BEFORE THE UTTARAKHAND REAL ESTATE APPELLATE TRIBUNAL AT DEHRADUN

APPEAL NO. 07 OF 2018

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

------ Chairman

Hon'ble Mr. D.K.Kotia

------Member

M/S Eminent Infra Developers Private Ltd, through its Director/ Authorized Representative, Regd. Off. A-1/112, Safdarjung Enclave, New Delhi-110029..

..... Appellant

vs.

Smt. Rashmi Bala Ahluwalia,w/o Co.(Retd.) Jitendra Kumar Ahluwalia, r/o H.No. A-14, Bawa Vihar, Sector-9, Ambala City (Haryana)

.....Respondent

Present: Sri Ansuya Prasad Chamoli, Counsel for the appellant
Sri Aalekh Nirala, Advocate/ Authorized Representative, for the respondent.

JUDGMENT

Dated: OCTOBER 29, 2018

Per: Justice U.C.Dhyani

Present appeal has been filed by the appellant for the following reliefs:

(i) Set aside and quash the impugned order dated 24.07.2018 passed by the Real Estate Regulatory Authority, Dehradun, Uttarakhand in the case bearing No. 02/2017 titled as Smt. Rashmi Bala Ahluwalia vs. M/S Eminent Enfradevelopers Pvt. Ltd.

(ii) Direct the respondent to take possession of flat in question i.e. Unit No. S 2-310, Third floor, measuring 1135 sq. ft., situated in the multi phased group housing project under the name and style of "Aarogyam" at Village Badheri Rajputana, Tehsil Roorkee, District Haridwar (UK) or

(iii) Direct the respondent to choose the option of alternative flat in accordance with Clause 3.6 of Flat Buyer's Agreement dated 12.03.2012.

(iv) Any other relief which the Hon'ble Tribunal, in facts and circumstances of the case, may deem fit and proper be passed injunction favour of the appellant and against the respondent.

2. The facts giving rise to present appeal are as follows:

2.1 On 12.03.2012, the respondent was allotted a 2 BHK Unit No. S 2 310, Third floor, admeasuring 1135 sq.ft. situated in the multi phased group housing project under the name and style of "Aarogyam" at Village Badheri Rajputana, Tehsil Roorkee, District Haridwar (hereinafter referred to as 'Flat in question'), being developed by the appellant. A Flat Buyer's Agreement (hereinafter referred to as 'the Agreement') dated 12.03.2012 was executed between the appellant and respondent. Further upon payment of entire consideration of Rs.20,50,000/-, a Sale Deed was also executed in favour of the respondents on 26.08.2014. The respondent/ complainant stated that the consideration of the sale deed is Rs.31,67,638/-. The possession of flat in question was, as per Clause 3.3 of the Agreement, not given in time. In the complaint, the respondents stated that multiple irregularities have been committed by the appellant company, who has failed to respond to the communication of the respondent. The respondent has alleged that there is delay of more than five years in handing over the possession and the appellant has failed to provide the amenities, as promised in the brochure. Feeling aggrieved, the complainant approached Real Estate Regulatory Authority (for short, 'RERA'), who passed an order (Annexure: 1), which is under challenge in present appeal.

2.2 RERA has narrated the facts giving rise to filing of complaint by the complainant (respondent herein). It has been mentioned in the order under challenge that the complainant filed the complaint for directing the promoter to pay 18% interest for not giving the flat in time. One Chartered Accountant and one Company Secretary, along with two Advocates were authorized to place the case of the complainant. The promoter authorized Sri Narayan Agarwal to place it's case on it's behalf. The complainant filed his affidavit on 24.04.2018. Written submissions were filed on 08.06.2018. The disputants appeared on 24.04.2018, 18.05.2018, 08.06.2018 and 06.07.2018. Sri Vikrant Gambhir and Sri Ashish Gupta filed their Vakalatnama on behalf of promoter. The

complainant supplied all the documents to the promoter on 06.07.2018. The promoter was given time up to 13.07.2018 to file it's replies/ written statement. 20.07.2018 was fixed for final hearing. No written statement / reply was filed on behalf of promoter till 20.07.2018. Owing to alleged illness of it's authorized attorney , 10 days' further time was sought for filing replies. Since sufficient opportunity was already given to the promoter to file replies and there is provision in the Real Estate (Regulation And Development) Act, 2016 (for short, 'Act of 2016') to decide the complaint within 60 days, therefore, such application of the promoter was rejected. RERA has gathered impression that repeated adjournments are sought unnecessarily and, therefore, proceeded with the decision on the complaint in accordance with law.

2.3 Complainant booked a flat with the promoter in January, 2012. He paid a sum of Rs.31,67,638 up to August, 2014 to the promoter. The possession of the flat was to be given within 15 months, up to April, 2013, but, according to the complainant, no such possession has been given, 60 months having been elapsed, despite the fact that the entire money has been paid to the promoter. Besides that, there are many irregularities in construction of the flat. Letters were sent by the complainant to the promoter by e-mail, but these communications remained unanswered. Hence, the complainant prayed for refund of principal amount along with penalty, to be realized from the promoter.

2.4 Affidavit filed by the complainant indicated that the Agreement was executed between the parties on 12.03.2012. Sale deed was executed on 26.08.2014. The basic price of the flat was Rs.20,50,000/-. According to Clause 2.3 of the Agreement, 18% interest was to be paid by the promoter, if the possession is not delivered to the complainant in time, which might be extended for three months. There were certain promises held out to the complainant by the promoter, in the Agreement, which have not been fulfilled.

2.5 Although sale deed in respect of Flat in question was executed on 16.08.2014, but the promoter has not been able to obtain 'completion certificate' as yet. The progress of the project is also very slow. The complainant supplied the photostat copies of the e-mail, sent by it to the

promoter, on different dates, which remained unreplied. It has been indicated in Para 2 of the sale deed that the entire money has been paid by the complainant to the promoter. The fact of delivery of possession of the flat is denied by the complainant. It was indicated that the complainant was impressed upon by the builder, to be ready for registration of sale deed, only because he (builder) wanted to save his Capital Gains Tax. Complainant is emphatic in saying that 'occupancy certificate' of the project has not been obtained by the promoter and in the absence of 'completion certificate'/ 'occupancy certificate', the registration of sale deed is meaningless. Complainant referred to Regulation 3.9 of the Uttarkhand Building Bylaws and Regulation to say that it was incumbent upon the promoter to obtain completion certificate/ occupancy certificate before handing over the possession to the allottee. Section 17 of the Act of 2016 also provides that physical possession of the flat is to be given by the promoter to the allottee. The complainant has also referred to a judgment rendered by National Consumer Commission in support of his submission. It was also brought to the notice of RERA that the promoter is running a hotel in the apartment, without permission of the competent authority. Although promoter told before RERA that it has obtained permission from the appropriate authority, but no document in support thereof has been placed before such Authority. According to the letter dated 07.03.2018, given by Haridwar Roorkee Development Authority, the project of the promoter is incomplete, and, therefore, no completion certificate could be given to him. According to the explanation appended to Section 3 of the Act of 2016, if any project is to be completed in phases, then each phase is deemed to be a project.

2.6 The project of the promoter was registered with RERA on 31.05.2018. According to para 3.6 of the Agreement, it was incumbent upon the promoter to satisfy itself that the amenities, as promised by the promoter, are complete, which is lacking in this case, therefore, the complainant is not willing to get the possession of the Flat in question. Considering the entire conspectus of facts and evidence adduced, Ld. Authority below has passed the order on 24.07.2018, which is under challenge in present appeal.

3. We, therefore, frame points of determination, as follows:-

(i) Whether there is non-compliance of the principles of natural justice?

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

(iii) Whether the project could not be completed because of *Force Majeur*e?

(iv) How much expenses were incurred by the complainant? Whether Rs.2050,000/- or Rs.31,67,638/-?

(v) Whether the promoter is absolved of it's responsibility once sale deed has been executed.

(vi) To what extent, if any, is the promoter liable ?

(vii) To what relief, if any, is the appellant entitled?

No other point-issue is pressed, nor arises.

INTERFACE

4. The first question which arises for consideration of this Tribunal is – whether there is non-compliance of the principles of natural justice?

4.1 It is the submission of Ld. Counsel for the appellant that no opportunity of hearing was granted to the appellant by Ld. Authority below. Such submission, on the face of it, falls to the ground, inasmuch as a perusal of the record of RERA, as well as the impugned judgment, would indicate that sufficient opportunity of hearing was granted to the promoter. Sri Narayan Agarwal, Authorized Attorney appeared for the promoter and on a subsequent date Sri Vikrant Gambhir & Sri Ashish Gupta, Advocates appeared for it. Sri Amar Pal, Chartered Accountant, Sri Rahul Sharma, Company Secretary, Sri Sanchiv Kumar and Sri Lakshya Soni, Advocates appeared for the complainant. The complainant supplied all the documents to the promoter on 06.07.2018. The promoter was given time up to 13.07.2018 to file its replies/ written submissions. 20.07.2018 was fixed for final hearing. No written submission/ reply was filed on behalf of promoter till 20.07.2018. Owing to 'stated' illness of its authorized attorney , 10 days' further time was sought for filing replies. This fact is not in dispute that no written statement/ reply is filed on

behalf of promoter by the dates fixed. Thus, it did so, at it's own risk and peril. A last minute attempt was made by introducing a new fact that its power of attorney was indisposed , which did not find favour with RERA, inasmuch as the Ld. Authority below was convinced that sufficient opportunities were already given to the promoter to file replies/ written submissions. It is, therefore, clear that no written statement/ reply was filed on behalf of the promoter although its Power of Attorney Holder/ or Advocates were present since beginning and they were heard on the complaint of the complainant/ respondent herein.

4.2 The principles of natural justice require that sufficient opportunity has to be given to one, and what is 'sufficient', depends on case to case. It cannot be stretched to an unfathomable limits. Law is based upon reasons. A reasonable and prudent person, in the instant case, would always think that sufficient opportunities were given to the promoter. Devil's Advocate can argue that Heavens would not have fallen, had one more opportunity of filing written statement was given to the promoter. There is no limit for such an argument. This Court has already noticed that concept of natural justice cannot be kept in a strait jacket formula. The discretion exercised by the Ld. Authority below, cannot be interfered only because a different view is possible. The promoter was duly represented by an attorney, be it legal attorney or power of attorney, since very beginning. The promoter was heard and all it's submissions have been noted and appropriately discussed by RERA. It is to be noted here that the complaints under the Act of 2016 are to be decided by RERA, as far as possible, within 60 days of filing of the complaint. The promoter was, and is, well aware of such legal provision. This Court is, therefore, unable to subscribe to the view of the appellant that no sufficient opportunity of hearing was given to it and principles of natural justice have been violated.

4.3 The point of determination is, accordingly, decided in the manner that the promoter was granted sufficient opportunity of hearing by Ld. Authority below.

5. The next question, which arises for indulgence of this Court is—

whether the promoter has failed to complete the project within stipulated time?

5.1 There is no dispute that the possession of the Flat in question was to be given to the complainant by the promoter by April, 2013 and despite a lapse of 60 months, he has not been given physical possession of the same. The fact remains that he has paid all the dues to the promoter. Token possession is meaningless because the promoter has not been able to procure 'completion certificate'/ 'occupancy certificate' regarding on-going project. Various reasons have been cited by the promoter, which are nothing, but lame excuses, to harness its case. The issue is, accordingly, decided against the promoter and in favour of the allottee.

6. The next question, which comes before us is— whether the project could not be completed because of *Force Majeure*?

6.1 Although, it is submitted by the Ld. Counsel for the appellant that the project could not be completed because of unforeseen circumstances, but the record is silent over this aspect of the matter. Although Clause 15 of the Agreement relates to *Force Majeure*, but the appellant has not been able to bring home the point that it is applicable to them, in the given set of facts. An attempt has been made by Ld. Counsel for the appellant to show that non-supply of some material in the year 2013, when natural calamity befell on this State, is partly responsible for non-completion of the project in time, but notice may be taken of the fact that such calamity, which befell on this State was in the remote Himalayan region and not at the site of project undertaken by the promoter. This Court, therefore, is of the view that appellant has not been able to bring home the point that it could not complete the project in time because of *Force Majeure.* Moreover, non-availability of building material at the given point of time, was business risk of the appellant.

6.2 The issue is, accordingly answered against the appellant.

7. We now proceed with the next question— as to how much expenses were incurred by the complainant? What was the sale consideration?

7.1 In Para 2 of the Agreement, it is indicated that the allottee shall pay to the company a total consideration of Rs.20,50,000/- plus service tax towards the basic sale price for the purchase of said flat, alongwith other charges, as per payment plan opted by the allottee, annexed as Annexure: A. The company has calculated the total price payable by the allottee for the flat, on the basis of Super Area, together with cost of providing common facilities in the said building/ project.

7.2 The Agreement, therefore, stipulates following consideration:

(a) Rs.20,50,000/-;

(b) Service Tax;

(c) Other charges, as per payment plan opted by the allottee and annexed as Annexure: A.

Annexure: A reads as below:

PAYMENT SCHEDULE- ANNEXURE A		
NET BASIC PRICE IN RS.		2050000
Plan A: Full Down payment Plan (with 10% rebate)		
At booking	10%	205000
Within 45 days of booking	85%	1742500
At offer of possession	5%	102500
OTHER CHARGES (one time) payable at possession		
Car Parking covered in Basement		1,25,000/-
Club Membership		40,000/-
Electric Meter and installation charges		25,000/-
Interest-free maintenance security (IFMS)		Rs.25/- per sq.ft.
Service Tax (w.e.f. 01.07.10)		2.575%
Any future taxes/ levies imposed by Government may be demanded by the company.		

7.3 Ld. Counsel for the appellant vehemently argued that Ld. Authority below was wrong in calculating the principal, as Rs.31,67,368/- and interest thereon. According to the appellant, who was also heard by us, in person, submitted that the principal amount is Rs.20,50,000/- and not Rs.31,367,368/-. It may be noticed here that RERA directed refund of Rs.31,67,368/-, along with 10% interest to the complainant (respondent

herein). Ld. Authority below has also directed cancellation of sale deed, entered into between the parties.

7.4 Since calculation of Rs.31,67,638/- is based on information supplied by the complainant, which is based on record and, which remains uncontroverted at the end of the promoter, in the absence of any evidence to the contrary, therefore, this Tribunal finds no reason to substitute its own discretion for the discretion exercised by Ld. Authority below, and further , why should the Tribunal interfere when the order of RERA is as per Scheme of the Act. As per Rule 15 of Uttarakhand Real Estate (Regulation and Development)(General) Rules, 2017, the maximum rate of interest could be up to 10.50 percent. Here Ld. Authority below has awarded interest @ 10%. We do not find any perversity in the same.

7.5 It is, accordingly, held that although Rs.20,50,000/- plus service tax was basic sale price for purchase of the Flat in question, but it was incumbent upon the allottee, as per the Agreement itself, that he has to pay other charges also, as per payment plan opted by the allottee, annexed with the Agreement as Annexure: A, which the allottee has paid. The issue is, accordingly, decided in favour of the allottee and against the promoter.

8. This fact is under no dispute that 'completion certificate'/ 'occupancy certificate' is yet to be obtained/ procured by the promoter in respect of 'ongoing project' and , therefore, notional possession, if any, given by the promoter to the allottee and sale deed executed in respect of the Flat in question, does not help the appellant-promoter to get rid of the responsibility, fastened upon him. Registry is payment of stamp duty. It does not envisage that possession has actually been handed over to the allottee.

8.1 In the Agreement itself there is a stipulation that the Company shall obtain 'Completion Certificate' after completing the construction, and after that give possession of the flats to the allottees. 'Completion Certificate' is yet to be obtained by the promoter. According to Section 17 of the Act of 2016, promoter is required to give physical possession to the allottee. According to Regulation 3.9 of Uttarakhand Building Bylaws

and Regulation, 2011, it is obligatory upon the builder to obtain 'completion certificate'/'occupancy certificate' of the building before handing over possession to allottee. According to a judgment rendered by National Consumer Commission, a reference of which is given in the order impugned, if development is not carried out by the promoter on the site, as per promise, physical possession, if any, given by the promoter to the allottee, shall only be deemed to be 'paper possession'. According to letter received by the promoter from Haridwar Roorkee Development Authority, on 07.03.2018, the project is still incomplete and, therefore, 'occupancy certificate' could not be given, although Associate Planner, *vide* letter dated 04.10.2013 has given 'completion certificate' with certain conditions in respect of six blocks only. This project was registered with RERA on 31.05.2018.

8.2 This Tribunal does not feel it necessary to enter into the question as to whether the 'completion certificate'/ 'occupancy certificate' has rightly or wrongly been denied to the appellant so far, for, the same is not within the domain of this Appellate Tribunal, who has to decide the *lis* on the basis of pleadings submitted before Ld. Authority below. The issue is, accordingly, decided against the promoter.

EXTENT OF PROMOTER'S LIABILITY

9. Section 18 of the Act of 2016 stipulates the following:

(i) 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 , he shall be liable on demand to the allotttee to return the amount received by him in respect of that apartment, with interest, as per Rules. This will be applicable in case allottee wishes to withdraw from the project.

(ii) 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 per Rules.

9.1 Section 18 of the Act provides provision as regards various situations in which the allottee would be compensated by the promoter due to delay in completion of the project.

9.2. The rate of interest is required to be specified by the appropriate Government in the Rules. Government of Uttarakhand has framed "Uttarakhand Real Estate (Regulation and Development)(General) Rules, 2017", Rules 15 and 16 whereof prescribe as under:

> **Rate of interest payable by the promoter and the allottee- 15**. The rate of interst 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.
>
> **Timelines for refund- 16**. Any refund of monies along with the applicable interst 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.

9.3. Promoter's liability has, therefore, rightly been accounted for by Ld. Authority below in the instant case.

10. We are unable to take a view different from what has been taken by Ld. Authority below in it's well discussed and reasoned order. No interference is called for in the same. The appellant is, therefore, not entitled to any relief.

10.1. When we disclosed our mind to dismiss the appeal, the promoter, who has appeared in person, submitted that the money, which has been deposited by him in compliance of Hon'ble Tribunal's interim order dated 26.09.2018, be returned to him. We are unable to accede to such request

of the appellant/ promoter. The reason is that, since the appeal is being dismissed and, in any case, but subject to the orders, if any of the Superior Courts the order passed by Ld. Authority below shall be executed at it's own level, therefore, we think it proper that instead of directing refund of such an amount, which was deposited by the promoter, in compliance of Tribunal's interim order dated 26.09.2018, Ld. Authority below should be directed to calculate such amount, which has been deposited by the promoter at our behest, along with interest accrued thereon, and such amount may be deemed to have been realized from the promoter. Ld. Authority below may direct adjustment of such amount in favour of the complainant (respondent herein), while securing compliance of impugned order. The amount deposited by the promoter, in compliance of Tribunal's interim order dated 26.09.2018, be remitted to RERA.

11. The appeal, therefore, fails and is dismissed. Costs easy.

(D.K.KOTIA)
MEMBER

(JUSTICE U.C.DHYANI)
CHAIRPERSON

DATED: OCTOBER 29, 2018
DEHRADUN

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