

GAHC010287102023



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

Case No. : RERA APPEAL/2/2024

DINESH SHARMA
R/O SHARMA COMPLEX, SHANTIPUR NEAR NAMGHARPATH,
PROFESSORS COLONY, P.O.-BHARALUMUKH, GUWAHATI-09, KAMRUP
(M), ASSAM

VERSUS

PINKY BHANSHALI AND 2 ORS
W/O SRI MUKESH BHANSHALI, R/O SHARMA COMPLEX, SHANTIPUR,
NEAR NAMGHAR PATH, PROFESSORS COLONY, P.O.-BHARALUMUKH,
GUWAHATI-09, KAMRUP (M), ASSAM

2:ANJU MALOO
W/O SURYA PRAKASH MALOO
R/O SHARMA COMPLEX
SHANTIPUR
NEAR NAMGHAR PATH
PROFESSORS COLONY
P.O.-BHARALUMUKH
GUWAHATI-09
KAMRUP (M)
ASSAM

3:MOHAN LAL BAID
S/O DULI CHAND BAID
R/O SHARMA COMPLEX
SHANTIPUR
NEAR NAMGHAR PATH
PROFESSORS COLONY
P.O.-BHARALUMUKH
GUWAHATI-09
KAMRUP (M) ASSAM

B E F O R E
HON'BLE MR. JUSTICE DEVASHIS BARUAH

Advocate for the appellant(s) : Mr. M. K. Sah, Advocate

Advocate for the respondents : None appears

Date of hearing : **20.03.2024**
& Judgment

JUDGMENT & ORDER

The instant Appeal under Section 58 of the *Real Estate (Regulation and Development) Act, 2016* (for short, the 'RERA, Act') is filed challenging the judgment and order dated 16.10.2023 passed in REAT/ASSAM/APPEAL No.09/2023 (for short referred to as 'the impugned judgment'). From a perusal of the said Section, it reveals that any person aggrieved by any decision or order of the Appellate Tribunal may file an Appeal to the High Court within a period of 60 days from the date of communication of the decision or order of the Appellate Tribunal to him on any one or more of the grounds specified in Section 100 of the Code of Civil Procedure, 1908 (for short, the Code).

2. Under such circumstances, for the purpose of entertaining the instant Appeal, this Court has to formulate substantial question(s) of law as is envisaged under Section 100(4) of the Code.

3. This Court vide an Order dated 19.03.2024 had asked the appellant to submit the proposed substantial questions of law on which the appellant

bases his Appeal and accordingly, today Mr. M.K Sah has placed before this Court four substantial questions of law, which he proposes are involved in the instant Appeal. The said four substantial questions of law so proposed were as under:

i) Whether building/property owner is a promoter if he is not engage in Commercial Activities and sold any portion of property/flat out of his hardships?

ii) Whether RERA is the competent authority to decides the complaint if disputed question of law and facts and pure question of law is involved?

iii) Whether order of RERA is suffered if it not passed in its full strength and violation of section 81 of the RERA, Act, 2016.

iv) Whether RERA and REAT can accept opinion of FSL Report if same is sub-judice in trial court between same parties in respect of other cases without trial and to pass order and judgment?

4. For the purpose of deciding as to whether the above-mentioned four substantial questions of law, so proposed, arise in the instant Appeal so that the said substantial questions of law could be formulated in terms with Section 100(4) of the Code, this Court takes up the facts involved in the instant Appeal.

5. It is seen from a perusal of the Memo of Appeal that the appellant for reasons best known, although specifically mentioned in the Memo of Appeal, have not brought on record the annexures. The record of the instant appeal

shows that on various occasions opportunities were given to bring on record the annexures to the Appeal but in order to keep the Appeal defective, the Annexures were not brought on record. In fact, when the matter was taken up on 19.03.2024, the certified copy of the impugned judgment and order dated 16.10.2023 was placed before this Court. Under such circumstances, on the basis of the materials available from the said impugned judgment and order the facts are being discerned.

6. Three complainants i.e. Smt. Anju Maloo, Smt. Pinky Bhanshali and Sri Mohan Lal Baid had claimed that they has purchased one flat each along with the car and scooter parking from the Appellant. On 9th September, 2021, they filed a complaint with the Real Estate Regulatory Authority (for short, the RERA) alleging violation of the approved plan by the Appellant as he had constructed three numbers of two bed rooms flats in the parking space and further constructed RCC rooms on the roof above the second floor. The complainants also alleged in their complaint that the parking, water, drain, common space, electricity and security were not provided to them by the appellant.

7. On the basis of the said compliant, a team consisting of the Secretary RERA, Town Planner RERA and two GMC officials conducted a joint inspection of the site on 01.12.2021 on the directions of the RERA and submitted their report.

8. It is also seen that on 27.09.2021 the appellant submitted a written statement stating *inter-alia* that he had not provided the car parking space to one of the complainant, Smt. Pinky Bhanshali, as per schedule B of the Deed of Sale signed by him with her. It was his claim in the written statement that

the car parking was not provided to her as she had failed to pay to Rs.5,00,000/- (Rupees Five Lakhs) which she had agreed orally to pay in addition to the total consideration price. It is also seen that 36 days after submission of the written statement i.e. on 03.11.2021, the appellant submitted before the RERA, a formal Deed of Agreement dated 27.12.2018 purportedly signed between him and Smt. Pinky Bhansali, wherein the later agreed to pay Rs.5,44,000/- as balance amount within a period of 12 months. It was the case of appellant therein that the said document could not be placed earlier as the said document was misplaced.

9. On the other hand Smt. Pinky Bhansali, had categorically stated that the said Deed of Agreement dated 27.12.2018 was a forged document and her signature on the Deed was forged, for which she had lodged an FIR with the police in connection with the said purported Deed of Agreement. It is also seen that on the basis of the said FIR which was lodged, an opinion was rendered by the Directorate of Forensic Science, Assam dated 05.01.2022, wherein it was opined that the document i.e. the Deed of Agreement dated on 27.12.2018 was not a genuine one.

10. On the basis of the above, the RERA Authority passed an order on 18.05.2023 passing various directions to the Appellant which included the direction to allot the parking space to Smt. Pinky Bhansali. In addition to the above, directions were also issued by RERA to the GMDA as regards the illegal construction so carried out of the 3 flats on the ground floor and on the roof top of the second floor. The RERA further taking into account the joint inspection report directed the appellant to ensure that sufficient water was provided to the complainants for regular use. On the question of drainage

problem, the RERA observed that as per the joint inspection report, there was no proper drainage system in the building and hence directed the Appellant to maintain the proper drainage system. On the complaint as regards the electricity problem, the RERA on the basis of the report of the Joint Inspection Team observed that because of the construction of the 3 flats on the ground floor and the room at the roof top the total available capacity of 13 Kilowatt was not enough and Appellant was directed to ensure that there was no shortage of load capacity. The RERA on the basis of the deficiency which was noticed from the Joint Inspection Report directed the Appellant to take necessary security measures. Further to that as regards the common space, the RERA drew attention to Clause 20 of the Sale Deed and directed the appellant to provide common space to the complainants as per the terms and conditions of the Sale Deed.

11. This Court at this stage finds it very relevant to take note of the observation made by RERA in its order dated 18.05.2023 to the effect that the Sale Deed dated 28.02.2018 categorically mentioned that the transfer was made in respect of the Schedule B property and the Schedule B property included the Flat No.1(C) along with one car parking space and two bikes parking space on the ground floor/the parking space, undivided proportionate share of land and common amenities and facilities. It was also observed on the basis of the contents of the Deed of Sale that the Appellant had duly received the entire sale consideration amount of Rs.15,00,000/- and had also mentioned in the Deed of Sale that nothing remained due from the purchaser towards the sale price of the aforementioned flat under sale.

12. In addition to that, it is also apparent from the impugned judgment and

order that the Appellant raised various preliminary objections as regards the maintainability of the said proceedings initiated before the RERA on the ground that the area of the plot was less than 500 square meters and the number of apartments is less than 8 (eight); the construction was started prior to date on which the RERA Act came into force and the RERA had no jurisdiction over private seller like him who sold some flats due to personal necessity and whose project is not registered with the RERA. To the said objections, the RERA Authority categorically opined in its order dated 18.05.2023 that as per the available record the project area was 509 square meters and further in terms with Section 2(zn) of the RERA Act, even if one apartment is sold, the project becomes a real estate project.

13. Being aggrieved by the order dated 18.05.2023 passed by the RERA Authority, (for short 'the Appellate Authority') an appeal was preferred before the Assam Real Estate Appellate Tribunal which was registered and numbered as REAT/ASSAM/APPEAL/NO.09/20023. The said Appeal was dismissed by the learned Appellate Authority by the impugned judgment and order dated 16.10.2023 and as such the present proceedings.

14. In the back drop of the above, let this Court therefore consider as to whether the substantial questions of laws so proposed are substantial questions of law that can be formulated in terms with section 100(4) of the Code.

15. The first substantial questions of law proposed is as to whether the building/property owner is a promoter, if is not engaged in commercial activities and sold any portion of the property flat out of his hardship. This is court finds it relevant to take note of Section 2(zk) which defines the term

'promoter'. From a perusal of the said definition, a person would come within the ambit of a promoter amongst others if he constructs or causes to be constructed an independent building or a building consisting of apartments, or converts any existing building or a part thereof into apartments, for the purpose of selling all or the some of the apartments to other persons and include his assignees. The definition of promoter also includes other person who constructs any building or apartment for sale to the general public. The Explanation to Section 2(zk) also shows that where a person who constructs or converts a building into apartments or develops a plot for sale and the person who sells apartments or plots are different persons, both of them shall be deemed to be promoter and shall be jointly liable as such for the functions and responsibility specified under the RERA Act or the Rules and the Regulations made there under. Therefore, from the above, it would be seen that the definition of 'promoter' is very large and wide. There is no material placed before this Court to show that the Appellant would not come within the ambit of the term 'promoter'. In fact, from the facts referred to above, it would show that the Appellant sold three flats to three different complainants, if not more to others. The Appellant further entered into agreement to provide and sell the three flats in his buildings along with all appurtenances thereto. Under such circumstances, the RERA Authority as well as the Appellate Authority were justified in their findings. Considering the above, the said substantial question of law so proposed cannot be a substantial question of law that can be framed. Apart from that, it is also seen that both the RERA Authority as well as the 1st Appellate Authority had duly taken note of the said aspect of the matter and had come to fact finding to the effect that the appellant is a promoter.

16. The second substantial question of law so proposed is whether RERA is a competent authority to decide a complaint involving disputed questions of law and facts, where a pure questions of law are involved. From a perusal of Section 35 of the RERA Act as well as Rule 24 of the Assam Real Estate and Regulatory Authority, Rules 2017 (Rules of 2017), it would be seen that RERA has the power to decide various disputes questions of law and facts. The pure question of law to be decided by the RERA Authority in the present facts does not arise and as such the said aspect cannot be brought within the ambit of the substantial question of law. Therefore, the second substantial questions of law proposed cannot also be formulated as the substantial questions of law within the meaning of Section 100(4) of the Code.

17. The third substantial questions of law so proposed was as to whether the order of RERA suffered, if it is not passed in its full strength and amounts to violation of Section 81 of the RERA Act, 2016. The said aspect of the matter was duly taken note of the learned Appellate Authority and relying upon the judgment of the Supreme Court in the case of ***M/S Newtech Promoters and Developers Pvt. Ltd. Vs State of U.P. and others reported in (2021) SCC Online SC 1044***, had observed that the delegation to hear complaints under Section 31 of the RERA Act by a Single Member is permissible. The said aspect being already settled by the Supreme Court, the said substantial question of law so proposed cannot be said to be a substantial question of law involved in the instant Appeal which can be formulated.

18. This leads this Court to take the fourth substantial questions of law so proposed as to whether RERA and REAT can accept opinion of the FSL report, if the same is sub-judice in a trial court between the same parties in respect

of other cases, without trial and pass order and judgment. This Court finds it relevant to taken note of Section 35(2) of the RERA Act which empowers the RERA Authority the powers of the Civil Court under the Code of Civil Procedure in respect to various aspects including any other matter which may be made by prescribed. The prescription therein could be seen from Rule 24 1(b) of the *Assam Real Estate (Regulation and Development) Act, 2017* which categorically empowers the authority to requisition, subject to the provisions of Section 123 & 124 of the Indian Evidence Act, 1872, any public record or document or copy of such record or document from any office. This Court is of the opinion that the FSL Report was a document which as per the counsel of the Appellant still stands. Under such circumstances, the RERA as well as the Appellate Authority were justified in taking into account the said FSL Report.

19. In addition to that, this Court also finds it relevant to take note of that the Appellate authority did not only rely on the FSL report to come to a conclusion that the purported agreement dated 27.12.2018 was not a genuine document. But the learned first appellate court had also take note of the registered Deed of Sale wherein it was categorically mentioned that after the payment of Rs.15,00,000/-, the property which was more specifically described in Schedule B to the Deed of Sale would be conveyed to Smt. Pinky Bhanshali, which included the parking space. Under such circumstances, the said substantial question of law so proposed is not a substantial question of law involved in the instant appeal.

20. Consequently this Court finds no substantial question of law being involved in the instant appeal, for which the appeal stands dismissed. No

costs.

JUDGE

Comparing Assistant