(2019) 11 UK CK 0111

In the Uttarakhand High Court

Case No : Second Appeal No. 191 Of 2019

M/s Eminent Infradevelopers Pvt. Ltd APPELLANT

Vs

Vivek Radhu RESPONDENT

Date of Decision : 15-11-2019

Acts Referred:

Real Estate (Regulation And Development) Act, 2016 — Section 2(q), 2(zf), 11(4)(a), 11(4)(b), 15, 17, 17(2), 18, 18(1), 31, 38, 44, 58
Code Of Civil Procedure, 1908 — Section 100
Real Estate Regulation And Development Rules, 2017 — Rule 15

Citation : (2019) 11 UK CK 0111

Hon'ble Judges : Sharad Kumar Sharma, J

Bench : Single Bench

Advocate : Rajendra Dobhal, Sehan Tiwari

Final Decision : Dismissed

Judgement

Sharad Kumar Sharma, J

1. This Second Appeal is arising out of the judgement rendered by the Real Estate Appellate Tribunal, in an Appeal No. 14 of 2019, M/s Eminent Infra Developers Pvt. Ltd. v. Shri Vivek Radhu, where while exercising appellate jurisdiction under Section 44 of Act of 2016, the Tribunal has delivered a judgement on 23.09.2019, which was arising of the judgement dated 31.12.2018, as passed by the Real Estate Regulatory Authority, Dehradun in a Complaint Case No. 92 of 2018, Vivek Radhu v. Manish Kumar Aggrawal and others, as decided entertaining complaint under Section 31 of the Act. As a consequence thereto, by the impugned judgements under challenge herein, which relates to the settling of liability on the appellant which has been saddled by the learned Tribunal, as well as and by the learned Regulatory Authority in relation to the remittance of the amount, as well as the interest payable on it by the developer. The brief facts of the case are :-

A. The property allotted to the complainant vide allotment letter dated

05.02.2016 by the developer/appellant herein is a Studio Service Flat No. S-1-012, Arogya Gram, situated on the ground floor, having an area of 610 sq. feet in village Baheri, Rajputana, Tehsil Roorkee, District Haridwar.

B. The total sale consideration, which was agreed and actually transferred by complainant/respondent was Rs. 42,36,066/- in the accounts of appellant.

C. An agreement for allotment was executed on 5.02.2016, which contained a clause 3.3 for execution of the sale deed and handing over of possession within three months from the date of allotment, subject to its extension on account of force majure which in the instant case was extended till 04.08.2016 that means sale deed was to be executed at least within the extended time.

D. The possession was to be handed over latest by 04.08.2016, lest failing which an interest was payable to the complainant i.e. the home buyer. As per the clause 7.1 of the agreement the developer was to obtain completion certificate/ occupancy certificate from the Authority before execution of deed of conveyance. It further provided under Clause 7.2, that developer on receipt of completion certificate would invite the allottee for getting the sale deed executed.

E. The developer/appellant agreed to pay damages @ Rs. 3/- per sq. feet per month, on the area of flat sold till possession is handed over, as per clause 3.3.

F. The responsibility to procure the completion certificate or the occupancy certificate was vested with the developer and it was thereafter only that the sale deed in relation to the flat or the property could be executed on the invitation by developer under clause 7.2 to get the deed executed.

G. The appellant's case is that by letter No. 374 dated 26.06.2018, they have requested the Haridwar Roorkee Development Authority to provide the completion certificate and the occupancy certificate which is necessary to execute the sale deed. Being the precondition under clause 7.1 of the Agreement.

H. The appellants' case is that the flat was constructed and completed on 30.05.2017, but the possession could not be given or the deed could not be executed despite of the extension till 04.08.2016 due to non providing of the completion certificate and occupancy certificate by the Development Authority i.e. HRDA herein.

I. On a complaint proceeding being culminated by the Regulatory Authority it has directed the builder i.e. appellant herein to remit an amount of Rs. 42,36,066/- along with interest @ 10.75 per annum w.e.f. 04.08.2016, as per Section 18 of the Act No. 16 of 2016 to be read with Rule 15 of the Rules of 2017. Section 18 of the Real Estate (Regulation and Development) Act, 2016 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. 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. 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."

Rule 15 of Rules of 2017 reads as under:

"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 benechmark lending rate which the State Bank of India may fix from time to time for lending to the general public."

J. Site inspection report from SDM Roorkee/and Joint Secretary, HRDA reported in report that flat was completed before 30.05.2017. But interior work was yet to be done.

K. Regulatory Authority held that the Developer wants to take advantage of his own latches and dishonest intention, by delaying execution of sale deed.

L. As per Section 2(zf) of the Act of 2016, Occupancy Certificate and as per Section 2(q) of the Act, the completion certificate was obligatory on developer to obtain prior to execution of deed of conveyance. Sections 2(zf) and 2(q) of the Real Estate (Regulation and Development) Act, 2016 read as under:-

"2(zf). "Occupancy certificate" means the occupancy certificate, or such other certificate by whatever name called, issued by the competent authority permitting occupation of any building, as provided under local laws, which has provision for civic infrastructure such as water, sanitation and electricity;

"2(q) "Completion certificate" means the completion certificate, or such other certificate, by whatever name called, issued by the competent authority certifying that the real estate project has been developed according to the sanctioned plan, layout plan and specifications, as approved by the competent authority under the local laws;

M. Under Section 11(4)(a) & (b) of the Act No. 16 of 2016, all responsibilities; obligations and functions under the Act or Rules was to be fulfilled by Developer till deed was executed, including Completion Certificate under Section 11(4)(b).

N. Rule 15 of Rules 2017, to be read with Section 38 provides powers of imposition of penalty or interest in an event of contravention of any obligations casted on promoters under the allotment agreement or Act or Rules framed thereunder. Section 38 of the Real Estate (Regulation and Development) Act, 2016 reads as under:-

"38. Powers of Authority - (1) The Authority shall have powers to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the rules and the regulations made thereunder.

(2) The Authority shall be guided by the principles of natural justice and, subject to the other provisions of this Act and the rules made thereunder, the Authority shall have powers to regulate its own procedure.

(3) Where an issue is raised relating to agreement, action, omission, practice or procedure that-

(a) has an appreciable prevention, restriction or distortion of competition in connection with the development of a real estate project; or

(b) has effect of market power of monopoly situation being abused for affecting interest of allottees adversely, then the Authority, may suo motu, make reference in respect of such issue to the Competition Commission of India."

2. Facts which emerges for consideration in the Second Appeal, are that in pursuance of the Bill, introduced in the Rajya Sabha on 15th March 2016, the Act called as "The Real Estate (Regulation and Development) Act, 2016" (hereinafter to be referred as "the Act of 2016), was formulated and enforced with an object to be achieved at was towards the role of Real Estate in the development of the country and its infrastructure which plays a very important role in development and while being engaged in the said development process, the developers are supposed to be extremely professional and necessarily there would be standardization of the projects which they are otherwise engaged to be built-up as per the terms of the allotment, which has been issued by them. The said purpose of the Act was to meet up the object of Consumer Protection Act 1986, also because here the principal allottee, who applies for allotment of the plot or flat falls to be within the definition of the consumer, who is otherwise legally entitled to get the real estate conveyed to him strictly in terms of the contract

executed by him along with the developer by way of allotment letter and in the absence of the same since there had been a wide and rampant corruption prevailing in the development of the real estate by developers engaged in it, the Act of 2016 was enforced with a laudable social objective to be achieved.

3. Few facts which are necessarily required to be considered herein in the instant second appeal are and which is not in dispute also that the development project was floated by the defendant/appellant who admittedly happens to be the developer of the project called as "Aarogyam", situated at Village Badheri Rajputana, Tehsil Roorkee, Distt. Haridwar, which is a project which was to be developed by the present defendant/appellant in which the complainant/ respondent had applied for an allotment of a flat measuring 610 sq. ft. which was numbered as Studio Service Flat No. S1/01 2, lying on the ground floor of the said project.

4. As per the terms of the allotment, which was executed by defendant/appellant in favour of the complainant/respondent on 5th February 2016, the said flat which was allotted to him on the said date i.e. 05.12.2016, it bear the total sale consideration of Rs. 42,36,066/-, out of which for payment of consideration, the total amount of sale consideration, the complainant/respondent had taken a financial assistance from the Diwan Housing Finance Limited i.e. DHFL, and he is bearing an interest which was made to be paid on the said financial assistance taken by him i.e. complainant for the purposes of allotment and for remittance of the total sale consideration of Rs. 42,36,066/- to the present appellant towards the flat.

5. The grievance of the respondent/complainant in his complaint which was filed by him before the Chairman, Real Estate Regulatory Authority, Dehradun, which was registered as Complaint No. 92 of 2018, and in the said complaint, as registered, primarily it was widely titled as "Non delivery of possession of apartment and non registration of sale deed". He has submitted in the complaint that in terms of the allotment dated 5th February 2016, it stipulated as per its clause 3.1 of the Agreement that it was obligatory on part of the developer to offer in writing the period stipulated as per the terms of the agreement for taking over possession of the flat after its completion of the construction by the developer. Clause 3.3 of the Agreement reads as under:-

"3.3 The Company shall endeavor to handover possession of the Said Flat within a period of (THREE months) from the date of booking subject to payments by the allottee towards the basic sale price and other charges as demanded in terms of this agreement. The time frame for possession provided hereinabove is tentative and shall be subject to force majeure and timely and prompt payment of all instalments and completion of formalities required and the timely receipt of all approvals from the concerned authorities. The Company shall be entitled to three (3) months additional period in the event there is a delay in handing over possession. However, in case of delay beyond a period of three (3) months and if such delay is attributable to the Company, the Company shall be liable to pay @

Rs. 3.00 per sq.ft. per month of the Super Area of the Said Flat for the period of further delay."

6. The said covenants of the clause 3.1 of the agreement and also that as contained under clause 3.3 are one of the situations to be considered where the developer had bound himself to hand over the said flat duly completed with all specifications within 3 months from the date of execution of the said agreement i.e. from 5th February 2016. Though the said stipulation contained which had provided that it was to be completed within a period of three months, for the purposes of handing over possession to the allottee, but the agreement itself also contained a clause that the said specified period of completion of the project, the same could also be extendable based on certain conditions beyond control, which are suffered by force majeure and in that eventuality, considering the contingencies being faced by the appellant/developer, the extension was granted and the project was expected to be completed latest by 4th August 2016. Clause 3.1 of the Agreement reads as under:-

"3.1 The Company, upon completion of the construction of the Said Building/Said Flat and after obtaining certificate for occupation and use of the same from the competent authority, shall offer in writing, to the Allottee to take over possession of the Said Flat in terms of this Agreement and within thirty (30) days from the date of issue of such offer, the shall hand over possession of the Said Flat to the Allottee, provided that the Allottee has made all payments in respect the Said Flat as provided in this Agreement and has complied with all provisions, formalities, documentation etc., as may be prescribed by the in this regard."

7. As per the agreement of allotment dated 5th February 2016, the developer i.e. the appellant herein had also agreed to pay damages @ Rs. 3/- per square metre per month of the super area of the said flat during the period for which the delay has chanced in the process of completion and till the process of the actual handing over of the possession of the said flat beyond the extended period of its completion that is 4th August 2016. The respondent/complainant had submitted a complaint in relation that the developer had not complied with the stipulations contained under clause 7.1 of the agreement for sale which has been agreed by him for obtaining an occupation/completion certificate from the Development Authority and it was thereafter only that it was agreed that the transfer deed would be executed by executing a registered sale deed. Clauses 7.1 a nd 7.2 read as under:-

"7.1 The Company, upon completion of construction of the Said Flat and/or after obtaining occupation/completion certificate, shall transfer the Said Flat by executing and registering a sale deed in respect thereof in favour of the Allottee, provided that the Allottee fulfils the entire obligations as stated in this Agreement.

7.2 The Allottee undertakes to execute the Sale Deed in respect of the Said Flat within the period as may be intimated by the Company in writing, failing which the Allottee shall solely be liable for the consequences arising there from which inter-alia may include the increase in the rate of stamp duty/registration fee or any other such duty or charges payable in respect thereof."

8. Hence, it is quite clear by covenants contained under clause 7.1 of the agreement, that the execution of the sale deed merely on the pretext that the appellant has completed the construction in 2017, that itself will not be a condition precedent to force the complainant to get the sale deed executed until and unless the conditions provided under clause 7.1 of the agreement is fulfilled by the developer i.e of getting the occupation / completion certificate prior to execution of the deed of conveyance in respect of the person in whose favour the letter of allotment has been executed by the developer/appellant herein.

9. Not only this, as per the contents of clause 7.2 of the agreement dated 05.12.2016, it was further made obligatory on part of the developer to intimate the principal allottee to execute and ensure to get the sale deed executed in respect of the flat allotted to him within the specified time period and it would be only subsequent to the fulfilment of conditions contained under clauses 7.1 and 7.2 of the agreement. Meaning thereby, the invitation extended by the appellant/ developer to the allottee/homebuyer/complainant/ respondent, herein couldn't have been complied with until and unless the preconditions of clauses 7.1 and 7.2, which admittedly till date has not been complied with by the defendant/ appellant, and hence no sale deed could have been executed despite of whatsoever efforts, have been projected by the appellant in his pleadings before the Court below and even before the second appellate Court that rather the respondent/complainant has not responded to get the sale deed executed, could not be a plea which could be accepted, in an event of non compliance of condition of clauses 7.1 and 7.2 of the terms of the allotment dated 05.02.2016.

10. Even otherwise also, this Court after having gone through the terms of allotment is of the view that the condition of executing the sale deed would not have come into play until and unless the completion certificate is extended by the development authority to the defendant/appellant for the reason that it is only after the fulfilment of the said condition of procurement of the completion certificate and occupancy certificate, that the authentication to the project which has been enforced by the developer would legally come into existence so as to entitle them to execute the sale deed and its only after the fulfilment of the said condition being complied with, the developer will thereafter only acquire a saleable right in relation to the property which has been agreed to be conveyed in terms of the agreement dated 5th September 2016 to its respective home buyer.

11. It was the case of the home buyer/complainant that under clause 10 of the agreement for allotment, the developer/appellant was supposed to raise the finances from the various Financial Institutions for enforcement of the project and which included availing of the financial assistance by way of to meet the sale consideration for the principal allottee which too was supposed to be utilized for development of the project. Admittedly in the instant case, there had been a

complete exchange of sale consideration with the defendant/appellant herein as a consequence of the agreement executed between them for allotment of the flat and this is the fact which is not being denied. It is also a fact which is not been denied by the defendant/appellant that as per clause 3.3 of the allotment agreement dated 5th February 2016, the extension of time of completion of construction which the developer was entitle to avail was rather also availed by him with an undertaking to complete the construction latest by 4th August 2016, but however, despite of the said extension, and undertaking given by defendant/ appellant, the construction was not completed resulting into initiation of the proceedings by the respondent by filing a complaint under Section 31 of the Act before the Real Estate Regulatory Authority, praying for the following reliefs:-

"Relief Sough from RERA:

The developer shall be called upon to forthwith and without any further delay 1. Send a copy of the Form-C/Registration Certificate of Project issued by Uttarakhand Real Estate Regulatory Authority (R.E.R.A.), along with a copy of Form-F/Certificate for Extension of Registration of Protect, if any; 2. Intimate the date and time for executing and registering the sale Deed in respect to the Said Flat in my favour; 3. Handover the physical vacant possession of the duly completed and furnished Flat to me, in terms of the Agreement and in line with the specifications agreed in Annexure B of the Agreement; 4. Release the charge on the project; 5. Send a copy of the Occupation/Completion Certificate issued by the competent authority; Send a copy of the Commencement Certificate/ Building Permit/Construction Permit, issued by the competent authority; 7. Send a copy of the sanctioned plan, site plan, building plan, service plan, parking and circulation plan, landscape plan, layout plan, zoning plan and such other plan, structural designs, permissions such as environment permission and such other permissions, which are approved by the competent authority prior to start of a real estate project; 8. Remit an amount of Rs. 42,36,066/- (Rupees Forty Two Lakh Thirty Six Thousand Sixty Six) along with Dewan Housing Finance Corporation Limited (D.H.F.L), towards the interest, against Home Loan for the said Flat; 10. Remit an amount of Rs. 3,50,000/- (Rupees Three Lakh Fifty Thousand) as liquidated damages against the monthly lease rental income; 11. Remit an amount of Rs. 50,000/- (Rupees Fifty Thousand) as liquidated damages, in terms of clause 3.3 of the Agreement, for delay in handing over the possession; 12, Indemnify me against the increase in the rate of stamp duty/ registration fee or any other such duty or charges payable in respect to the delay in execution and registration of the Sale Deed."

12. As per the relief clause, the complainant/respondent had prayed for that Form C and F certificate, for extension of the registration of the project, and its completion, if any, and further prayed for the intimation of the date for execution of the registration of the sale deed in respect of the flat in favour of the complainant should be intimated to him, and that too after complying with the conditions of Clause 7.1 of the allotment agreement, but because of the absence

of fulfilment of the said condition of Clause 7.1, no such legal offer under clause 7.2 could have been extended by the defendant/appellant as it has been argued by the learned counsel for the defendant/appellant before this Court that though according to them even after completion of the project in 2017, that is apparently as per the case even much beyond the extended period, which already extended to 04.08.2016, the appellant contended that they have called upon the respondent/complainant to get the sale deed executed, but merely upon the said invitation given for execution for sale deed was not as per clause 7.2 hence could have been not complied with for the reason that clause 7.1 was not fulfilled, hence the complainant has prayed for that the complainant should be ensured its compliance prior to execution of the sale deed to the effect that occupation and completion certificate has been issued in favour of the developer by the Development Authority prior to inviting him for execution of the sale deed.

13. The said completion certificate provided under Section 2(zf) and 2(q) of the Act, even otherwise also the correspondence which has been placed on record and even as per the terms of allotment also could not have been issued in favour of the developer/appellant because the other allied services, which were also required to be fulfilled and completed by the developer as per the scheme and conditions of allotment for providing with the Sanction Plan, Site Plan, Building Plan and Service Plan, and apart from it, other additional development features which the developer/appellant was supposed to provide for example; the parking and the circulation plan, the land scape plan and other plans they were also required to be fulfilled and supplied prior to issuance of the 'development and completion certificate', by the Development Authority. Since the same was not done even after registration of the complaint by the appellant/developer before the development authority, has filed his objection to the Complaint No. 92 of 2018, and he has expressed his inability to execute the sale deed because according to him i.e. appellant and as per the communications made between the development authorities, and the appellant, particularly a reference which was made of the communication dated 26th February 2018, the application which has been submitted by the development/appellant to Haridwar and Roorkee Development Authority for issuance of completion certificate in relation to Block S1 and Block S2, however since the appellant/developer company did not received any communication despite of the letter issued by the Development Authority being letter number 1748 dated 7th March 2018. Meaning thereby, the defendant/appellant has expressed his inability to execute the sale deed; because if there was any stalemate prevailing with the Development Authority and Appellant, because of whatsoever embargo which has been created by them for getting the sale deed executed, according to appellant's case the developer cannot be made responsible for delayed execution of the sale deed due to non supply of the completion and occupancy certificate by the Development Authority, and hence he had questioned the objection as filed by the complainant/ respondent by raising a preliminary ground that he i.e. the Developer/Appellant could not be held responsible and made liable to pay the interest which otherwise

is to be paid to the complainant in terms of the agreement and as per Section 18 of the Act itself, which contemplated the payment of interest on the delayed allotment or delayed execution of the sale deed.

14. Even if the provisions of the Act itself is taken into consideration, particularly, the provisions of Section 17 on which the reliance has been placed by the learned counsel for the defendant/appellant with regards to the mode to be adopted for transfer of title, if Section 17, itself is read in its precession, the proviso to sub Section (2) which provides that the transfer of title could have only taken place subject to the fulfilment of condition as projected under clause 7.1 of the terms of the allotment dated 5th February 2016.

"17. Transfer of title.-(1) The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws: Provided that, in the absence of any local law, conveyance deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate.

(2) After obtaining the occupancy certificate and handing over physical possession to the allottees in terms of sub-section (1), it shall be the responsibility of the promoter to handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, as per the local laws: Provided that, in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, within thirty days after obtaining the 1 [completion] certificate."

15. Even as per Section 18 of the Act itself, the delayed handing over of the possession or execution of the sale deed entails the remittance of entire amount along with the interest and compensation, which was to be paid subject to the condition according to the intention expressed by the allottee/home buyer whether he wants to get refund of money or he wants to await the completion of the formalities for the purpose of execution of the sale deed to be resorted to by the developer. Accordingly, after the exchange of the pleadings, the Regulatory Authority, as constituted under the Act, after considering the rival contentions and particularly the impact of clauses 7.1 and 7.2 of the agreement and as per the mandatory condition of clause 3.1 and 3.3, which provided for the specification of completion of the project and on its apparent violation the Court of Regulatory Authority has framed the issues of determination which is quoted

hereunder:-

"1. ???? ?????? ????? ?? ??????? ????? ???? ? ????? ???? ??? ?????? ??? ???

2. ??????????? ?????? ??????? ?? ????? ?????? ???? ??? ???

3. ??????????? ???? ?????? ???? ?? ??????? ???"

16. The issues raised was related to the determination of the fact as to whether who could be made responsible for the delayed allotment and handing over the possession of the flat and if once the aforesaid issue No. 1 is settled, that there happen to be a delay in completion of the flat, the second issue which would arise consideration would be as to who would be responsible for remittance of the amount of interest, which was liable to be imposed as a consequence of the delayed allotment as per the terms of the allotment condition and the Act too. The Regulatory Authority, while determining the issue No. 1 and after referring to Section 11(4) (b) of the Act, it has laid down that it was the sole responsibility on the promoter/developer/appellant herein that he would be completing all the formalities of completing the project and its ultimate execution of the sale deed for transferring over the property to the principal allottees i.e. the home buyers, with the time specified under clause 3.1 and 3.3 of the terms of allotment.

17. The Act had further provided in its Section 15, that the process of completing of the project and procurement of the completion certificate vis-a-vis it has to be obtained from the Development Authority, which in fact it was the responsibility to be discharged by the developer himself and no one else. Consequently, after determining the issue No. 1, the Regulatory Authority has recorded a finding to the effect that after considering the evidence which was adduced by the parties in relation to the nature of relief sought for on appreciation of documentary evidence had concluded that the developer was held guilty when despite of extended period of completion of the project till 4th August 2016, and even as per the pleadings raised by the developer/appellant himself that despite of the extended period, the project was completed only in 2017, that in itself would lead an inference that there had been delayed completion of the project and consequently there couldn't have been an handing over of the possession in accordance with clause 7.3 or in accordance with Section 17 of the Act.

18. The Court has also recorded a finding on appreciating evidence that as far as the responsibility to be discharged by the developer for completing the project and making the allotment has to be exclusively vested with the developer, and because of his inaction in getting the completion certificate is a responsibility which he has to shoulder and hence it has been held by both the Courts that ever since 2016 and till the date of institution of the complaint, the developer/ appellant has been held to be responsible in delayed process of allotment and execution of the sale deed. Ultimately, the liability, which was supposed to be imposed in accordance with the determination which was sought to be made by formulation of issue No. 2, the Regulatory Authority has recorded that it is not in dispute that after taking the financial assistance by way of a loan, the private

respondent has made the payment of total sale consideration amount of Rs. 42,36,066/- to the developer/appellant and it is also not disputed by the developer himself that he has not received the amount of total sale consideration payable towards the cost of the flat allotted to the complainant respondent that is Flat No. S1/012 (in the present case.

19. In that eventuality, it stood proved by evidence on record that the actual sale consideration stood conveyed to the developer/appellant and he was the beneficiary of the recipient of the amount without actual transfer of ownership of the flat agreed to be sold and in that eventuality, when he was enjoying the capital, invested by the allottee in pursuance of the allotment dated 5th February 2016, it would be presumed that the said capital received by the appellant was actually invested by the developer in enforcing the project and he was the beneficiary of the amount thus remitted to him and hence he was entitled to pay the interest in accordance with the terms of the agreement and also in accordance with the provisions contained under Section 18 of the Real Estate (Regulation and Development) Act, 2016, which is already referred above.

20. Hence, the Court held that in view of the dereliction on part of the promoter/ appellant in getting the completion certificate from the Developer Authority within the stipulated time frame, at least the complainant/respondent cannot be held responsible for, delayed execution of the sale deed and thus the Regulatory Authority has rightly held that he would be entitled to pay the interest as contemplated under Section 18 (1) after the extended date of completion of the project i.e. 8th August 2016, and the same has been directed to be made payable till the date of actual handing over of possession after the execution of the sale deed in terms of the Rule 15 of the Rules as framed under the Act itself. Consequently, the liability of remittance of the interest was approximately fixed upon the promoter/appellant @ 10.75% in accordance with the finding recorded by the judgement impugned dated 31st December 2018.

21. In view of the some admitted facts, which have already been dealt with above, and also in view of the liability settled as per the provisions of Section 18 of the Act, and also as per the embargoes which was required to be submitted by the developer/appellant prior to execution of the sale deed which is to be read with clause 7.1 along with Section 17 of the Act, since admittedly the same was not complied with mere reference of the communications which had been made by the developer with the Development Authority for issuance of completion certificate that in itself cannot be taken as to be the escape for the developer/ appellant so as to deprive the allottee of possession of the flat, and execution of the sale deed which was otherwise to be executed in his favour after the extended time period that is 4th August 2016 in the present case. In view of the self implied condition which was accepted by the developer/appellant, itself and once the same has been apparently proved to be violated in that view, the developer itself has to be held responsible for delay in handing over of possession or execution of sale deed, and thus the liability as fixed for remittance

of the interest from 4th August 2016 till the date of handing over possession was absolutely justified and binding on the appellant in view of the provisions contained under Section 18 of the Act, the said imposition cannot be faulted of in any manner whatsoever.

22. The learned counsel for the appellant has drawn the attention of this Court to the letter written by the Additional Secretary of the State of Uttarakhand i.e. being letter No. 127 dated 13th September 2019, apart from the fact that it will have no relevance because it was not a communication which was under consideration or relied by the appellant before the Regulatory Authority, but even otherwise also if the said letter dated 13.09.2019, it is taken into consideration, since the same being procedural in nature which has only stipulated an amendment in clause 3.9.1, as provided under the bye laws framed in 2011, since the same being procedural in nature, it will not have a retrospective effect governing the interse relationship between the developer and the allottee i.e. respondent No. 2 herein, as the said communication of making amendment in the regulation 3.9.1 will not have a retrospective effect and would not apply or govern the terms of allotment of flats made by Developer/Appellant with the Hone Buyer which stood executed prior to the issuance of letter dated 13.09.2019.

23. The other communication on which the learned counsel for the developer/ appellant has placed reliance to defend the claim of the home buyer is the communication dated 28th November 2018, which is said to have been made by the Uttarakhand Property Development Authority to the Joint Secretary of the State providing for governing the stipulations for the grant of completion certificate under the Act, it is hereby observed that the said communication too would be nothing but only an interse departmental communication governing the actions of authority itself and amongst themselves, but the said communication will not override the stipulation of the Act and Rules framed thereunder, and also the terms of allotment letter dated 05.02.2016, which would definitely bind the appellant and his actions had to be in accordance with it, such stray communications cannot be derived by developer/appellant to deny the claim raised by home buyer under Section 31 of the Act. Otherwise if such a defense is permitted to be taken to oppose the claim under Section 18 of the Act as raised under Section 31 of the Act, apart from the fact that it will be overriding it will also carry a wrong precedent contrary to the very purpose of the Act. Hence, I deny to accept the said plea of defense of the developer/appellant. But as far as any positive steps taken by the appellant/developer for getting the completion certificate as per the stipulations of clause 7.2 of the agreement executed by them, there is nothing on record brought by the developer/appellant, by way of an evidence before the Regulatory Authority to show that any positive steps have been taken by the developer/appellant to procure the completion certificate or the occupancy certificate as defined under the Act, and hence on that ground also, the impugned order passed by the Regulatory Authority, imposing the liability of interest till 2019 or till handing over of possession; whichever is earlier

cannot be faulted of because even as on today (when this Second Appeal has been argued), no deed has been executed nor any possession has been handed over to the complainant/respondent No. 3, which couldn't even otherwise have been done in the absence of fulfilment of the condition of Section 17 of the Act itself.

24. The said order/judgement of Regulatory Authority was put to challenge by the appellant by preferring of an appeal before the Real Estate Appellate Tribunal and the learned Real Estate Appellate Tribunal too, by the impugned judgement under challenge in the present Second Appeal that is dated 23rd September 2019, after considering the aforesaid observations, which has already been dealt with by this Court has held that the finding which has been recorded by the Regulatory Authority for fixation of liability and with regards to the inaction on part of the appellant in getting the formalities completed are shown to be apparently established, against them and thus while determining the rate of interest the sale consideration in accordance with Rule 15 of the Rule of 2017, the Court has held that even the Regulatory Authority, itself has got a power vested in them under Section 38 of the Act, to impose a penalty and interest in case if there happens to be an apparent contravention to the obligation, which has been entered into between the developer with the respondent allottees. Consequently, the appeal of the appellant was dismissed by the impugned judgement dated 23rd September 2019. Pursuant to which and being aggrieved against the said judgement the present second appeal has been preferred by the appellant by invoking Section 58 of the Act of 2016, which happens to be a second appeal in consonance to the provisions contained under Section 100 of the Code of Civil Procedure which is attracted by reference, which itself has limited the scope of interference at the second appellate stage, and that is permissible only when there is an existence of substantial question of law to be considered by the Court while exercising its power under Section 100 of CPC, in accordance to the legal principles laid therein in Code of Civil Procedure.

25. The appellant in the present Second Appeal has formulated the substantial question of law with regards to the implications carried by Section 18 to be read with Section 38 of the Act and also a question itself as to whether at all the scope of imposition of interest could be widened to be imposed on the developer/ appellant, and also as to whether it has to be confined upto the date when the appellant claims to have completed the construction i.e. in 2017 or it could be extended beyond the said period till the date when the developer executes the sale deed. Since in view of the finding which has been recorded and particularly in view of the provisions contained under Section 38 of the Act itself, the Regulatory Authority is entitled to impose the interest and damages in relation to and in those circumstances where there is delayed execution of the sale deed in pursuance to the agreement of allotment dated 5th February 2016, no fault as such could be pointed out so as to attract to answer the substantial question of law which has been framed by the appellant and thus this Court is of the view that no such substantial question of law is involved and required to be answered

by this Court in the instant case. Section 38 of the Real Estate (Regulation and Development) Act, 2016 reads as under:-

"38. Powers of Authority.-(1) The Authority shall have powers to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the rules and the regulations made thereunder.

(2) The Authority shall be guided by the principles of natural justice and, subject to the other provisions of this Act and the rules made thereunder, the Authority shall have powers to regulate its own procedure.

(3) Where an issue is raised relating to agreement, action, omission, practice or procedure that-

(a) has an appreciable prevention, restriction or distortion of competition in connection with the development of a real estate project; or

(b) has effect of market power of monopoly situation being abused for affecting interest of allottees adversely, then the Authority, may, suo motu, make reference in respect of such issue to the Competition Commission of India."

26. The aforesaid contention with regards to the impact of the delayed allotment process made by the developer, which the developer/appellant in the present case acquires the status of being the same, as it has also been settled by the Division Bench of Allahabad High Court as reported in 1996 (2) ARC 383, Smt.Vrinda Gujarati and others v. Bareilly Development Authority, wherein the division bench in paras, 22, 23 and 24 has provided as under:-

"22. It may be mentioned that the allottees deposited the instalments under the hope and trust that they will get the flats within the time schedule advertised at the initial stage. There may be certain cases where the allot tees might be residing in rented houses and they might have managed their financial positions in such a manner that after deposit of instalments, they will get flat of their own and thereafter they will be free from the payment of rent as then they will shift from rented houses to allotted flats but on account of inordinate delay in delivery of possession of allotted flats, their financial calculations and legitimate expectations stand frustrated causing various types of financial losses to them. On the other hand once the authorities made offers and same were accepted by allottees with legitimate expectations, the statutory obligation cast upon the authorities is to complete the same within the time schedule mentioned in the offer and if they fail to discharge the same, the affected allottees are entitled to the interest for delayed delivery of possession, as the allottees have parted with the money which was earning interest. To that extent for the delayed period, the allottees are entitled to interest which will be in accordance with the principles of equity.

23. We are of the considered view that the petitioners are entitled to get 18% interest for the delayed delivery of the possession on the amount deposited by

them till the actual date of delivery of possession. The interest would be given on the total amount from the date of last instalment deposited by them till the date of delivery of possession as the authorities also charge 18% interest on delay in deposit of instalment. They cannot make a turn about or blow hot and cold that they could not pay interest for the late delivery of possession. We are of the considered opinion that the respondent will have to pay interest @ 18% after one month of the issue of allotment letter which is reasonable period to complete the formalities.

24. We issue direction that the interest at the rate of 18% be paid on the total amount deposited including the registration fee and allowance of this amount be given in deduction of the price and to this extent recovery certificate has to be modified and direction is issued accordingly."

27. The aforesaid ratio of Division Bench, it had provided that when there is a delayed execution of a sale deed after the allotment made by the developer and there is non fulfilment of the conditions of the allotment which has resulted into financial loss or harassment to the allottee, the Real Estate Development Authority was made liable to pay interest @ 18% per annum on account of the delayed allotment of a residential flat. The same ratio has also been propounded in para 38 of the said judgement of Division Bench, which is quoted hereunder:-

"38. Learned counsel for the respondent submitted that the increase in price has been justified in the synopsis. The date of allotments have been given in the earlier part of judgment i.e. which starts from 28-10-1988 and ended on 26-5-1992. Definitely there is inordinate delay in execution of project. The money of the petitioner was also blocked and in the legitimate expectation they may not have built any other house. In this case there is delay ranging between 12 years to 9 years from the date of taking possession. Even from external development there is delay of five years in first allotment and first allotment which took place in 1991 there is delay of eight years andnine years from IIIrd instalment i.e. 26-5-1992. The concept of this extreme inaction or say failure to perform the duly to complete the project has not been explained except that lot of money was blocked and the project could not have been completed and the authority has to depend on the loan."

28. Hence in view of the aforesaid ratio of the Division Bench of Allahabad High Court, the direction as issued for imposition of interest by the impugned order and the challenge do not suffer from any apparent error, consequently the Second Appeal lacks merits and the same is hereby dismissed.

29. However, there would be no order as to cost.

