking refund

of entire amount with interest and penalty. On 30.11.2017, respondents moved another application for further reliefs, in addition to the reliefs claimed in the complaint, as under:

(i) To refund the entire deposited amount without any deduction.

(ii) MDDA to make the payment of interest at MCLR rate of State Bank of India applicable from time to time plus 2% interest.

(iii) To award relief of Dearness as per National Index *w.e.f.* October, 2015.

(iv) To cancel registration of MDDA in RERA and to ban it from doing business of real estate.

The appellant MDDA filed written reply on 12.12.2017. Hearing before RERA took place on 16.01.2018. RERA delivered its verdict on 30.01.2018, which is under challenge in present appeals.

4. It is the submission of Ld. Counsel for the appellant-MDDA that although RERA admitted that the respondents had applied for cancellation of allotment much before completion of the project, and yet, by passing the impugned order, got swayed by extraneous consideration in allowing the complaint. **RERA,** although admitted that respondents had acquiesced the terms and conditions as contained in the brochure and admission thereof by them, by way of affidavit, yet awarded the relief of interest and installments paid by the respondents against the loan.

5. It is further contended that RERA, though accepted the condition of brochure of 10% deduction of registration amount, yet awarded the relief of refund without any deduction. It was wrong to say on the part of RERA that there was no contract between the parties. RERA did not disclose under which provision the relief of repayment of installments, paid by the respondents to the Bank and interest thereon, has been granted. There was no privety of contract between the parties to pay the amount of installments and interest thereon to the Bankers. RERA travelled beyond its jurisdiction while granting the same. Respondents failed to disclose and quantify the loss towards installments and interest, but, still they were granted the relief.

6. Principal ground, apart from other admitted facts, in Appeal No. 03/2018 is that, as per the brochure, the completion period scheduled for the project was 24 months from the start date of registration, i.e., 13.10.2015, which could be extended on account of unforeseen circumstances. It is emphasized on behalf of the appellant of Appeal No. 03/2018 that respondents could not complete first floor of the project of eight storied structure in more than 22 months against total specified period of 24 months. MDDA did not come up with 'unforeseen circumstance' causing delay and the revised completion plan. So, the appellant of Appeal No. 03/18 served a notice on 21.08.2017 for unsatisfactory progress, with details of deposited money, for cancellation of allotment and to return the money with interest. It was followed by another letter, which was replied to by MDDA stating that the refund will be given after deduction and without interest. Appellant of Appeal No. 03/18 sent a letter to RERA on 18.09.2017 for intervention in the matter regarding delay in completion of the project. The appellants filed complaint on 23.10.2017 before RERA seeking refund of entire amount with interest and penalty. It is the submission of Sri Mukesh Kumar Gupta, General Power of Attorney Holder (for short, GPAH) that filing of affidavit with application was mandatory because of monopolistic behavior of MDDA, a semi Government Organization, which is not acceptable in law.

7. Ld. General Power of Attorney Holder brought omissions of MDDA, as promoters to the notice of the Court as follows:

(i) Section 11(3)(b) of Real Estate (Regulation and Development) Act, 2016 (for short Act No. 16 of 2016) by which a promoter has to provide, at the time of booking and issuance of allotment letter to the allottee, stage wise time schedule of completion of the project, including the provisions for civic infrastructure like water, sanitation and electricity..

(ii) MDDA failed to adhere to the promise made in the brochure to complete the project in 24 months and thereby violated Section 12. The appellants were never informed about the unforeseen circumstance and the extended time schedule for completion of the project with all amenities. No

consent of the appellants for extension of time of the project was obtained from the appellants.

(iii) There was no written registered agreement with the appellants and thereby Section 13 of the Act No.16 of 2016 was violated.

8. It is further submitted that RERA has although passed the judgment, as per law, but MDDA has been exempted from paying as per State Bank of India Housing MCLR + 2% as per Clause No. 15 of Uttarakhand Real Estate (Regulation and Development) (General) Rules, 2017 (for short, Rules of 2017). MDDA has been directed to pay Bank interest only. MDDA did not perform its functions and duties as stated in Section 3(1) of the Act No. 16 of 2016. It is liable to return the amount and compensation according to Section 18 of the said Act. MDDA also violated Sub Clause (c) of Clause 1 of Sub Section (2) of Section 4 of the Act No. 16 of 2016 and thereby violating registration under RERA. The MDDA also failed to adhere to Section 19(2) of the Act No. 16 of 2016 to provide stage wise time schedule of completion of the project to the allottees.

9. RERA in the impugned order has narrated following facts:

"Complainants Sri Abhimanyu Gupta and Smt. Sarita Gupta filed a complaint on 23.10.2017 under Section 31 of the Real Estate (Regulation & Development) Act, 2016. Complainants applied for registration for Flat No. F-203 under ISBT Housing Scheme floated by MDDA on 9.11.2015. Complainants alleged that progress of construction work is 'nill' on the spot and scheme has not been completed so far. Complainants sought a relief that amount paid by them to MDDA should be refunded to them without deduction and with interest. Written replies were sought from MDDA, who filed written statement on 12.12.2017. Replication was filed on behalf of complainants on 19.12.2017. RERA heard the parties on 16.01.2018. The matter was fixed for 30.01.2018 for final disposal.

RERA after going through the documents and other evidence, found that the complainants applied for registration in Housing Scheme launched by MDDA on 16.11.2015, in which complainants

have agreed to all the terms and conditions, by way of declaration in the registration form. Complainants had agreed to abide by all the terms, specially condition No.9 in his affidavit, which stipulates that if the flats are not constructed within 24 months due to unavoidable circumstances, then they will have no objection. They will not take recourse to Court of law/ Consumer Forum for redressal of their grievance".

According to judgment under challenge, it has been indicated in Para No. 10.12 that if applicants surrender their allotment or any terms and conditions are observed by breach (by applicants), and MDDA makes a refund of monies deposited by them along with interest, if any, 10% of the registration amount shall be deducted.

Flat No. F-203 was allotted to the complainants by MDDA on 15.3.2016. The approximate cost of the flat was 65 lacs. In Para 4 of the allotment letter, time schedule for payment of installment has been given. The same relates to completion of 8th floor of the project. According to Ld. Authority, there is no reference of completion of construction which corresponds the payments of installments by the allottees. The complainants moved an application on 21.08.2017 for cancellation of allotment of flat No. F-203, in which it was mentioned that it was necessary for MDDA to have given possession of the flat by 13.10.2017, which could not be done. The complainants (allottees) requested for cancellation of their allotment in view of poor progress in completion of the project. The complainants (allottees) also requested MDDA to refund the loan amount, which they have obtained from Punjab National Bank, with interest. MDDA, *vide* letter dated 14.09.2017 requested the allottees to supply original receipts of deposition of money (with MDDA). On 18.09.2017 the complainants again made a request to MDDA to cancel their allotment and refund entire amount (along with interest) to them.

According to Ld. Authority, the complainants moved the application for cancellation of allotment two months prior to completion of the project. The complainants (allottees) had undertaken

that they had read the terms and conditions of the project and they agreed to such terms and conditions. MDDA, *vide* letter dated 08.11.2017, addressed to Bank of Baroda, requested the Bank to deduct Rs.77625/- (Service Tax) from total amount of Rs.18,02,625/- (Rs.17,25,000+ Service Tax Rs.77,625) and also to deduct 10% (i.e., Rs. 10,000/-) from registration charges Rs.1,00,000/-, which comes to Rs. 17,15,000/-. There was no reference of the loan amount taken by the complainants from Punjab National Bank in the information supplied to the complainants. MDDA has demanded money from the allottees only up to the stage of completion of foundation of the project. The allottees applied to MDDA two months prior to stipulation duration of completion of the project. By that time MDDA had already completed the project till the stage of foundation. MDDA did not demand money from allottees for further progress of the project and it was just possible that MDDA could have completed the project within two months and would have transferred ownership to the allottees after completing construction up to 8th floor. MDDA did not furnish any information to the allottees for delay in completion of the project, although the allottees made a complaint prior to stipulated duration of completion of the project. MDDA furnished details of the project to the allottees. Allottees agreed to abide by such conditions. MDDA did not conceal any fact which includes the condition that if the project is not completed within 24 months due to unavoidable circumstances, the allottees will have no objection against the same. It does not mean that the allottees were agreeable that the project shall not be completed for infinite period, yet it was the duty of the allottees to have given a notice to MDDA for completion of the project in time or else they would take recourse to a Court of law for refund of amount, along with interest, as also for cancellation of their allotment. The allottees did not do so. They unilaterally applied for cancellation of their allotment, on which MDDA started taking action. Ld. Authority came to the conclusion that although the allottees filed an application for cancellation of their allotment prior to two months of completion of the project, but that is not suggestive of the fact that there was breach of

conditions of brochure. No agreement was entered into between allottees and MDDA.

Ld. Authority, therefore, directed MDDA to refund entire amount to the allottees/ complainants without deduction. A direction was also given to MDDA to refund the installments and amount of interest paid by the allottees to the Bank, from whom loan was taken by them. Such directions were purported to have been given under Section 80 of the Real Estate (Regulation and Development) Act, 2016 read with G.O. dated 28.07.2017 and Office Memorandum dated 24.10.2017 of Regulatory Authority.

10. Launching of ISBT Housing Scheme by MDDA, Sri Abhimanyu Gupta and Smt. Sarita Gupta's applying for allotment of Flat No. F-203, signing of declaration by the allottees, payment by allottees, non completion of the project within stipulated time, application by the allottees for withdrawal of their allotment prior to two months of the project, are some of the facts which are admitted to the parties. There is no dispute on those facts. Although, 'issues' were not settled by Ld. Authority, yet contentious issues have been dealt with by such authority in the order under challenge. Detailed description of such a decision has been given by this Court in preceding paragraphs of this judgment. Ld. Authority has dealt with the entire matter in one long paragraph and concluded the matter. Ld. Authority is advised to settle the 'issues' first and thereafter proceed to discuss those 'issues' one by one with the aid of evidence filed in support thereof, in future.

11. We, therefore, proceed to frame the points of determination, as follows:

(1) Whether the promoter failed to complete the project within stipulated time?

(2) Whether the project could not be completed because of unforeseen circumstances?

(3) Whether the allottes were bound by terms of agreement?

(4) What remedy is available to the allottees, if the promoter fails to complete the project and allottees wish to withdraw their booking?

(5) Whether promoter has provided, at the time of booking and issuance of allotment letter to the allottees, such time schedule of completion of the project, including provision of civic infrastructure like, water, sanitation, electricity? If so, its effect.

(6) Whether MDDA has not entered into written registered agreement with the allottees? If so, whether it is violation of Section 13 of the Act No.16 of 2016?

(7) Whether a request for cancellation of allotment by the allottes, before completion of the project, is not tenable?

(8) Whether RERA could have awarded the relief of refund to the allottees without deduction?

(9) Whether there was no privity of contract between the parties to pay the amount of installments and interest thereon to the Bankers?

(10) Whether award of interest and installments to the allottees, against the loaned amount, is barred by principle of estoppel by acquiescence?

(11) To what relief, if any, are the appellants entitled?

INTERFACE

12. Sri Abhimanyu Gupta (allottee) applied for registration of one number HIG type flat on 16.11.2015 (Ms. Sarita Gupta joined him subsequently). Estimated time for completion of the scheme was (approx) 24 months from the date of registration. Such period might be extended for unavoidable circumstances. The allottees undertook that they will have 'no objection' on the same. On 18.08.2017, the allottees wrote a letter to RERA, under intimation to Secretary, MDDA, permitting them to withdraw from the scheme and return them entire money thus deposited by them, along with interest (copy of the letter: Annexure: 9). This letter was preceded by letter dated 16.09.2017 (Annexure: 8) and letter dated 21.08.2017 (Annexure: 6). Allottees made a complaint to Regulatory Authority in prescribed performa on

23.10.2017(Annexure: 12). Thus, the facts culled out from the record indicate that the allottees applied for HIG house on 16.11.2015 and filed a complaint with RERA on 23.10.2017.

13. Condition No. 16:17 in the Brochure (of MDDA) indicated that tentative time schedule for completion of flats is 24 months from the date of registration of the scheme, which might be extended for unavoidable circumstances, to which allottees will have no objection. Another stipulation in Condition No. 16:17 is that allottees will have no right to approach any Court or Consumer Forum. The declaration at the end of the application form is signed by the applicants/ allottees. Annexure: 2 is an affidavit filed by the allottees. The allottee has undertaken in Para 9 of the affidavit that if the flats are not ready within approx 24 months, then he will have 'no objection' on the same. The project is for construction of eight storey building. There is no default on behalf of allottees as regards scheduled payment. If we presume that the registration started on the date allottees of present appeals applied for registration (which is 16.11.2015), the fact remains that the complaint to Regulatory Authority was filed before expiry of 24 months' period, on 23.10.2017. Not only that, preparation for doing so was already on, when allottees made up their mind and wrote to Secretary, MDDA on 21.08.2017 (Annexure: 6), for withdrawal from scheme and for refund of the principal along with interest, followed by letter dated 16.09.2017 (Annexure: 8) and letter dated 18.09.2017 (Annexure: 9). Thus, they made up their mind to withdraw from scheme about two months prior to estimated time of completion of the project. Not only that, 24 months' time was only an estimated time. Such time could exceed for a reasonable period, to which condition the allottees agreed in their affidavits. Thus, the allottees not only filed their applications and complaints earlier, they also tried to 'cover up' the admission in the affidavit that they will have 'no objection' if the project is delayed for unavoidable circumstances, by taking a plea that it is an example of 'monopolistic behaviour' of the Development Authority. This Tribunal is not impressed by such plea of the allottees, for the following reasons, *viz*:

(i) ‘unavoidable circumstances’ are distinct from ‘unforeseen circumstances’. This Tribunal is saying so, because, on each occasion it was argued that the circumstances were beyond the control of MDDA for unforeseen circumstances, which is akin to ‘*force majeure*’. The words ‘unavoidable circumstances’ are the words of lesser magnitude, and in this case, not even 24 months had elapsed since the registration of the scheme. Moreover, it was not ‘water tight’ 24 months. No dead line was fixed. There was an element of flexibility in it. The word ‘estimated’ or ‘probable’ was used, which could reasonably be extended for further period and still further, the allottees agreed to abide by such condition, of their own violation.

(ii) Applicants sent their applications for registration with initial payment only after having fully understood the terms and conditions of the brochure.

(iii) MDDA cannot be said to be acting arbitrarily and unreasonably when they incorporated a clause that they will complete the flats approximately within 24 months.

(iv) One should not lose sight of the fact that MDDA did not compel any of the applicants to move his/her application for registration of the flats. Option was left purely with the allottees. MDDA has not changed terms and conditions or Rules, once the game started.

(v) Factually, the position in this case clearly unambiguously reveals that the allottees, after voluntarily accepting the conditions imposed by MDDA, have entered into the realm to conclude contract pure and simple with MDDA and hence, allottees can only claim the right conferred upon them by the said contract and are bound by the terms of contract unless some statute steps in and confers some special statutory obligations on the part of MDDA in the contractual field.

(vi) There is a catena of decisions to show that where the contract entered into between State (read MDDA) and the persons aggrieved, is non statutory, purely contractual, the rights are governed only by the terms of the contract. The decision rendered by Hon’ble Apex Court in Bareilly Development Authority and another vs. Ajay Pal Singh and others, AIR 1989 SC 1076 is an illustration on the point,

para 15 of which is akin to the affidavit filed by the allottee in the instant case.

(vii) It is a case of admission and avoidance by the allottees.

14. In Ramana Daya Ram Shetty vs. International Airport Authority of India, AIR 1979 SC 1628, it was observed that in price fixation the executive has reasonable discretion provided there is no statutory control over its policy of price fixation and it is not the function of the Courts to sit in judgment over such matters of economic policy. When the parties have entered into the field of ordinary contract, the relations are no longer covered by any other provision, but by legally valid contract which determines the rights and obligations of the parties *inter se*.

15. Section 18 of the Real State (Regulation & Development) Act, 2016 (No. 16 of 2016) (hereinafter referred to as the 'Act') provides that if the promoter fails to complete an apartment or building, in accordance with the terms of the agreement for sale or as the case may be, duly completed by the date specified therein (read approximate 24 months), he shall be liable on demand to the allotttee, in case 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 in the manner as provided under this Act.

16. The other important aspect is 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 handing over of the possession at such rate, as may be prescribed.

17. It, therefore, follows that the promoter's failure to complete the apartment or building by the date specified in the agreement for sale, the promoter shall return the amount received by him in respect of that apartment, with interest at such rate as may be prescribed in this behalf, in case the allottee wishes to withdraw from the project.

18. Section 18(1) of the Act, therefore uses the words "duly completed by the date specified therein", "in accordance with terms of the agreement for sale". It does not use the words "if promoter is unable to complete the apartment or building by the date specified in the agreement". There is no pointer for the future. It is indicative of the past only. It only points out that 'if the construction is not complete' and not that, 'if the construction is not likely to be completed'. The allottee has the discretion to withdraw from the project, as per Section 18(1), only when the promoter fails to complete the building by the date specified in the agreement for sale. The word 'fails' is used in the Sub Section and not the words 'unable to complete' or 'likely to fail'. It is, therefore, clear that the cause of action will arise to the allottee only when the promoter fails to complete the building by the date specified in the agreement for sale. Here 24 months' period is a flexible period which could reasonably be extended for further few months, depending upon peculiar facts and circumstances of each case.

19. This inference is further strengthened by the language used in *proviso* to Sub Section (1)of Section 18 of the Act, which prescribes that if an allottee does intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay till handing over of the possession, at such rate as may be prescribed, which means that if there is delay in completion of apartment and as a consequence thereof, delay in handing over the possession, the promoter shall pay interest to the allottee for every month of delay, at such rate as may be prescribed.

20. The allottee has, therefore, option to withdraw from the project only when the promoter fails to complete the building by the date specified in the agreement. Furthermore, the expression "on demand" used in Sub Section (1) of Section 18 of the Act means a request from the allottee that he wishes to withdraw from the project and the amount paid by him should be returned to him. The words "on demand" also qualifies the fact that the promoter should have failed to complete the apartment by the date specified in the agreement. Here the demand was initiated by the allottees much before 24 months, even if it be

conceded for the sake of arguments that they filed the complaint with RERA no sooner 24 months were completed, although the agreement envisaged flexibility to a reasonable extent as regards the time period of completion of the apartment. Remedy was available to the allottees only on completion of 24 months, if construed strictly, or after a reasonably extended period, if construed liberally.

21. For academic purposes, let us discuss what is rate of interest, prescribed in the Rules?

Chapter V of the Uttarakhand Real Estate(Regulation and Development(General) Rules, 2017 provides as under:

> "**Rate of interest payable by the promoter and the allottee**
>
> **15.** 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."

Section 2(za) of Act No.16 of 2016 reads as follows:

> *".(za)* "interest" means the reates of interest payable by the promoter or the allottee, as the case may be.
>
> *Explanation*- For the purpose of this clause-
>
> (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;
>
> (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date of amount or part thereof and interest thereon is refunded, and the interest

> payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

22. Condition No. 9 of the affidavit of allottee Abhimanyu Gupta is that if the flats are not completed within approx 24 months in inevitable / unavoidable circumstances, then he will have no objection. Second part of the Condition No. 9 is contrary to Section 28 of the Indian Contract Act and, therefore, MDDA is advised to delete second part of Condition No.9 in future agreements/ affidavits.

23. Likewise, in Para 16:17 of the Brochure it has been indicated that probable (*sambhavit*) time for completion of the flats is 24 months from the date of beginning of the registration, but in unavoidable circumstances, this period (for completion of flats) is likely to be extended, to which the allottee will have no objection. A condition has been fastened whereby the allottee has been restrained from taking recourse to legal proceedings, which is in violation of Section 28 of Indian Contract Act, 1872 and, therefore, should be struck down and set aside. But since we are hearing the appeals and no such prayer has been sought by the allottees, therefore, we can only advise MDDA to delete such part of the condition in future.

24. To recapitulate, the allottees moved application for registration on 16.11.2015, therefore, reasonably, even if they were of the view that the flats ought to have been completed within 24 months, then 'demand' [used in Section 18(1)] on their behalf ought to have been raised only on 15.11.2017, and not before that. Even if the submission of the allottees, in their application dated 21.08.2017 (Annexure: 6) is that the flats ought to have been completed by 13.10.2017, the fact remains that Annexure: 6 was moved even before 13.10.2017, almost two months prior to the probable time of completion of flats, in the estimation of the allottees. The subject of Annexure: 6 is cancellation of allotment and refund of principal along with interest which includes interest payable by the allottees, towards the loan obtained by them from the Bank. In Annexure: 6 dated 21.08.2017, a request was made

to treat such letter as notice. The reason assigned by the allottees in such letter was that, it is not possible for the Development Authority to complete the construction of flats by 13.10.2017, as per the progress of construction on the site. [In their reply before RERA], the allottees have stated that out of two years, one year has been consumed in laying foundation, which is indicative of mismanagement on the part of MDDA.

25. In the humble opinion of this Court, legally, it was not permissible for the allottees to have pre-empted, in the absence of any evidence, to have declared that completion of flats by 13.10.2017 would not be possible. If the law declares anything to be done in a particular manner, the allottees should have done that thing in that manner alone. If Section 18 desires that demand notice should be given only after completion of the time schedule of construction, nobody is expected to interpret such statutory provision in other way.

26. Section 18 nowhere deals with the complaint by the allottee. It deals with 'Return of amount and compensation'. It speaks about the fact that if the promoter fails to complete the apartment within the date specified in agreement for sale, he shall be liable on demand to the allottees to return the amount received by him along with interest. Here demand is premature. The allottees did not wait even for 24 months, although the clause is flexible that the time schedule for completion of the project is tentatively 24 months, which means that there is no date fixed. It is only tentative, that the building may be constructed within 24 months. MDDA never made a commitment that the date of completion of the building will be exactly 24 months and no more. Section 31 of the Act speaks about 'Filing of complaints with the Authority or the Adjudicating Officer.'

27. Annexure: 6 was replied to by MDDA on 14.09.2017 (Annexure: 7). The allottees served a reminder upon MDDA on 16.09.2017 (Annexure: 8). Within two days, they gave another letter dated 18.09.2017 (Annexure: 9) to RERA with a copy to MDDA for refund of principal along with interest. Thus, it is clear that deemed demand

notice (Annexure: 6), sent by the allottees to MDDA, is premature. The allottees were entitled to withdraw from the project only when the promoter failed to complete the apartment, in accordance with the terms of the agreement and only then MDDA was bound to return the amount received by it with interest thereon, as per law, on making a demand by the allottees from it. Here the allottees demanded the same, after withdrawing from the project, but before tentative time schedule of completion of the project, as declared by MDDA. Here, we have to go by law, in letter and spirit. The law, in given set of facts and circumstances, goes against the allottees in the instant case.

28. Next question is – what will happen if they are not covered by Section 18(1) of the Act? The obvious reply would be, the rights and liabilities of the parties shall be decided in accordance with the agreement [Read 'Brochure' and 'affidavit' here].

29. The declaration in the brochure is that if flat is allotted to any allottee, and he wants to surrender the same, then the allotte shall be entitled to refund of registration amount after deducting 10% and no interest shall be payable to such allottee (Para 10.11),as has been indicated on behalf of MDDA in its letter dated 14.09.2017 (Annexure: 7) and letter dated 8.11.2017 written to the Bank (Annexure: 10), which say that the allotttees will be refunded balance amount after deducting 10% of the registration charges and no interest will be payable. MDDA has taken recourse to para 10.12 of the brochure to show that 10% of the registration charges of Rs.1 lac, which comes to Rs.10,000/-, shall be deducted and the balance Rs.17,15,000/- shall be refunded to the allottees.

30. Nobody can go beyond the contract. If there is a statute, contrary to certain provisions of the contract between the parties, such conditions in the contract shall remain eclipsed . It was a premature claim on behalf of the allottees. They might have filed the complaint before RERA in time, but their demand notice was premature, as has been discussed above. It has already been indicated above that if the law presupposes something to be done in a particular manner, the

things should be done in that manner only. Section 18 is not based on 'apprehension' of the allottees. It pinpoints that if apartment/ building is not completed by the due date, then only, on demand notice, the promoter shall be liable. Section 18 also does not envisage the concept of 'proportionality'. It is not permitted for any allottee to foresee that if foundation of any building is complete within a specified period, certain stories of the building cannot be raised within remainder of time. Section 18 does not permit an allottee to pre-empt, what has not happened till date and that is the drawback of the allottees in the instant case. It is an 'ongoing project' by MDDA and although no unavoidable circumstance has been established by MDDA, yet there is flexibility clause in their agreement that probable time of completion of the building is 24 months. Although time is essence of contract, yet, in the instant case, the time is elastic, which can be stretched to a reasonable extent in the given facts and circumstances. Allottees, it appears, were impatient to get their money refunded along with interest, which was not to be. In fact, scheme of law does not permit us to give a verdict in favour of the allottees.

CONCLUSIONS THUS DRAWAN ARE:

On the basis of above detailed discussion, the reply of the points of determination, in short, is as follows:

(1) When demand notice was issued on behalf of the allottees, stipulated time for completion of the project was not complete. Demand notice was premature in view of Section 18 of Act No. 16 of 2016. Although, the promoter failed to complete the project within 24 months, but such time, as per declaration was flexible and, therefore, could be reasonably extended to further few months.

(2) There is no evidence of unforeseen (or unavoidable) circumstance and, as has been held above, the demand notice was issued by the allottees even before 24 months, which was probable time period for completion of the project.

(3) The allotttes are bound by the terms of agreement. Although there is no 'agreement' as such, but the allottees have

undertaken, by way of affidavit to abide by terms and conditions of the brochure.

(4) Remedy has been provided under Section 18 of the Act No. 16 of 2016, a reference of which has been given above under the head ‘interface’.

(5) The reply seems to be in the affirmative although the project has not been completed as yet.

(6) Section 13 provides that the promoter cannot accept a sum more than 10 percent of the apartment/ plot cost as an advance payment/ application fees. For any further collection towards the apartment/ plot cost, the promoter is required to enter into an ‘Agreement for Sale’ with the allottee.

As per Section 13(2) the appropriate Government is required to specify through Rules the ‘Agreement for Sale’ to be entered into between the promoter and the allottee. This Agreement is binding on the parties. This is in Chapter III, under the head “Functions and Duties of Promoter”.

The project underken by MDDA commenced in the year 2015. Some of the provisions of the Act came into force in April/May, 2016. In February, 2017, the whole Act came into force. This Court has been informed that no form for ‘Agreement for Sale’ has been prescribed under the Rules.

In the instant case, admittedly, ‘Agreement for Sale’ has not been entered into between the promoter and the allottees. Nevertheless, terms and conditions are contained in the brochure, which the allottees have agreed to abide by. They have agreed that they shall abide by the terms and conditions of the brochure. Affidavit has been filed on their behalf. Although, there is no ‘Agreement for Sale’, yet, there was probable date, by which the apartment was to be duly completed by the promoter, which conforms to the provision of Section 18(1) of the Act. If the promoter fails to complete the apartment by the date specified, then, according to Section 18(1) of the Act, he shall be liable, on demand, to the allottee, in case the allottee wishes to withdraw from the

project, to return the amount received by him with interest. Point No. 6 is answered accordingly.

(7) Request for cancellation of allotment by the allottees is not tenable in view of the above detailed discussion. They are out of the preview of Section 18 of the Act. Their case will, however, be governed by the terms contained in the Brochure and affidavit filed on their behalf.

(8) RERA could not have awarded the relief of refund to the allottees without deduction, in view of Para 10 of the brochure.

(9) There is no evidence to show that there was contract between the parties to pay the amount of installments and interest thereon to the Bankers. The question is replied accordingly.

(10) Award of interest and installments to the allottees against the loaned amount was beyond the purview of terms and conditions of brochure and, therefore, is not permissible. Compensation could only be adjudicated by Adjudicating Officer [Section 71 of the Act].

(11) Ld. Authority below has although admitted that the allottees have moved an application for cancellation of allotment prior to two months of the completion of the project, yet have granted partial relief to the allottees, which in the given facts of the case, is interfereable. Ld. RERA has granted relief to the allottees on the ground that they have not committed breach of any condition of allotment and no agreement has taken place between the parties, yet, granted relief of payment of interest corresponding to the interest on their borrowing from the Bank and refunding entire amount without deductions, for no just reason, and therefore, this Court is of the view that whereas Appellant of Appeal No. 02/2018 is entitled to relief sought, the Appellants of Appeal No. 03/2018 are not entitled to reliefs claimed in their appeal.

ORDER

Whereas Appeal No. 02/2018 filed by MDDA against the respondents allottees is allowed, Appeal No. 03/2018 filed on behalf of

Sri Abhimanyu Gupta and Smt. Sarita Gupta (allottees) against MDDA is dismissed. The parties shall bear their own costs.

The judgment and order passed by Ld. Authority below is set aside.

The allottees shall, however be entitled to refund as per Para 10.00 of the Brochure (Annexure: 3), for which the Development Authority is already agreeable.

The allottees may, however, continue in the housing scheme of the MDDA, as allottees, as per the conditions of the agreement, if they so desire, without prejudice to any remedy available to them under law. The allottees, in such case, are permitted to withdraw their applications submitted to the MDDA for cancellation of their allotment. This part of the order is being passed purely in the interest of justice, keeping in view the peculiar facts of the case.

Deposition (and not the Court Fee) of the promoter be refunded to it, as per Rules.

A copy of this judgment be provided to the Development Authority as well as to the allottees, as per Rules, within 72 hours. Let a copy of this judgment be also sent to RERA, Dehradun for information and necessary action. RERA is requested to send a copy of this judgment to every Development Authority of the State.

ADVISORY

Before parting with it, we owe a solemn duty to issue an advisory to Development Authority in respect of its working as promoter, as follows:

Section 11(1) of the Act No. 16 of 2016 provides that the promoter shall create its Web Page on the Website of the Authority and enter all the details of the project for public viewing, including quarterly up to date status of the project. It appears that the same is not being done. If that is so, Development Authority is advised to abide by Clause (e) of Sub Section (1) of Section 11 of the Act.

MDDA is working in public domain. It cannot be equated with other private promoters. It has been permitted to act as promoter by virtue of Clause (zk) of Section 2 of the Act. It has several tasks to perform as provided under Section 7-A of the U.P. Urban Planning and Development Act, 1973 (as applicable to the State of Uttarakhand).

This Court has been informed that the Development Authority is not doing construction work on its own. Rather, it is, being done through some sub contractor. Even if it is so, MDDA is responsible for its duties as promoter. MDDA cannot be absolved of its responsibility as promoter, if it is getting contract work done through any sub contractor.

If the Development Authority has no sufficient means to act as promoter and is unable to deliver the goods in time, it is well advised not to act as promoter in future. Development Authority is also expected to construct quality buildings/ apartments, at reasonable rates, and within time, and not to lure public for earning undue profit. The very fact that it has delegated the work to sub contractor, means that is has no sufficient means to produce quality constructions and deliver the possession to gullible innocent people in time.

If Development Authority wants to continue as promoter, many clauses of the Brochure and proforma affidavit need to be revisited. Fair trade practices should be adopted in business ventures.

A piece of advice to RERA also. The Authority should take suitable measures for the promotion of advocacy, creating awareness and imparting training about laws relating to real estate sector and policies. [Section 33(1) (3) of the Act No. 16 of 2016].

RERA record be also sent back.

(D.K.KOTIA)
MEMBER

(JUSTICE U.C.DHYANI)
CHAIRMAN

DATED: JULY 30, 2018
DEHRADUN

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