

GAHC010134152023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : RERA APPEAL/3/2023

BIPUL BHARALI
S/O LATE MADHAB BHARALI,
RESIDENT OF GRAMYA NAGAR, PANDU, BARBAZAR, PS JALUKBARI, PO
PANDU, DIST KAMRUP, ASSAM

VERSUS

PRASANTA DAS
S/O LATE KIRAN CH. DAS,
RESIDENT OF SWASTEEL RESIDENCY APARTMENT, TOWER II, FLAT NO.
1-A, HILL SIDE COLONY, GATE NO. 1, PS JALUKBARI, DIST KAMRUP M
ASSAM 781011

Advocate for the Petitioner : MR. P SAIKIA

Advocate for the Respondent : MS S DEV

:::BEFORE:::
HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 30.04.2024

Date of Judgment & Order : 31.05.2024

JUDGMENT & ORDER (CAV)

Heard Mr. P. Saikia, learned counsel for the appellant. Also heard Mr. M. Dutta, learned counsel for the respondent.

2. This is an appeal under Section 58 of the Real Estate (Regulation and Development) Act, 2016 *read with* Section 100 of the Code of Civil Procedure, 1908, preferred by the appellant, against the judgment and order dated 25.04.2023, passed by the Assam Real Estate Appellate Tribunal, Guwahati in REAT/ASSAM/Appeal No. 13/2022, arising out of RERA Complaint No. RERA/ASSAM/COM/2021/53, whereby the learned Tribunal dismissed the appeal filed by the appellant.

3. The brief facts of the case is that the appellant is the proprietor of M/S Bipul Construction, a registered proprietorship Firm/Builders/Promoters dealing with Real Estate/Construction of Flats/Apartments/Residential Units and allied business having its registered Office at Bipul Complex, 3rd Floor, Maligaon Chariali, District Kamrup (M), Assam. On the strength of Irrevocable General Power of Attorney vide Deed No. 3710/13, dated 15.10.2013, and 3167/14, dated 29.08.2014, and Deed of Agreement for Development being Deed No. 463/13, dated 15.10.2013, and Deed No. 3167/14, dated 29.08.2014, executed by and between Shri Amal Kumar and Hem Chandra Kumar, both are the son of Late Dambari Dhar Kumar, resident of Maligaon, the said M/S Bipul Construction was empowered and authorized to construct a multi-storied apartment/building/flats on the plot of land.

4. The respondent accordingly executed an individual Agreement for Sale of Flat/Residential Unit with the appellant in the year 2016, whereby, the appellant Firm agreed to sale an individual Residential Unit/Flat, as prescribed in the Agreement dated 30.01.2016, along with proportionate undivided share of plot of land, more specifically described in the Schedule. The said Flat was under the name and style "Radhika Enclave". As per the Agreement for Sale, the appellant agreed to sale a unit of residential flat in the said "Redhika Enclave", Flat No. C-1 on 3rd Floor measuring 1022 Sq. Ft. (Carpet area) under certain conditions, as prescribed in the Agreement for Sale dated 30.01.2016, in a total consideration amount of Rs. 50,00,000/- (Rupees fifty lakhs) only and it was agreed by both the parties that the payment of the said consideration will be determined as per the payment schedule stated in the Agreement. The parties also agreed that the respondent/complainant will pay an amount of Rs. 10,00,000/- (Rupees ten lakhs) only as advance payment against the total consideration and balance payment will be made as per the terms in the Agreement. Accordingly, the respondent paid an amount of Rs. 10,00,000/- (Rupees ten lakhs) only as advance payment by way of 2 (two) bank cheques before the date of execution of the said Agreement. On the basis of the Clause 1 of the Agreement, the respondent is required to pay next payment of Rs. 5,00,000/- (Rupees five lakhs) at the time of the First Slab Casting. But the respondent failed to comply with the conditions and had not paid any amount to the appellant at the time of First Slab Casting. Alternatively, he has not made any request to extend further time to comply with the said mandate, though the appellant on various occasion requested the respondent to make the payment. Thus, there was no any alternative option left to the appellant apart from presuming that the respondent had abandoned the deal as he is not showing any interest to

discharge his duties and responsibilities. But, to utter shock and surprise, the appellant received a notice in the month of November, 2022 from the learned Real Estate Regulatory Authority, Guwahati (in short 'RERA') and then only the appellant came to know about the pendency of the RERA Case No. RERA/ASSAM/COM/2021/53 filed by the respondent before the RERA. Immediately, the appellant applied for the certified copies of the impugned orders dated 13.10.2022 and 07.11.2022, which was received by him on 16.11.2022 and 01.12.2022, respectively.

5. It is further stated that the appellant was not aware about the pendency of the case before the RERA as he was not staying in his own house for last couple of years due to certain matrimonial disputes. Thereafter, the appellant applied for certified copies of the Complaint Petition along with evidence and other related orders passed by the Authority. Upon receipt of all the relevant documents, the appellant came to know that the respondent instituted the complaint case against the appellant projecting a false and fabricated story and on the basis of such materials in evidence, the RERA passed the impugned order dated 13.10.2022 without appreciating the legal obligations of the respondent/complainant. It is alleged by the respondent in his evidence that the appellant had not furnish the NOC, Allotment Letter, Demand Letter etc. for applying loan from the concerned bank. Thus, the RERA passed the impugned order *ex parte* without hearing the appellant and directed the appellant to refund the advance amount of Rs. 10,00,000/- (Rupees ten lakhs) only to the respondent/complainant along with interest payable on the basis of calculation stated under Rule 17 of the Assam Real Estate (Regulation and Development) Rules, 2017 (hereinafter referred to as 'Rules of 2017').

6. Thereafter, the appellant preferred an Appeal before the Assam Real Estate Appellant Tribunal (in short 'REAT/Tribunal') against the impugned *ex parte* order dated 13.10.2022, passed by RERA and the said Appeal was accordingly registered as REAT Appeal No. 13/2022. The learned Tribunal heard the matter at length and vide impugned order dated 25.04.2023, dismissed the said REAT Appeal No. 13/2022 and directed the appellant to return an amount of Rs. 17,40,744/- (Rupees seventeen lakhs forty thousand seven hundred forty four) only to the respondent.

7. It is submitted by Mr. P. Saikia, learned counsel for the appellant, that as per the Agreement for Sale, the respondent/complainant was required to make payments in the manner indicated therein, but the payments were not made by the respondent, except the initial payment of Rs. 10,00,000/- (Rupees ten lakhs) only, which is a clear violation of Section 19(6) of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as 'Act of 2016') and for non-payment of the money, the respondent/complainant is liable to pay interest in terms of Sub-Section (7) of Section 19 of the said Act. Further, the Agreement for Sale gives a right to the purchaser to purchase the property in question on satisfaction of certain conditions. The buyer should fulfill all conditions specified under the Clause of the Agreement.

8. Mr. Saikia further submitted that the Apex Court in the case of **Kewal Krishan Vs. Rajesh Kumar & Ors.** has held that the sale of an immovable property has to be for a price. The payment of price is an essential part of a sale covered by Section 54 of the TP Act.

9. He further submitted that under the Act of 2016, the duty of a house buyer is to make payment as per the agreement made between the parties and no statute/forum has decided any case in favour of any defaulter. Although there is no time limit in filing a case in a RERA is not under the statute, but certainly the provision of Limitations Act, 1963 is to be followed to ensure that RERA proves its efficacy when approached on time and applicability of Limitation Act will prevent the misuse of RERA.

10. Mr. Saikia further submitted that the learned Tribunal failed to appreciate the actual facts and circumstances of the case and also failed to appreciate the liabilities of a buyer as stated under Section 19 (6) & (7) of the said Act of 2016. Further, the compliance of Clauses in the Agreement is the duty of both the parties and they are equally responsible to carry out the terms and conditions of the Agreement. The learned Tribunal also failed to justify that the appellant on various occasion requested to make necessary payment as per the Clauses of the Agreement. But, the learned Tribunal wrongly held that the appellant did not demand any payment at the time of First Slab Casting. Further, the learned Court below, as referred above, failed to held that complying the Clauses in Agreement is not only the duty of appellant, but it is the duty of both the parties and thus, it is the equal rights and liabilities of both the parties to carry out of Clause in terms of strict sense of law.

11. The learned Tribunal also failed to appreciate the provision as per Sub-Section (a) & (b) of Section 72 of the Act of 2016, wherein the quantum of compensation and interest to be imposed to any defaulter must be calculated on

the basis of the loss suffered due to default. But, the learned Tribunal failed to appreciate the said provision of law and decided the quantum of compensation and interest in favour of the respondent without justifying the evidence of loss and damage suffered by the respondent. The learned Tribunal also failed to appreciate the mandate of procedure stated under Clause 20 of the Agreement for Sale dated 30.01.2016, wherein it is clearly stated that any dispute between the parties shall go to the arbitration proceeding as per the provision of Arbitration and Conciliations Act, 1996. More so, the Real Estate (Regulation and Development) Act, 2016 has come into force w.e.f. 25.03.2016 and as such, prior to execution of any agreement is bound to follow the mandates as prescribed under the Code of Civil Procedure, 1908.

12. He further submitted that the respondent, in his evidence, has stated that the proposed Flat No. C-1 has already been handed over to one Shri Tarun Bora that too without adducing a single piece of evidence. The validity of such presumption has not been ascertained by the learned Tribunal as per authority given under Section 35 of the said Act of 2016. He further submitted that even if the question of 3rd party right is involved, in that case also the authority can exercise the principles of natural justice as per the power conferred by Section 38 (2) of the Act of 2016. The learned Tribunal had not scrutinized any evidence or witness to ascertain the strength of 3rd party right. Accordingly, it is submitted that the respondent has resorted to unfair practice claiming the said Flat without paying the necessary payment and as such, the impugned order dated 13.10.2022, passed by the learned Real Estate Regulatory Authority is arbitrary, illegal and liable to be set aside and quashed.

13. The appellant also formulated the following Substantial Questions of Law in the present Appeal:

- (i) That, the learned First Appellate Tribunal below erred in law by not framing the points for determination for determining the appeal as provided under Article 14 of the Constitution of India, i.e. Equality before law, and whatever the points are appearing on the impugned judgment are meant for the benefit of the respondent without justifying the proper facts and law involve in the appeal and as such the Learned First Appellant Tribunal committed error in law and hence, the judgment being perverse is liable to be set aside.
- (ii) That, whether the respondent is entitled for any compensation without determining the quantum of damage or loss suffered to the respondent without any fault to his part.
- (iii) That, whether the case filed by the respondent is for specific performance of contract and is hit by Article 54 of the Limitation Act.
- (iv) That, whether the respondent is entitled for relief given by the learned Tribunal who violates the provision of Section 19 (6) & (7) of the RERA Act, 2016 by ignoring the prima facie records that the appellant request for deposit the first installment and the observation made in paragraph in impugned judgment is totally ignored.
- (v) That whether the learned Appellate Tribunal is entitled to justify the

concept of rights in favour of respondent by ignoring the principles of law, that the rights and duties are close related to each other and cannot be separated from one another.

14. Mr. P. Saikia, learned counsel for the appellant, further submitted that the allegation brought against the present appellant that he had not submitted the required documents, i.e. NOC and other relevant documents on the basis of which the respondent was to seek for loan from the bank, but there is no requisition from the bank to that effect and most of the documents are in public domain and it cannot be a case for the respondent that he could not apply for loan due to non furnishing of such documents by the appellant. But, without considering all those aspects of the case, specially the default on the part of the respondent to comply with the Clauses of the Agreement, the learned RERA as well as the learned Appellate Authority, i.e. the REAT, had passed the order directing the present appellant to make payment of Rs. 10,00,000/- (Rupees ten lakhs) only including the interest and compensation.

15. Mr. M. Dutta, learned counsel for the respondent, has submitted in this regard that the appellant had already sold the property to 3rd party without even informing the present respondent. Further, the appellant never made any slab wise demand as per the Agreement. There is no iota of evidence to support the claim of the appellant that he made any subsequent demand in pursuant to the Agreement made between the parties. He further submitted that in paragraph No. 10 of the judgment passed in REAT Appeal No. 13/2022, the learned Tribunal had discussed in detail and accordingly held that "there is not an iota of evidence or document borne on record to substantiate that the

appellant had apprised the respondent/ complainant of any of the events occurring or had made any demand for payment of the balance amounts at any given point of time. There is an inexplicable silence in this regard on the part of the appellant.”

16. He further submitted that the learned RERA has computed the interest and has not directed to pay the compensation as alleged by the appellant and per Rule 17 of the Rules of 2017, rate of interest is already specified and on the basis of which, the calculation was made in paragraph No. 7 of the judgment and order passed by the learned RERA, which is also described in paragraph No. 14 of the judgment passed by the learned Tribunal. He further submitted that there is no violation of Sections 71 & 72 of the Act of 2016 to form any Substantial Question of Law. Further he submitted that the question of violation of provision under Section 19 (6) (7) of the Act of 2016 also does not arise. This is a second appeal filed against the concurrent decision under Section 58 of the Act of 2016 *read with* Section 100 of the Code of Civil Procedure and hence, the same facts cannot bring in the present appeal. Further, the facts of demand etc. were never brought before the RERA as well as the REAT and hence, at the stage of second appeal, those facts cannot be brought by the appellant. More so, as per Rules 17 & 18 of the said Rules of 2017, it authorized to pay interest and in the present case also, it is seen that no compensation was paid and the interest was calculated as specified in Rule 17 of the Rules of 2017.

17. After hearing the submissions made by the learned counsels for both sides, I have perused the entire case record as well as the judgments passed by the RERA as well as the appellate authority, i.e. REAT.

18. The issue raised in this case as to whether the Act of 2016 will be applicable in the present case or not. It is a fact that the Agreement for Sale was executed in the year 2016, i.e. prior to coming to force of Real Estate (Regulation and Development) Act on 01.05.2017. But the project of the appellant under his firm M/S Bipul Construction of multi storied building under the name and style "Radhika Enclave" was an ongoing project has agreed to the Agreement dated 30.01.2016. The appellant undertook to complete the project within 2 (two) years as seen from the Clause 4 (e) of the Agreement. He got the Guwahati Municipal Corporation(GMC) permission vide GPL/51633123082 011, dated 01.08.2014, as reflected from the copy of the Agreement enclosed.

19. As per Section 3 of the Act of 2016, the provision of the said Act is applicable to the ongoing projects on the date of commencement of the Act and for which the completion certificate has not been issued by the competent authority. This Act has come for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building etc. in an efficient and transparent manner and to promote the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal.

20. Section 18 of the Act of 2016 comes under the heading "Return of amount and compensation" and as per Section 18 (1), if the promoter fails to complete or unable to give possession and if the allottees wish to withdraw from the project, without prejudice to any other remedy available, the promoter to return the amount so received from the allottees with such rate of interest as may be prescribed and the same is prescribed in Rule 17 of the Assam Real Estate

(Regulation & Development) Rule, 2017.

21. The rights and duties of allottees are provided in Section 19 of the Act of 2016 and Section 19 (4) provides that if the promoter fails to comply or being unable to give possession of the apartment, plot or building in terms of the agreement, it makes the allottees entitled to claim the refund amount paid along with the interest and compensation in the manner prescribed. And this provision under Section 19 (4) is akin to Section 18(1) of the Act. Both the provisions recognize the right of an allottee in two distinct remedies, viz. refund of the amount together with interest or interest for delayed handing over of possession and compensation and these right to seek refund is not dependent on any contingencies or stipulations thereof, as hold by the three Judge Bench of the Supreme Court in paragraph 25 of the case of **M/s Newtech Promoters & Developers Pvt. Ltd. –vs- State of U P and Ors., in Civil Appeal Nos.6745-6749 of 2021 decided on 11.11.2021.**

22. The Act provides distinct remedies, i.e. “return of amount/investment” on the one hand and “compensation” on the other hand, to be determined separately.

23. The claim of refund under Section 18(1) and 19(4) of the Act vests within the jurisdiction of the regulatory authority unlike the provision under Section 71 of the Act which rests with the Adjudicating Officer for compensation along with refunds etc. The Supreme Court in the case of **Imperia Structures Ltd. –vs- Anil Patai & Ors., 2020 (10) SCC 783,** held that Section 18 confers unqualified right upon an allottee to get refund of the amount deposited with the promoter and interest at the prescribed rate, if the promoter fails to

complete or is unable to give possession of an apartment.

24. The function of the regulatory bodies involves imposing requirements, conditions of restrictions, setting the standard for activities and enforcing compliance. Its power is to offer quick relief to the buyers, enforcing industry accountability and transparency and for fast track dispute resolution. Furthermore, Section 88 provides that the provisions of the Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force.

25. Now coming to the maintainability of the second appeal, it is felt just and proper to refer to the case of **State Bank of India & Anr. Vs. S.N. Goyal** reported in **(2008) 8 SCC 92**, wherein, the Supreme Court has dealt with the procedural aspect relating to the second appeal in paragraph 14 and 15.

26. It was held therein that care should be taken to ensure that the cases not involving substantial question of law are not entertained and at the same time ensure that cases involving substantial questions of law are not rejected. When any concurrent finding of fact is assailed in the second appeal, the appellant is entitled to point out that it is bad in law because it was recovered de hors the pleadings or it was based on no evidence, or it was on misreading of material documentary evidence or it was recorded against the provision of law and lastly a decision is one which no judge acting judicially could reasonably have reached.

27. Now it is to be seen as to whether the appellant has been able to point out any of the material illegality by the regulatory authority or the First

Appellate Authority warranting entertaining the second appeal, in other words whether any substantial question of law is involved.

28. The ground raised in appeal is stated to be substantial question of law of not following Article 14 of the Constitution of India on the ground of discrimination against the appellant and not giving equality before law does not hold ground as the appellant failed to show any discrimination or not giving him any opportunity of being heard.

29. The order dated 13.10.2022 of the regulatory authority shows that the notice from the authority was duly served upon the appellant on 21.08.2022. Another notice dated 05.06.2022 for hearing was also issued and on his non-appearance, another notice dated 16.06.2022 was issued fixing 15.07.2022, but it was refused by the wife and son of the appellant, who informed the process server Shri B.B. Sarma that the appellant was staying at Vishal Lodge, Maligaon and when the process server went there, the appellant was not present and the manager of the lodge refused to accept the notice at which the process server pasted the notice on the wall of the lodge.

30. Apart from above notices, the appellant was also issued legal notices dated 18.11.2019 and 16.01.2020. The notice dated 18.11.2019 was sent by registered post and it was delivered on 19.11.2019, as reflected in the order dated 13.10.2022 of the regulatory authority and the notice dated 16.01.2020 was served upon Shri Sanjib Dey, Advocate for the appellant. The appellant was told vide the above notices that he violated the Agreement for Sale dated 30.01.2016 by selling the said flat to one Shri Tarun Bora and asked either to

hand over the flat to the respondent (buyer) or to refund the advance amount of Rs. 10 lakhs with prevailing rate of interest.

31. The First Appellate Tribunal took note of the fact in paragraph 6 of the order dated 25.04.2023 in REAT Appeal No.13/2022 that of notices/summons issued by the regulatory authority to the appellant on 23.12.2021, 17.02.2022, 30.03.2022, 25.04.2022 and 04.06.2022 on the address as "C/o Madhab Ch. Bharali, Gramya Nagar, Pandu, Bargaon, Guwahati-II" which address the appellant himself has mentioned in his appeal before the REAT as well as in this second appeal and it is the very address given in the Agreement for Sale dated 30.01.2016. The REAT hold that the appellant failed to show any contrary material to dispute the finding of the Regulatory Authority as regards giving adequate opportunities to the appellant. In view of above, no substantial question of law as regard equal opportunity being denied as envisaged under Article 14 of the Constitution.

32. The second point raised as substantial question of law is that "Compensation without determining the quantum of loss". The issue raised by the complainant is failure of the appellant to furnish certain documents to the respondent for availing Bank loan and the appellant failed to provide the agreed flat and instead sold it to a third party named Shri Tarun Bora. The respondent demanded the refund of the advance amount of Rs. 10 Lakh paid with prevailing interest, which the Regulatory Authority allowed in terms of Section 19(4) *read with* 18(1) of the Act *read with* Rule 17 of the Rules, 2017. The appellant failed to substantiate that he made demand from the respondent for the installment amounts before the REAT and instead without giving any intimation sold the

said flat to the third party. Being so, the respondent has a right to invoke Section 18 and 19 of the Act for refund along with the interest as per Rule 17. There is no question of compensation, as contended by the appellant and being so the plea of substantial question of law on this count fails.

33. Coming to the third point raised of limitation under Article 54 of the Limitation Act, the same is also not sustainable in view of Section 18(2) of the Act as it provides that claim for compensation under Section 18(1) shall not be barred by limitation provided under any law for the time being in force.

34. Other contentions like non resorting to Arbitration Proceedings as per Clause 20 of the Agreement, this Act in Section 88 provides that the provisions of the Act shall be in addition to, and not in derogation of the provisions of any other law for the time being in force.

35. In view of above as in the instant appeal there arises no substantial question of law, the present appeal stands dismissed. The appellant will make the payments of Rs. 17,40,774/- as per the calculation made by the RERA as well as the REAT, i.e. Rs. 10,00,000/- which is the principle amount deposited earlier along with the interest thereon, within a period of 2 (two) months from the date of passing of this order.

36. The appeal stands disposed of in terms above.

JUDGE

Comparing Assistant