

A. F. R.

Neutral Citation No. - 2023:AHC-LKO:85858

Court No. - 17

Case :- RERA APPEAL No. - 266 of 2019

Appellant :- Lucknow Development Authority Thru. Vice Chairman
Lucknow

Respondent :- Smt.Upasana Duggal

Counsel for Appellant :- Ratnesh Chandra

Counsel for Respondent :- Ashish Chaturvedi

Hon'ble Alok Mathur, J.

1. Heard Shri Ratnesh Chandra, learned counsel for the appellant as well as Shri Ashish Chaturvedi, learned counsel appearing on behalf of respondents.
2. The controversy in brief is with regard to the delay in handing over the possession of the flat which was sought to be constructed by the petitioner while developing apartments known as Smriti Apartments, Sector J Extension, Sitapur Raod Scheme, Jankipuram, Lucknow.
3. In the brochure published by the petitioner it was stated that the flats would be handed over within a period of 24 months as per clause 2.4 of the said brochure and as per clause 11.1 it was provided that in case possession is not given then the allottee shall be at liberty to seek refund of the entire money along with interest at the rate of 4% per annum.
4. It is stated that for certain reasons beyond the control of the petitioner construction activities could not commence and, hence, there was delay in completion of the said project. In the meanwhile the Real Estate Regulation & Development Act, 2016 came into operation and the said project was registered by the petitioner with the concerned authorities and further the date of delivery of possession was extended till 31.12.2019.

5. In light of the fact that the petitioner did not complete the project within the stipulated time, the respondent filed a complaint before the Real Estate Regulatory Authority, Uttar Pradesh seeking interest on the delay in completion of the said project as provided under Section 18 and also sought a direction to the petitioner for expediting the possession of the said flat.

6. In the application it was stated that in pursuance to the application made by the respondent he was allotted a flat no. D/1407/C which was valued at Rs.13,00,000/- and by 13.12.2013 he had paid an amount of Rs.14,18,886/-. It was further stated by him that as per the registration booklet the possession was to be given within 24 months and, accordingly, he should have got possession by 01.10.2013 and till filing of the said application before authority, i.e., some time in 2018 the possession had not been given to the respondent/ allottee and hence prayed for quashing the order dated 26.2.2019 passed by Chairman, Real Estate Appellate Tribunal, U.P., Lucknow in Appeal No.87 of 2018 (Smt. Upasand Duggal Vs. Lucknow Development Authority).

7. The petitioner had put in appearance before the Authority and objected to the claim made by the respondent/ allottee. The petitioner had admitted that the possession was to be handed over by 01.10.2013 but due to certain dispute and delay by the construction agency who was given the contract of constructing the said flats there was delay in completion of the said project. It was further stated that there was difficulty and delay in obtaining the possession of the said land due to farmers' agitation and it is only when settlement was arrived at, the possession was given to the petitioners and, accordingly, submitted that the delay was beyond the control of the petitioners and, consequently, prayed that the interest as claimed by the petitioner does not deserve to be granted in peculiar facts of the present case.

8. Another objection made with regard to the claim of the allottee was that as per the brochure he was entitled only for refund of the entire

amount with interest @ 4% and as per the settled terms and conditions there was no provision for grant of interest on the delay in completion of the said project and, consequently, stated that the prayer made by the allottee before the Authority could not be admitted/ allowed.

9. Considering the arguments the Real Estate Regulatory Authority was of the considered view that the petitioner had delayed in handing over the possession of the said flat despite there being agreement in this regard and once there is a breach of the said agreement the allottee was entitled for interest for the delay in completion of the said project, and, accordingly, awarded interest @ MCLR +1% per year for the delayed period commencing from 01.12.2013. The said amount was directed to be paid within 45 days and further the petitioner was directed to hand over the possession expeditiously.

10. The allottee/ respondent being aggrieved of the said order has moved an appeal before the Real Estate Appellate Tribunal. He was aggrieved only with regard to the interest granted by the RERA on the delay in handing over the said possession. It was contended that as per provision of Section 2 (za) of the Act of 2016 it was provided that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default.

11. In this regard it was submitted that as per the agreement between the petitioner and allottee the rate of interest prescribed for delay in payment of the consideration of the said flat was determined at 15% by the petitioner himself. It was stated that in the brochure published by the petitioner in Clause 2.1 it has been specifically stated that in case allottee does not pay the amount of consideration for the flat or the instalments, the same shall be payable along with interest @ 15% per annum.

12. The Appellate Tribunal considered the contention of the allottee as well as of the petitioner and also the provisions of Section 2 (za) of the Act of 2016 and, accordingly, was of the considered view that the

order of the Authority cannot be said to have been passed in accordance with the provision of the Act of 2016 and, accordingly, modified the order and directed the petitioner to make payment of interest @ 15% per annum on the deposited amount with effect from 01.12.2013 within a period of 45 days and continue to make payment till the date of handing over of actual physical possession of the flat in question.

13. It has been submitted by learned counsel for the petitioner that the Authority under the Act of 2016 can pass orders and give benefit to the allottees only in case there is violation of the terms and conditions stated before the Authority itself. He states that in the application for registration the petitioner himself has stated the date of completion of the project was till 31.12.2019, and, accordingly, any modification of the order would be impermissible.

14. I have heard the learned counsel for the parties and perused the record.

15. Undisputed facts of the case are that the respondent is an allottee who had made application to the petitioner for allotment of the flat in the Smriti Apartments being constructed by the petitioner.

16. The brochure was published by the petitioners some time in the year 2011 pursuant to which the respondent had made an application and he was allotted Flat No.D/1407/C on 26.11.2011. His contention that the flat was not delivered to him till 2018 and, accordingly, he moved an application before the RERA seeking compensation for the delay in handing over the possession as provided for under Section 18 of the Act of 2016.

17. The Authority considered the claim of the petitioner as well as the respondent and was of the view that in light of the fact that the petitioner/ promoter had not fulfilled his promise and did not deliver the possession over the said flat within the time prescribed by him as per the agreement between the parties he was liable to pay interest @

MCLR + 1% w.e.f. 01.12.2013 till the date of possession of the said apartments.

18. At this stage it is relevant to consider the fact that no appeal against the said order dated 11.7.2018 was filed by the petitioner but an appeal was filed only by the allottee before the Real Estate Appellate Tribunal.

19. The only ground raised was with regard to the rate of interest awarded by the Authority. It was the case of the allottee that as per the definition of interest provided for under Section 2 (za) of the Act of 2016 he was entitled to same rate of interest which is chargeable by the promoter on delay in payment of the instalments or consideration of the said flat. In the present case he was able to demonstrate that as per the brochure and specially in terms of the Clause 2.1, the petitioner was charging 15% interest from the allottees for the delay in payment of their instalment/ sale consideration towards the apartments/ flats and, consequently, any interest which is payable under Section 18 will commensurate with the rate of interest chargeable by the promoter and, accordingly, prayed that the order of the Authority requires interference and the promoter should be directed to pay interest at the rate of 15 %.

20. By means of the impugned order dated 26.02.2019 the appellate tribunal has allowed the appeal preferred by the allottee.

21. The order of the Appellate Tribunal dated 26.02.2019 has been impugned in the present appeal on the ground that once the Act of 2016 has come into operation, then only the conditions prescribed in the said Act or any declaration made before the Authority can be implemented, and the terms and conditions stated in the brochure which was published in 2011, cannot be implemented after coming of the Act of 2016.

22. In the brochure published by the promoter it was provided that the rate of interest chargeable from the allottee for the delay in payment of the consideration for the flat/apartment would be 15%, while the

regulatory authority had allowed the application of the allottee granting him interest for the delay in giving of possession at MCLR+1%, while the appellate Tribunal has bound the promoter to pay interest for the delay in giving of the possession @ 15% per annum.

23. The promoter has questioned the judgement of the appellate tribunal stating that the Tribunal committed error by binding the promoter to pay the rate of interest which was as per the agreement which was entered prior to coming into force of the act of 2016 and, hence, the order is without jurisdiction.

24. This aspect of the matter has been duly considered by the Supreme Court in the case of ***M/S Newtech Promoters and Developers Private Limited Vs State of U.P*** (civil appeal No. 6745 – 6749 of 2021 decided on 11/11/2021). Supreme Court after due analysis has laid down the following:-

“45. At the given time, there was no law regulating the real estate sector, development works/obligations of promoter and allottee, it was badly felt that such of the ongoing projects to which completion certificate has not been issued must be brought within the fold of the Act 2016 in securing the interests of allottees, promoters, real estate agents in its best possible way obviously, within the parameters of law. Merely because enactment as prayed is made retroactive in its operation, it cannot be said to be either violative of Articles 14 or 19(1)(g) of the Constitution of India. To the contrary, the Parliament indeed has the power to legislate even retrospectively to take into its fold the pre-existing contract and rights executed between the parties in the larger public interest.”

46. The consequences for breach of such obligations under the Act are prospective in operation and in case ongoing project, of which completion certificate is not obtained, are

not to be covered under the Act, there is every likelihood of classifications in respect of underdeveloped ongoing project and the new project to be commenced.

47. The legislative power to make the law with prospective/retrospective effect is well recognized and it would not be permissible for the appellants/promoters to say that they have any vested right in dealing with the completion of the project by leaving the allottees in lurch, in a helpless and miserable condition that at least may not be acceptable within the four corners of law.

48. The distinction between retrospective and retroactive has been explained by this Court in Jay Mahakali Rolling Mills v. Union of India, which reads as under:—

"8. "Retrospective" means looking backward, contemplating what is past, having reference to a statute or things existing before the statute in question. Retrospective law means a law which looks backward or contemplates the past; one, which is made to affect acts or facts occurring, or rights occurring, before it comes into force. Retroactive statute means a statute, which creates a new obligation on transactions or considerations or destroys or impairs vested rights."

49. Further, this Court in Shanti Conductors Private Limited v. Assam State Electricity Board, held as under:—

"67. Retroactivity in the context of the statute consists of application of new rule of law to an act or transaction which has been completed before the rule was promulgated.

68. In the present case, the liability of buyer to make payment and day from which payment and interest become payable under Sections 3 and 4 does not relate to any event which took place prior to the 1993 Act, it is not even

necessary for us to say that the 1993 Act is retroactive in operation. The 1993 Act is clearly prospective in operation and it is not necessary to term it as retroactive in operation. We, thus, do not subscribe to the opinion dated 31-8-2016 [Shanti Conductors (P) Ltd. v. Assam SEB, (2016) 15 SCC 13] of one of the Hon'ble Judges holding that the 1993 Act is retroactive."

50. In the recent judgment of this Court rendered in the case of Vineeta Sharma v. Rakesh Sharma wherein, this Court has interpreted the scope of Section 6(1) of the Hindu Succession Act, 1956, the law of retroactive statute held as under:—

"61. The prospective statute operates from the date of its enactment conferring new rights. The retrospective statute operates backwards and takes away or impairs vested rights acquired under existing laws. A retroactive statute is the one that does not operate retrospectively. It operates in futuro. However, its operation is based upon the character or status that arose earlier. Characteristic or event which happened in the past or requisites which had been drawn from antecedent events. Under the amended Section 6, since the right is given by birth, that is, an antecedent event, and the provisions operate concerning claiming rights on and from the date of the Amendment Act."

51. Thus, it is clear that the statute is not retrospective merely because it affects existing rights or its retrospection because a part of the requisites for its action is drawn from a time antecedent to its passing, at the same time, retroactive statute means a statute which creates a new obligation on transactions or considerations already passed or destroys or impairs vested rights.

52. *The Parliament intended to bring within the fold of the statute the ongoing real estate projects in its wide amplitude used the term "converting and existing building or a part thereof into apartments" including every kind of developmental activity either existing or upcoming in future under Section 3(1) of the Act, the intention of the legislature by necessary implication and without any ambiguity is to include those projects which were ongoing and in cases where completion certificate has not been issued within fold of the Act.*

53. *That even the terms of the agreement to sale or home buyers agreement invariably indicates the intention of the developer that any subsequent legislation, rules and regulations etc. issued by competent authorities will be binding on the parties. The clauses have imposed the applicability of subsequent legislations to be applicable and binding on the flat buyer/allottee and either of the parties, promoters/home buyers or allottees, cannot shirk from their responsibilities/liabilities under the Act and implies their challenge to the violation of the provisions of the Act and it negates the contention advanced by the appellants regarding contractual terms having an overriding effect to the retrospective applicability of the Authority under the provisions of the Act which is completely misplaced and deserves rejection.*

54. *From the scheme of the Act 2016, its application is retroactive in character and it can safely be observed that the projects already completed or to which the completion certificate has been granted are not under its fold and therefore, vested or accrued rights, if any, in no manner are affected. At the same time, it will apply after getting the on-*

going projects and future projects registered under Section 3 to prospectively follow the mandate of the Act 2016.

The quantum of interest payable by the promoter when there is a delay in handing over the possession is the bone of contention in the present appeal. Do so the said controversy we will have to advert to the definition of "Interest" as per section 2 (za) of the act of 2016 which is as under:-

(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation.—For the purpose of this clause—

- i. the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- ii. the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;*

The issue pertaining to payment of interest for the past contractual rights was also duly considered by the Bombay High Court in the case of Neelkamal Realtors Suburban Pvt Ltd vs Union of India and others 2017 SCC Online Bom 9302 wherein paragraph No. 137-142 of the said judgement it was observed:-

137. The another plea raised is as to why a promoter shall pay interest for the past contractual rights, in case of failure to complete the project after registration under RERA, till the possession is handed over. Under the scheme of the

RERA it is clear by now that a promoter has to self assess and declare time period during which he would complete the project. But in case, inspite of making genuine efforts, a promoter fails to complete the project, then the concerned authorities, adjudicators, forums, tribunals would certainly look into genuine cases and mould their reliefs accordingly. We do not find that on that count the provisions of Section 18(1)(a) are to be declared as contrary and violative of Articles 14 and 19(1)(g). Considering the scheme of the RERA and the provisions of Section 18(1)(b), we are of the view that the same are not contrary to Articles 14 and 19(1)(g) of the Constitution. The provisions cannot be struck down on the ground of challenge that its operation is retroactive in nature. Neither the provisions of Section 18(1)(a) and (b) violate Article 20 of the Constitution. The payment of interest under Section 18 is compensatory in nature [Abati Bezbaruah v. Director General, Geological Survey of India-(2003) 3 SCC 148 (para 18) and Alok Shanker Pandey v.UOI-(2007) 3 SCC 545(para 9)].

138.The provisions of Section 18 must be read with Sections 71 and 72. The adjudicator would consider each case on its merits and unless such cases emerge and decisions are taken by the authority, it would not be appropriate at this stage to hypothetically consider a situation and decide constitutional validity of statutory provisions.

139.It was submitted on behalf of the Union that MOFA provides for interest to be paid in certain cases (Section 8) and the constitutional courts too had granted interest to flat purchasers in case of defaults by the promoters.

140.The requirement to pay interest under Section 18 is not penal since payment of interest is compensatory in nature due to delay suffered by the flat purchasers (Alok Shanker

Pandey v. Union of India (Supra). Even assuming that the interest is penal in nature, levy of interest is not retrospective but is only based on antecedent facts; it operates prospectively.

141. The interest payable under Section 18 is as per the definition of "interest" under Section 2(z) Explanation (ii), the same interest that would have been payable by the flat purchaser for delay in payment. Therefore, the payment of interest payable cannot be said to be penal in nature.

142. The legislature has power to make laws with retrospective effect. Therefore, even assuming that RERA or any part thereof operates retrospectively, such retrospective operation would not render it unconstitutional, unless the retrospectivity is shown to be excessive or harsh which injuriously affects a substantive or vested right. The inhibition against retrospective construction of a statute is not a rigid rule and has been held not to apply to a curative statute or a law enacted for the benefit of the community as a whole, which may be held to be retrospective even in the absence of any provision : (Vijay v. State of Maharashtra- (2006) 6 SCC 289- paras 10, 12 and Virender Singh Hooda v. State of Haryana- (2004) 12 SCC 588- para 35. RERA is enacted to protect the interest of consumer in the real estate sector. It was enacted in the public interest.”

25. Considering the aforesaid judgements it is clear that the levy of interest as provided for in section 18 of the Act of 2016 is compensatory in character, and therefore can operate retrospectively, and therefore if provisions of section 2(z) of the Act of 2016 are deployed for levying interest for the delay which occurred even prior to coming into force of the said Act, cannot be said to be illegal and arbitrary. The levying of interest at the rate of 15% per annum for the delay in handing over possession has been made applicable from 2013

which is prior to coming into force of Act of 2016 and in view the Newtech Promoter's case, the promoter cannot shirk from the responsibilities/ liabilities under the Act and the contractual terms do not have an overriding effect to the retrospective applicability of the authority under the provisions of the Act.

26. The Tribunal while allowing the appeal preferred by the respondent has duly noticed the fact that the appellant had admitted the entire cost of the flat in question received from the allottee and also admitted that the flat in question was to be delivered by it within 24 months from the date of allotment letter but no reason was mentioned for not providing possession of the flat in question within 24 months from the date of allotment letter.

27. Tribunal also considered the fact that as per the terms of the agreement, the allottee has been made liable to make payment of interest at the rate of 15% per annum in default of payment of amount of arrears to the appellant and, therefore, as per section 2 (za) (ii) of the Act of 2016, the appellant is also liable to make payment of interest at the rate of 15% per annum to the allottee if the appellant has defaulted in providing possession of the flat in question to the allottee in the stipulated period.

28. Considering the impugned order of the Tribunal as well as the arguments of the parties, this Court is of the considered view that there was no infirmity in the impugned order. The issues raised have already been determined and answered by the Supreme Court in the case of *M/S Newtech Promoters and Developers Private Limited Vs State of U.P (supra)* and, consequently, no substantial question arises in the present appeal which is accordingly **dismissed**.

(Alok Mathur, J.)

Order Date :- 30.11.2023

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