

**BEFORE THE UTTARAKHAND REAL ESTATE APPELLATE TRIBUNAL  
AT DEHRADUN**

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

----- Chairperson

Hon'ble Mr. Rajeev Gupta

----- Member

**Appeal No. 13 of 2020**

M/s Eminent Infra Developers Pvt. Ltd., Bahedi-Rajputana, Roorkee,  
through its Authorized Representative, Sri Narayan Aggarwal, s/o Murari  
Lal Aggarwal, r/o Purvavali, Ganeshpur, Roorkee, District Haridwar

.....Appellant

Versus

1. Chairman, Real Estate Regulatory Authority, Dehradun.
2. Sri Ramesh Chandra Agnihotri, s/o late Pt. Chandrika Prasad Agnihotri, r/o Atri Nagar, Atarra, Banda, District Banda (U.P.)

.....Respondents

Present: Sri Rajavtar Singh, Advocate, for the Appellant-Promoter  
Dr. N.K. Pant, Advocate, for the Respondent-Homebuyer

**JUDGEMENT**

**Dated: 31<sup>st</sup> March, 2022**

**Per: Justice U.C. Dhyani**

Present appeal has been filed by the appellant-promoter against the respondent-home buyer under Section 44 of the Real Estate (Regulation and Development) Act, 2016 (for short, 'the Act') being aggrieved against the order dated 18.05.2020 passed by Real Estate Regulatory Authority (for short, 'RERA') in complaint No. 137/2019 *Online*. The appellant/ promoter has also assailed order

dated 17.02.2021 which is a recovery certificate issued against the appellant-promoter by RERA.

2. Earlier, a writ petition was filed by promoter before Hon'ble High Court of Uttarakhand in WPMS No. 1037/2021, M/s. Eminent Infra Developers Pvt. Ltd. vs. State of Uttarakhand and others. Directions were given by the Hon'ble High Court *vide* order dated 07.06.2021, as below:

“Looking to the contingency, which has occurred on account of the prevalent Covid-19 pandemic situation, this Court is carving out an exception, in order to balance the equities between the parties to the effect:-

(1) If the petitioner prefers an appeal under Section 44 of the Act, within a period of three weeks from the date of receipt of a certified copy of this order, along with delay condonation application, the same would be considered exclusively in accordance with law, including the delay condonation application.

(2) The entertainment of the appeal and the delay condonation application, would obviously be subject to satisfying the prior condition of depositing of the 30% of the total financial liability, as has been harnessed by the RERA Authority on the petitioner *vide* its judgment of 18.05.2020.

(3) If the petitioner deposits the 30% of the amount and during the pendency of the delay condonation application, which the petitioner would be preferring along with an appeal, no coercive action would be taken till the delay condonation application is considered and decided by the learned Trial Court on its own merits exclusively as per law.”

3. This Tribunal, accordingly, passed an order on 08.07.2021 in compliance of Hon'ble High Court's order. The appellant-promoter has shown his *bona fide* by depositing a bank draft of Rs. 10,00,000/-.

4. Xerox copy of RERA record has been received. Dr. N.K. Pant, Advocate, for the respondent-home buyer has filed his written arguments, under intimation to Sri Rajavtar Singh, Id. Counsel for the appellant-promoter, who also filed written arguments on 03.03.2022.

#### **JURISDICTION: RESOLUTION AND DELEGATION**

5. Id. Counsel for the appellant has placed a copy of judgement rendered by Hon'ble Apex Court on 11.11.2021 in Civil Appeal No(s) 6745-6749 of 2021, M/s Newtech Promoters and Developers Pvt. Ltd.

vs. State of U.P. & others. The *ratio* of this decision shall be discussed by this Tribunal in subsequent paragraphs.

6. At the very outset, Id. Counsel for the appellant submitted that the directions contained in decision of M/s Newtech Promoters and Developers Pvt. Ltd. (*supra*) have been observed by breach by RERA.

7. In reply, Id. Counsel for the respondent placed a copy of resolution dated 21.05.2018, taken by the Authority consisting of Chairman and members of RERA. Cases bearing serial no. 1 to 3 were delegated for resolution to the Chairman, RERA; serial No. 4 was delegated for resolution to Sri Chandra Mohan Singh Bisht (Member) and serial No. 5 to Sri Mohan Chandra Joshi (Member) and so on. This was done under Section 81 of the Act, which reads as below:

“81. **Delegation.**—The Authority may, by general or special order in writing, delegate to any member, officer of the Authority or any other person subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Act (except the power to make regulations under section 85), as it may deem necessary.”

8. Id. Counsel for the appellant placed copies of order sheets alongwith notice dated 19.08.2019 to show that notice in complaint No. 137/2019 *online* was issued by Sri Chandra Mohan Singh Bisht (Member). In other words, hearing on such complaint was initiated by Sri Chandra Mohan Singh Bisht (Member). Id. Counsel for the appellant further contended that suddenly Sri Vishnu Kumar, Chairman started hearing the complaint, without resolution and delegation of RERA.

9. According to him, resolution and delegation under Section 81 of the Act ought to have been there, before Sri Vishnu Kumar, Chairman, started hearing the complaint. There was no such resolution and delegation dated 21.05.2018.

10. It will be useful to quote the findings of the Hon'ble Apex Court in decision of Ms. Newtech Promoters and Developers Pvt. Ltd. (*supra*), as below:

“31. After we have heard learned counsel for the parties at length, the following questions emerges for our consideration in the

present batch of appeals are as under:-

1. Whether the Act 2016 is retrospective or retroactive in its operation and what will be its legal consequence if tested on the anvil of the Constitution of India?
2. Whether the authority has jurisdiction to direct return/refund of the amount to the allottee under Sections 12, 14, 18 and 19 of the Act or the jurisdiction exclusively lies with the adjudicating officer under Section 71 of the Act?
3. Whether Section 81 of the Act authorizes the authority to delegate its powers to a single member of the authority to hear complaints instituted under Section 31 of the Act?
4. Whether the condition of pre-deposit under proviso to Section 43(5) of the Act for entertaining substantive right of appeal is sustainable in law?
5. Whether the authority has power to issue recovery certificate for recovery of the principal amount under Section 40(1) of the Act?

***Question no. 3: Whether Section 81 of the Act authorizes the authority to delegate its powers to a single member of the authority to hear complaints instituted under Section 31 of the Act?***

87. It is the specific stand of the respondent Authority of the State of Uttar Pradesh that the power has been delegated under Section 81 to the single member of the authority only for hearing complaints under Section 31 of the Act. To meet out the exigency, the authority in its meeting held on 14<sup>th</sup> August 2018, had earlier decided to delegate the hearing of complaints to the benches comprising of two members each but later looking into the volume of complaints which were filed by the home buyers which rose to about 36,826 complaints, the authority in its later meeting held on 5<sup>th</sup> December, 2018 empowered the single member to hear the complaints relating to refund of the amount filed under Section 31 of the Act.

88. Mr. Gopal Sankarnarayanan, learned counsel for the appellants submits that if this Court comes to the conclusion that other than adjudging compensation wherever provided all other elements/components including refund of the amount and interest etc. vests for adjudication by the authority, in that event, such power vests with the authority constituted under Section 21 and is not open to be delegated in exercise of power under Section 81 of the Act to a single member of the authority and such delegation is a complete abuse of power vested with the authority and such orders passed by the single member of the authority in directing refund of the amount with interest are wholly without jurisdiction and is in contravention to the scheme of the Act.

89. Learned counsel further submits that the order passed by the single member of the authority is without jurisdiction and it suffers from coram non-judice. Section 21 of the Act clearly provides that the authority shall consist of a Chairperson and not less than two whole time members to be appointed by the Government. Regulation 24(a) of the Regulations 2019 framed by the authority is

in clear contravention to the parent statute that the delegation of power can be of class, category of cases, specific to the member of the authority but a general delegation of power to the single member of the authority in exercise of power under Section 81 is not contemplated under the Act and delegation to a single member of the authority in adjudicating the disputes under Sections 12, 14, 18 and 19 is without jurisdiction and that is the reason for which the appellants have approached the High Court by filing a writ petition under Article 226 of the Constitution and in furtherance to this Court.

90. Learned counsel further submits that from the plain reading of the statute itself, the role of the authority is of a quasi-judicial body forms its underpinning. The adjudicatory role of the authority is specifically recognized under Sections 5, 6, 7(2), 9(3) and 31 where the authority is supposed to hear the other side, after compliance of the principles of natural justice, is supposed to pass an order in accordance with law.

91. Section 31 allows the aggrieved person to file a complaint with the authority or the adjudicating officer for any violation or breach or contravention to the provisions of the Act or the rules and regulations made thereunder and this being a quasi-judicial power to be exercised by the authority could not be delegated to a single member of the authority under the guise of Section 81 of the Act, that apart, there are certain provisions where authority alone holds power to initiate action or make inquiries like Sections 35(1), 35(2), 36 or 38, the powers are exclusively exercised by the authority and the tests for determining whether an action is quasi-judicial or not are laid down in ***Province of Bombay Vs. Kushaldas S Advani and Others, 1950 SCR 621***, which has been consistently followed by the Constitution Bench in its decision in ***Shivji Nathubhai Vs. Union of India and Others, 1960(2) SCR 775***; ***Harinagar Sugar Mills Limited, Vs. Shyam Sunder Jhunjhunwala and Others, 1962(2) SCR 339***.

92. Learned counsel further submits that according to him, the powers which have been exercised by the authority under Sections 12, 14, 18 and 19 of the Act have the trappings of the judicial function which in no manner can be delegated without being expressly bestowed. Placing reliance on two decisions of the Queen's Bench in ***Barnard Vs. National Dock Labour Board, 1953(2) QB 18***, and ***Vine Vs. National Dock Labour Board, 1956(1) QB 658***, and taking assistance thereof, learned Counsel submits that the judgments indicated above makes it clear that the delegation of judicial power must be express; that a provision of quorum for a quasi-judicial body is distinguishable from the delegation of power to the exclusion of other members of that body; and the reasons of workload cannot trump the legal requirement. These principles have been adopted by this Court consistently in ***Bombay Municipal Corporation Vs. Dhondu Narayan Chowdhary, 1965(2) SCR 929***; ***Sahni Silk Mills(P) Ltd. and Another Vs. Employees State Insurance Corporation, 1994(5) SCC 346***; ***Jagannath Temple Managing Committee Vs. Siddha Math and Others, 2015(16) SCC 542***.

93. Learned counsel submits that it has been consistently held by this Court that the power being quasi-judicial in nature, the

presumption is that it ought to be exercised by the authority competent and no other, unless the law expressly or by clear implication permits it.

94. Learned counsel further submits that even by necessary implication, the judicial power of the authority cannot be delegated by the multi-member authority to any of its members. If at all there are practical considerations of workload, the Government can always establish more than one authority in terms of the second proviso to Section 20(1).

95. Per contra, Mr. Devadatt Kamat, learned senior counsel for the respondents submits that the complaint of the appellants has been primarily on the issue that a single member is not competent to exercise power to hear complaints under Section 31 of the Act and the delegation of its power by the authority invoking Section 81 is beyond jurisdiction.

96. Learned counsel submits that as a matter of fact the entire functioning of the authority has not been delegated to the single member. It is only the hearing of complaints under Section 31 that the single member of the authority has been empowered to deal with such complaints, keeping in view the overall object of speedy disposal of such complaints mandated under the law. According to him, it is factually incorrect to say that the other functions of the authority like imposition of penalty under Section 38, revocation of registration under Section 7 or functions of the authority under Sections 32 or 33 have been delegated to a single member of the authority.

97. Learned counsel further submits that the question is not whether the delegation per se to a single member is bad, but the question is whether the power to hear complaints in reference to Sections 12, 14, 18 and 19 delegated to a single member is permissible under the law. It may be noticed that the authority has been vested with several other powers and functions under the Act, which the authority has consciously not delegated to a single member.

98. Learned counsel further submits that pursuant to the delegation of power under Section 81 by the special order dated 5<sup>th</sup> December, 2018 read with Regulation 24, a single member has been authorized by the authority to hear the matters related to refund of the amount under Section 31 of the Act.

100. Learned counsel further submits that Section 21 of the Act relates to the composition of the authority and does not deal with minimum bench strength. At the given time, the legislature has consciously avoided prescribing any minimum bench/quorum strength to hear complaints by the authority. At the same time, the Act only prescribes a bench/quorum only of the Appellate Tribunal under Section 43(3) of the Act and further submits that in the absence of the minimum bench/quorum strength being fixed by statute, it is impermissible to treat the composition of the authority itself as a minimum bench strength.

102. To examine the scheme of the Act it may be relevant to take note of certain provisions add infra:-

**21.** The Authority shall consist of a Chairperson and not less than two whole time Members to be appointed by the appropriate Government.

**29.** (1) The Authority shall meet at such places and times, and shall follow such rules of procedure in regard to the transaction of business at its meetings, (including quorum at such meetings), as may be specified by the regulations made by the Authority.

(2) If the Chairperson for any reason, is unable to attend a meeting of the Authority, any other Member chosen by the Members present amongst themselves at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote.

(4) The questions which come up before the Authority shall be dealt with as expeditiously as possible and the Authority shall dispose of the same within a period of sixty days from the date of receipt of the application:

Provided that where any such application could not be disposed of within the said period of sixty days, the Authority shall record its reasons in writing for not disposing of the application within that period.

**31.** (1) Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of this Act or the rules and regulations made thereunder against any promoter allottee or real estate agent, as the case may be.

Explanation.—For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.  
(2) The form, manner and fees for filing complaint under sub-section (1) shall be such as may be specified.

**81.** The Authority may, by general or special order in writing, delegate to any member, officer of the Authority or any other person subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Act (except the power to make regulations under section 85), as it may deem necessary.

103. Section 21 of the Act relates to the composition of the authority which consists of a Chairperson and not less than two whole time members to be appointed by the appropriate Government but conspicuously it does not mention minimum bench strength at the same time consciously prescribes minimum bench/quorum while constituting the Real Estate Appellate Tribunal as reflected under Section 43(3) of the Act.

107. It may be relevant to note that the authority in its meeting held on 5<sup>th</sup> December, 2018 in exercise of its power under Section 81 of the Act for disposal of complaints under Section 31 delegated its power to a single member of the authority. The extract of the minutes of the meeting dated 5<sup>th</sup> December, 2018 relevant for the purpose is extracted as under:

Sl. No.	Agenda
5.01	Both the benches of Uttar Pradesh Real Estate Regulatory Authority in the month of December 2018 and subsequently also while working as single benches as per the requirement, proposal for disposal of complaint cases at Lucknow and Gautambudh Nagar on same dates.
	-
	-

Point wise decision on agenda is as under:-

Agenda point no. 1:

Regarding hearing by both the benches of Uttar Pradesh Real Estate Regulatory Authority in the month of December 2018 and subsequently also while working as single benches as per the requirement, for disposal of complaint cases at Lucknow and Gautambudh Nagar on same dates.

Decision:

Proposal was approved by the authority.

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..”

108. Pursuant to the delegation of power to the single member of the authority, complaints filed by the allottees/home buyers for refund of the amount and interest under Section 31 of the Act came to be decided by the single member of the authority after hearing the parties in accordance with the provisions of the Act.

110. The express provision of delegation of power under the SEBI Act is akin to Section 81 of the Act 2016. This Court observed that if the power has been delegated by the competent authority under the statute, such action, if being exercised by a single member cannot be said to be de hors the provisions of the Act.

111. In ***Heinz India Private Limited and Another vs. State of Uttar Pradesh, 2012(5) SCC 443***, the revisional powers were conferred upon the State Agricultural Market Board under Section 32 of the state law to examine the orders passed by the market committee. Section 33 thereof empowered the Board to delegate its powers to the Director. In the facts of the case, an objection was taken to the exercise of revisional powers not by the Director himself but by some officer lower in the hierarchy. This Court, while taking note of the definition of ‘Director’ as provided in Section 2(h) to include “any other officer authorized by the Director to perform all or any of his functions under this Act” held as under:-

“34. Now, it is true that the stakes involved in the present batch of cases are substantial and those called upon to satisfy the demands raised against them would like their cases to be heard by a senior officer or a committee of officers to be nominated by the Board. But in the absence of any data as to the number of cases that arise for consideration involving a challenge to the demands raised by the Market Committee and the nature of

the disputes that generally fall for determination in such cases, it will not be possible for this Court to step in and direct an alteration in the mechanism that is currently in place. The power to decide the revisions vests with the Board who also enjoys the power to delegate that function to the Director. So long as there is statutory sanction for the Director to exercise the revisional power vested in the Board, any argument that such a delegation is either impermissible or does not serve the purpose of providing a suitable machinery for adjudication of the disputes shall have to be rejected.”

112. Section 81 of the Act 2016 empowers the authority, by general or special order in writing, to delegate its powers to any member of the authority, subject to conditions as may be specified in the order, such of the powers and functions under the Act. What has been excluded is the power to make regulations under Section 85, rest of the powers exercised by the authority can always be delegated to any of its members obviously for expeditious disposal of the applications/complaints including complaints filed under Section 31 of the Act and exercise of such power by a general and special order to its members is always permissible under the provisions of the Act.

113. In the instant case, the authority by a special order dated 5<sup>th</sup> December, 2018 has delegated its power to the single member for disposal of complaints filed under Section 31 of the Act. So far as refund of the amount with interest is concerned, it may not be considered strictly to be mechanical in process but the kind of inquiry which has to be undertaken by the authority is of a summary procedure based on the indisputable documentary evidence, indicating the amount which the allottee/home buyer had invested and interest that has been prescribed by the competent authority leaving no discretion with minimal nature of scrutiny of admitted material on record is needed, if has been delegated by the authority, to be exercised by the single member of the authority in exercise of its power under Section 81 of the Act, which explicitly empowers the authority to delegate under its wisdom that cannot be said to be de hors the provisions of the Act.

116. The further submission made by learned counsel for the promoters that Section 81 of the Act empowers even delegation to any officer of the authority or any other person, it is true that the authority, by general or special order, can delegate any of its powers and functions to be exercised by any member or officer of the authority or any other person but we are not examining the delegation of power to any third party. To be more specific, this Court is examining the limited question as to whether the power under Section 81 of the Act can be delegated by the authority to any of its member to decide the complaint under Section 31 of the Act. What has been urged by learned counsel for the promoters is hypothetical which does not arise in the facts of the case. If the delegation is made at any point of time which is in contravention to the scheme of the Act or is not going to serve the purpose and object with which power to delegate has been mandated under Section 81 of the Act, it is always open for judicial review.

117. The further submission made by learned counsel for the appellants that Section 81 of the Act permits the authority to delegate such powers and functions to any member of the authority

which are mainly administrative or clerical, and cannot possibly encompass any of the core functions which are to be discharged by the authority, the judicial functions are non-delegable, as these are the core functions of the authority. The submission may not hold good for the reason that the power to be exercised by the authority in deciding complaints under Section 31 of the Act is quasi-judicial in nature which is delegable provided there is a provision in the statute. As already observed, Section 81 of the Act empowers the authority to delegate its power and functions to any of its member, by general or special order.

118. In the instant case, by exercising its power under Section 81 of the Act, the authority, by a special order dated 5<sup>th</sup> December, 2018 has delegated its power to the single member of the authority to exercise and decide complaints under Section 31 of the Act and that being permissible in law, cannot be said to be de hors the mandate of the Act. At the same time, the power to be exercised by the adjudicating officer who has been appointed by the authority in consultation with the appropriate Government under Section 71 of the Act, such powers are non-delegable to any of its members or officers in exercise of power under Section 81 of the Act.

119. That scheme of the Act, 2016 provides an in-built mechanism and any order passed on a complaint by the authority under Section 31 is appealable before the tribunal under Section 43(5) and further in appeal to the High Court under Section 58 of the Act on one or more ground specified under Section 100 of the Code of Civil Procedure, 1908, if any manifest error is left by the authority either in computation or in the amount refundable to the allottee/home buyer, is open to be considered at the appellate stage on the complaint made by the person aggrieved.

120. In view of the remedial mechanism provided under the scheme of the Act 2016, in our considered view, the power of delegation under Section 81 of the Act by the authority to one of its member for deciding applications/ complaints under Section 31 of the Act is not only well defined but expressly permissible and that cannot be said to be de hors the mandate of law."

[Emphasis Supplied]

11. Taking a leaf out of Hon'ble Supreme Court's book, it is held that the power of delegation under Section 81 of the Act by the Authority to one of its members for deciding application/ complaints under Section 31 of the Act is permissible in law.

12. But the next question which arises for consideration of this Tribunal is, where is the delegation that Sri Vishnu Kumar, Chairman RERA will decide complaint No. 137/2019 *online*, the cognizance of which was taken by Sri Chandra Mohan Singh Bisht (Member), as per earlier delegation?

13. On a perusal of RERA record, the Tribunal finds that there is a copy of office order dated 04.09.2019. A list of cases has been appended with such office order. At serial No. 18, there is a mention of complaint no. 137/2019 in the list. This office order has been issued in the light of the decision taken in the meeting of the authority held on 02.09.2019. Learned Counsel for the respondent-homebuyer has placed a copy of the minutes of the meeting of the Authority held on 02.09.2019, in which the Chairman and three other members of the Authority namely Sri Chandra Mohan Bisht (Member), Sri Mohan Chandra Joshi (Member) and Sri Manoj Kumar (Member) were present. According to the decision taken at point 9.5 of these minutes, in view of the tenure of Sri Chandra Mohan Bisht (Member) concluding on 04.09.2019, the matters pending with him and all other future matters coming before the Authority were decided to be delegated between the Chairman and Members in the ratio of 2:1:1. Accordingly, the office order dated 04.09.2019 has been issued for the 18 cases pending with Sri Chandra Mohan Bisht (Member), out of which serial no. 1 and 2 have gone to Chairman, serial no. 3 to Sri Mohan Chandra Joshi (Member), serial no. 4 to Sri Manoj Kumar (Member); serial no. 5 and 6 to Chairman, serial no. 7 to Sri Mohan Chandra Joshi (Member), serial no. 8 to Sri Manoj Kumar (Member); serial no. 9 and 10 to Chairman, serial no. 11 to Sri Mohan Chandra Joshi (Member), serial no. 12 to Sri Manoj Kumar (Member); serial no. 13 and 14 to the Chairman, serial no. 15 to Sri Mohan Chandra Joshi (Member), serial no. 16 to Sri Manoj Kumar (Member); and serial no. 17 and 18 to the Chairman. The complaint no. 137/2019 has been mentioned at serial no. 18 and as per the delegation decided in the meeting of the Authority on 02.09.2019 and subsequent order dated 04.09.2019, it has been duly given to the Chairman, Sri Vishnu Kumar for disposal and this Tribunal finds no infirmity in the same.

## **DISCUSSION ON MERITS**

### **FLAT-BUYER AGREEMENT**

14. It is the submission of learned Counsel for the appellant-promoter that the appellant-promoter had invested the entire amount paid by the

complainant-homebuyer and constructed the flat as per agreed conditions of flat-buyer agreement and conditions of allotment letter. The conditions of flat-buyer agreement specify this legal point that in case of any dispute between buyer of flat and developer, the dispute shall be resolved through the provisions of Arbitration and Conciliation Act, 1996. Learned Counsel for the appellant-promoter argued, as has been mentioned in the written arguments also, that the dispute be settled as per flat-buyer agreement, which is mutually signed and agreed to by both the parties.

15. According to the appellant-promoter, it is ready for mutual conciliation as per conditions of flat-buyer agreement under the provisions of Arbitration and Conciliation Act. It is, therefore, prayed that the appellant-promoter and respondent-homebuyer be allowed to resolve the dispute under the Arbitration and Conciliation Act. Appellant-promoter is agreeable to pay an amount of Rs 24 lakhs to respondent-homebuyer to resolve the issue amicably. This offer for resolving the dispute mutually has been mentioned in the written arguments.

16. This Tribunal is of the view that the dispute between the appellant-promoter and respondent-homebuyer can be settled under the Arbitration and Conciliation Act, 1996. The dispute is arbitrable in view of the decision rendered by Hon'ble Apex Court in Civil Appeal No. 2402/2019, Vidya Drolia and others vs. Durga Trading Corporation, which was decided on reference by three judges made *vide* order dated 28.02.2019 titled Civil Appeal No. 2402/2019, Vidya Drolia and others vs. Durga Trading Corporation, 2019 SCC Online SC 358.

17. Arbitration is a private dispute resolution mechanism whereby two or more parties agree to resolve their current and future disputes by an Arbitral Tribunal, as an alternative to adjudication by the Courts or a public forum established by law. Arbitration agreement gives contractual authority to the Arbitral Tribunal to adjudicate the disputes and bind the parties. Doctrine of election to select arbitration as a dispute resolution mechanism by mutual agreement is available only if

the law accepts existence of arbitration as an alternative remedy and freedom to choose, if available. The claims covered by the DRT Act are non-arbitrable as there is a prohibition against waiver of the jurisdiction of the DRT by necessary implication. Landlord-tenant disputes governed by the Transfer of Property Act are arbitrable as they are not actions in *rem* but pertain to subordinate rights in personam that rise from rights in *rem*. Such actions normally would not accept third party rights or have *erga omnes* effect.

18. Although it was open or is still open for the parties to resolve their disputes amicably as per agreement, but, it appears that no such efforts were made before learned Authority below. It appears that no application was filed by the appellant-promoter for resolving the dispute through arbitration and therefore, impugned order cannot be set aside merely on the ground that since the dispute is arbitrable, therefore, parties be permitted to decide their disputes amicably as per their agreement. The parties do not require Tribunal's order, if they want to decide their dispute amicably. However, even if the appellant-promoter and respondent-homebuyer want to decide the matter through Out-of-Court settlement or through Arbitration and Conciliation Act, the same will not prevent this Tribunal from deciding their *lis* on merits.

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

- (i) Meaning of non-arbitrability and when the subject matter of the dispute is not capable of being resolved through arbitration; and;
- (ii) The conundrum- "who decides"-whether the court at the reference stage or the arbitral tribunal in the arbitration proceedings would decide the question of non-arbitrability.

20. Para 22 of the decision of the Vidya Drolia (*supra*) assumes significance, which says -Landlord-tenant disputes governed by rent control legislation are not actions in *rem*, yet they are non-

arbitrable..... As arbitrator is appointed by the parties and not by the State, Arbitrator cannot impose fine, give imprisonment, commit a person for contempt or issue a writ of *subpoena* nor can he make an award binding on third parties and affect public at large, such as a judgment in rem..... Booz Allen & Hamilton Inc. vs. SBI Home Finance Ltd., 2011 (5) SCC 532, refers that eviction or tenancy matters are governed by special statutes where the tenant enjoys statutory protection against eviction and only the special Courts are conferred jurisdiction to grant eviction or decide the disputes.

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

“26. In Emaar MGF Land Limited, the Division Bench referred to the object and the purpose behind the [Consumer Protection Act, 1986](#) as a law that meets the long-felt necessity of protecting the common man as a consumer against wrongs and misdeeds for which the remedy under the ordinary law has become illusory as the enforcement machinery does not move, or moves ineffectively or inefficiently. Thus, to remove helplessness and empower consumers against powerful businesses and the might of the public bodies, the enactment has constituted consumer forums with extensive and wide powers to award, wherever appropriate, compensations to the consumers and to impose penalties for non-compliance with their orders. [The Consumer Protection Act](#) has specific provisions for execution and effective implementation of their orders which powers are far greater than the power of the ordinary civil court. After referring to the amendments made to [Sections 8](#) and [11](#) of Arbitration Act by Act No. 3 of 2016, it was observed that the amendments cannot be given such expansive meaning so as to inundate entire regime of special legislation where such disputes are not arbitrable. This amendment was not intended to side-line or override the settled law on non-arbitrability. Reference was made to an earlier decision in [Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke of Bombay and Others](#), (1976) 1 SCC 496 wherein examining Section 9 of the Code of Civil Procedure in the context of rights and remedies under [Industrial Disputes Act](#), 1947 it was observed that the legislature has made provisions for the investigation and settlement of industrial disputes between unions representing the workmen and the management. The authorities constituted under the Act have extensive powers in the matter of industrial disputes. Labour Court and Tribunal can lay down new industrial policy for industrial peace and order, or reinstatement of dismissed workmen, which no civil court can do. For this, the provisions of [Industrial Disputes Act](#) completely oust the jurisdiction of the civil court for trial of the industrial disputes.

The intent of the legislature is to protect the interest of workmen and consumers in larger public interest in the form of special rights and by constituting a judicial forum with powers that a civil court or an arbitrator cannot exercise. Neither the workmen nor consumers can waive their right to approach the statutory judicial forums by opting for arbitration.”

[Emphasis supplied]

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

“36. In Transcore, on the powers of the Debt Recovery Tribunal (DRT) under the DRT Act, it was observed:

“18. On analysing the above provisions of the DRT Act, we find that the said Act is a complete code by itself as far as recovery of debt is concerned. It provides for various modes of recovery. It incorporates even the provisions of the Second and Third Schedules to the Income Tax Act, 1961. Therefore, the debt due under the recovery certificate can be recovered in various ways. The remedies mentioned therein are complementary to each other.

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

[Emphasis supplied]

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

“The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”

[Emphasis supplied]

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

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

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

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

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

27. RERA is established under Section 20 of the Act. Its functions have been delineated in Sections 32 and 34 of the Act, which an arbitral tribunal adjudicating dispute does not have. The dispute should not, normally, be referred to an arbitrator, when there is specialized forum setup for the same. RERA is better equipped to effectively adjudicate promoter-buyer disputes. So, why should the matter be referred to the arbitrator by the Appellate Tribunal, when the Act No. 16/2016 is a complete Code in itself and provides for adjudicating mechanism for speedy redressal of promoter-homebuyer disputes.

28. The dispute between the parties can be adjudicated as per the provisions of the Act and even if there is arbitration clause between the parties, the provisions of The Real Estate (Regulation and Development) Act, 2016, shall have effect (Section 89 of the Act). It,

therefore, cannot be held that the complaint before learned Authority below was not maintainable, simply because there was an arbitration clause in the allotment agreement.

### **RERA GAVE THE DECISION DURING PANDEMIC**

29. Learned Counsel for the appellant-promoter also submitted that there was complete lockdown during hearing and listing of the matter before RERA due to Covid-19, which is evident from the circular dated 16.05.2020, issued by the Govt. regarding which notice was issued by Chairman, RERA, on 17.05.2020. The impugned judgement on 18.05.2020 is arbitrary, according to learned Counsel for the appellant-promoter. The complainant-homebuyer has filed the complaint maliciously for undue gains. The appellant-promoter has already invested the amount paid by the respondent-homebuyer in constructing the flat. Appellant-promoter has acquired occupancy and completion certificate. Appellant-promoter is maintaining the property since long on which huge expenditure has been made. Appellant-promoter is ready to deliver the booked flat to the respondent-homebuyer. Recovery order was issued immediately after lockdown without affording an opportunity of hearing to make payment with SBI highest marginal cost of lending rate plus 2 %, which was without affording an opportunity of hearing to the appellant-promoter.

30. A reference of circular dated 16.05.2020 and consequential notice dated 17.05.2020 has been given to argue that the impugned judgement dated 18.05.2020 has arbitrarily been passed by the learned Authority below. It is a common knowledge that the Courts and Tribunals were functioning in the country under the orders of Hon'ble Apex Court *virtually* or in *hybrid* mode or physically with Covid-19 guidelines. The Hon'ble Apex Court or Hon'ble High Court never directed any Court or Tribunal for not conducting hearing and not deciding the cases. Therefore, this cannot be a ground for interference in the impugned order that the impugned order was passed during Covid-19 pandemic.

31. Further, impugned order cannot be interfered only on the ground that the appellant-promoter had already invested the amount paid by the respondent-homebuyer in constructing the flat and the appellant-promoter is now ready to deliver the flat to the respondent-homebuyer after acquiring occupancy and completion certificate.

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32. The Tribunal is required to examine the issue legally. If the pleas taken by the appellant-promoter come within the scheme of law, as legislated by the parliament, he should be given relief to the extent it is capable of bringing its matter within the scheme of such law, otherwise he is not entitled to any relief.

### **S. 18 OF THE ACT**

33. Section 18 of the Real Estate (Regulation and Development) Act, 2016, governs the field. Such provision reads as under:

“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) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this

subsection shall not be barred by limitation provided under any law for the time being in force.

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

34. The law is clear that if the promoter fails to complete or is unable to give possession of an apartment in accordance with the terms of the agreement for sale, duly completed by the date specified therein or due to discontinuance of his business as a developer or for any other reason, 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 at such rate as may be prescribed in this behalf. When an allottee does not intend to withdraw from the project, he shall be paid by the promoter interest of every month of delay, till the handing over of the possession, at such rate as may be prescribed.

## **RATE OF INTEREST**

35. Rate of interest has been prescribed in Uttarakhand Real Estate (Regulation and Development) (General) Rules, 2017, as below:

### **“Chapter V**

#### **Rate of Interest Payable by Promoter and Allottee and Timelines for Refund**

**15. Rate of interest payable by the promoter and the allottee-** The rate of interest payable by the promoter to the allottee or by the allottee to the promoter, as the case may be, shall be the State Bank of India highest Marginal Cost of Lending Rate plus two percent.

Provided that in case the State Bank of India Marginal Cost of Lending Rate is not in use, it would be replaced by such benchmark lending rate which the State Bank of India may fix from time to time for lending to the general public.”

36. The rate of interest shall, therefore, be SBI highest cost of marginal lending rate plus 2 %.

**APPLICABILITY OF S. 18 OF THE ACT**

37. In the impugned judgement, learned Authority below has narrated the facts of the complaint of the respondent-homebuyer, reply filed by the appellant-promoter and their supplementary pleadings in detail. Learned Authority below has dealt with the arguments of disputants before it, at length. Whereas, according to the respondent-homebuyer, the dispute falls within the four corners of Section 18 of the RERA Act, appellant-promoter denied the same, on the ground, *inter alia*, that no time limit was fixed for handing over the possession of the flat to the respondent-homebuyer. In the impugned judgement dated 18.05.2020, learned Authority below has also given the details of payments made by the respondent-homebuyer, the terms of agreement dated 24.10.2011, parawise pleadings and supplementary pleadings of the disputants, contents of the brochure etc. in great detail. The Tribunal does not think it necessary to reproduce those details, for, they are already part of record. The Tribunal feels that it should confine itself to the material facts of the complaint, counter version, points of adjudication, law governing the field and the decision.

38. The respondent-homebuyer, after reading the brochure of Aarogyam Group Housing Project of the appellant-promoter, booked service apartment no. S1-201 in September, 2011. Promise of 12 % annual assured return was made (by the appellant-promoter). Although date of handing over the possession of the flat to the respondent-homebuyer has not been mentioned in flat-buyers agreement dated 24.10.2011 but a period of 12 months plus grace period of 3 months, from the date of booking has been mentioned in application form dated 20.09.2011 of Eminent Infra Developers. In other words, the possession of the flat was to be given within 12 months (plus 3 months grace period) from the date of booking. There is no mention of assured return in the application form. In agreement to sale, there is reference of assured return @ 12 % per annum on the value of the flat, but the said condition has been deleted by the appellant-promoter in the application form.

39. It has been established that S1 block of Aarogyam Group Housing Project could not be completed even by June, 2018. The same is evident from the letter no. 1544 dated 18.12.2018 of Joint Secretary, HRDA-cum-SDM, Roorkee. In such letter, it has been mentioned that 5<sup>th</sup> and 6<sup>th</sup> floor of S1 block are incomplete. It has also been mentioned therein that even internal work of many flats in 1<sup>st</sup> floor was incomplete. One basement in S1 block was not constructed. In this way, the construction of the flat no. S1-201 within 15 months of booking was not complete. One HRDA case under Sections 27 and 28 of Urban Planning and Development Act, 1973, was pending against the appellant-promoter, in which it was stated that S1 and S2 blocks were being used as hotel, contrary to the conditions of the sanctioned map. There is possibility that HRDA might pass order for demolition of S1 and S2 blocks and completion and occupancy certificate have not been obtained by the appellant-promoter. The documents also reveal that an enquiry committee has been constituted against HRDA and officials of Urban Planning Department for giving undue benefit to Eminent Infra Developers Pvt. Ltd., as is evident from letter dated 09.10.2019 of the Govt. of Uttarakhand.

40. The requirement of the law is that the homebuyer has to show that promoter has failed to complete or is unable to give possession of the apartment in accordance with terms of agreement, duly completed by the date specified in the agreement for sale, the allottee wishes to withdraw from the project and therefore, the promoter is liable to return the amount received by him in respect of that apartment with the rate of interest, which shall be the SBI highest marginal cost of lending rate plus 2 %. Facts of the complaint and reply of the promoter lie in this narrow compass. Narrow inspection hole through which the Tribunal is required to examine the controversy in hand is restricted to Section 18 of the RERA Act, and not beyond that. One can multiply the arguments, which suit to his client, in any manner one likes, but the Tribunal has to remain focused on what is required to be seen by it in law, and should not waste its time on futile things.

41. The Real Estate (Regulation and Development) Act, 2016, has been enacted, *inter alia*, to protect the interests of the consumers in the real estate sector. The Tribunal would be failing in its duty if contrary interpretation of the law is made, on flimsy grounds, which are not relevant for the purpose of deciding RERA appeal.

### **INFERENCE**

42. The direction given by learned Authority below to return a sum of Rs. 1675800/- along with 9.55 % annual interest to the respondent-homebuyer within 45 days, failing which the same shall be realized from it as the arrears of land revenue, is in accordance with law.

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

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

### **LOGIC**

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

**ORDER/ DIRECTION**

46. No interference is called for in the impugned order. RERA appeal, therefore, fails and is dismissed.

47. An amount of Rs. 10,00,000/- has been deposited by the appellant-promoter on 13.08.2021 as per the directions of the Hon'ble High Court of Uttarakhand dated 07.06.2021 in WPMS No. 1037 of 2021, M/s Eminent Infra Developers Pvt. Ltd. vs. State of Uttarakhand and others. Such amount 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.

48. Copy of this order be sent to learned Authority below for compliance.

**(RAJEEV GUPTA)**  
MEMBER

**(JUSTICE U.C. DHYANI)**  
CHAIRPERSON

*DATE: 31<sup>st</sup> March, 2022*  
*DEHRADUN*  
*RS*