

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 3701 OF 2019

Sanjay Phulwaria and Ors.	}	Petitioners
versus		
Maharashtra Real Estate	}	
Regulatory Authority	}	
and Ors.	}	Respondents

Mr.Pravin Samdani-Senior Advocate with Mr.Mayur Khandeparkar, Mr.Vikramjit Garhewal and Mr.Kaustubh Patil for the petitioners.

Mr.A.A.Kumbhakoni-Advocate General with Mr.Ashutosh M. Kulkarni and Mr.Akshay Kulkarni for respondent no.1.

Mr.Dinyar Madon-Senior Advocate with Mr.Sharan Jagtiani and Ms.Garima Agrawal i/b. M/s.Wadia Ghandy and Co.for respondent no.2.

Mr.P.P.Kakade-Government Pleader with Ms.A.A.Purav-AGP for respondent no.3 (State).

**CORAM :- S. C. DHARMADHIKARI &
G. S. PATEL, JJ.**

DATED :- SEPTEMBER 11, 2019

P.C. :-

1. This writ petition is directed against an order, a copy of which is at Exhibit 'A' to the petition.

2. On the previous occasion, several aspects of the law and the dispute involved in this case were noted. All sides invited an

authoritative pronouncement from this court. We, too, thought this to be appropriate at one stage, and, therefore, adjourned the matter, called upon both sides to address us on the points noted in our order passed on this very petition on 15th July, 2019. That order reads as under:-

“1 At the request of this Court on the last occasion, the authorities met in the Chambers of the learned Advocate General.

2 The learned Advocate General is kind enough to appear today and say that there are larger issues at the root of a factual controversy raised in this petition and which need to be authoritatively decided only by this Court.

3 He says that he would formulate the issues and after formulating and crystallizing them, a copy of such formulation will be forwarded to both, the petitioners and the contesting respondents.

4 The request of the learned Advocate General is, in the event these crystallized issues are addressed and decided, the matters will get smoothened before the authority.

5 We accede to the request, but equally clarify that all objections, particularly of the petitioner not to apply or not to exclude the project in question from the provisions of the Act will be taken due note of while addressing these larger issues.

6 Stand over to 20th August, 2019.”

3. Thereafter, this matter has been adjourned to crystallize the issues and for an appropriate adjudication thereon.

4. However, on hearing both sides today, we do not think that we should now, in the facts and circumstances peculiar to this

case, attempt to decide any wider question or deal with a larger controversy. We keep it open for being decided either at an appropriate stage in this very case or in some other appropriate matter.

5. Exhibit 'A' to the petition reads as under:-

"Hearing of the complaints to be heard before Full Bench

From: alt vrush (avrushali.maharera@gmail.com)
 To: kd_patil95@gmail.com,
akshay.pare@lodhagroup.com

Date: Wednesday, 20 March, 2019, 3:39 pm IST

Sir,

As directed I have to inform you that the below mentioned matters are scheduled to be held on 22/03/2019 at 4.00 pm before the full bench of the MahaRERA Authority.

Complaint No. CC006/56889, CC006/56939, CC006/57442, CC006/57444, CC006/57445, CC006/57446, CC006/57447, CC006/57450.

Kindly make it convenient to attend the hearing on time.

Vrushali Altekar

Jr.Legal Consultant"

6. The petitioners before us are the complainants. They say that they purchased flats in the project of respondent no.2-Lodha Developers Limited, which project is known as "New Cuff Parade" situated at Wadala, Mumbai (for short "the said project"). The project consists of four buildings and flats therein are stated to be

allotted or to be sold to these petitioners. They made complaints under the Real Estate (Regulation and Development) Act, 2016 (for short “the RERA”) before the first respondent. The petitioners’ case is that the said project can be brought under the purview of this legislation and is subjected to the rigour and discipline of that enactment. In saying so, they rely upon an order passed in the case of one Haresh Jethmal Asher (Complaint No.006000000044384). To the complaint of Mr. Haresh Asher, the second respondent (Lodha Developers Ltd), which is a common respondent to the case of Haresh Asher and the petitioners before us, raised a preliminary objection. The objection was that the ‘Adjudicating Officer’ (as defined in the RERA) has no authority, power and jurisdiction to deal with these complaints, as the project consisting of ground plus 40 upper floors is not registered with the Authority. The Adjudicating Officer and member passed an order on 12th September, 2018 holding that he does have jurisdiction to entertain and try this complaint.

7. The second respondent, being aggrieved and dissatisfied with this order, preferred an appeal before the Real Estate Appellate Tribunal. That appeal came to be dismissed on 25th October 2018. Copies of the orders passed on 12th September,

2018 and 25th October, 2018 are annexed as Exhibits 'D' and 'E' to the petition. A second appeal was preferred against the appellate tribunal's order in this court being Second Appeal No.708 of 2018. However, when the second appeal was to be taken up for decision, the second respondent-original appellant to that second appeal chose to withdraw it.

8. The petitioners, therefore, urge that the orders passed by the Adjudicating Officer and the appellate tribunal have gained finality, and similar complaints can now be entertained by the Adjudicating Officer. In other words, RERA can be invoked by them.

9. The apprehension of the petitioners is that while they were awaiting a decision on their complaints, they came across an order passed by another member of the Authority (not the Adjudicating Officer), dismissing a very similar complaint on the ground that the flat in respect of which that particular complaint was filed was not registered and therefore, RERA cannot be invoked.

10. Now, the argument is that while coming to such a conclusion, the member did not notice the orders passed on 12th

September, 2018 and 25th October, 2018 although he himself passed an order that RERA cannot be invoked much later on 20th February, 2019.

11. There is another order relied upon passed on 9th February, 2019. Thus, the later orders and the earlier order of the Adjudicating Officer were not placed. It appears that the Authority took a decision to constitute a Larger Bench or what is styled as a Full Bench of the Authority.

12. The apprehension of the petitioners is that this Full Bench is constituted although there is a clear demarcation and segregation of the functions of the Adjudicating Officer and the Authority.

13. Our attention was invited to the definitions in the Act itself, where, the term “Adjudicating Officer” is defined in section 2(a) to mean the adjudicating officer appointed under sub-section (1) of section 71. Section 71 reads as under:-

“71. Power to adjudicate. - (1) For the purpose of adjudging compensation under sections 12, 14, 18 and section 19, the Authority shall appoint in consultation with the appropriate Government one or more judicial officer as deemed necessary, who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any

person concerned a reasonable opportunity of being heard:

Provided that any person whose complaint in respect of matters covered under section 12, 14, 18 section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986 (68 of 1986), on or before the commencement of this Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.

(2) The application for adjudging compensation under sub-section (1), shall be dealt with by the adjudicating officer as expeditiously as possible and dispose of the same within a period of sixty days from the date of receipt of the application.

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

(3) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), he may direct to pay such compensation or interest, as the case may be, as he thinks fit in accordance with the provisions of any of those sections.”

14. The definition of the term “authority” is to be found in section 2(i) and that is defined to mean the Real Estate Regulatory Authority established under sub-section (1) of section 20.

15. During the course of arguments, Mr.Samdani, learned senior counsel appearing for the petitioners, would submit that now the matter, which was within the exclusive domain of the adjudicating officer under section 71, would travel to the Full Bench of the Authority and that is wholly uncalled for and unnecessary. The matter should have proceeded before the Adjudicating Officer and he should have taken a decision in accordance with law. In other words, these complaints could have been dealt with by the Adjudicating Officer and he was not at all required to refer to any view of the Authority much less await the Full Bench order as per the impugned communication. Thus, the second respondent has stalled the adjudication and by such tactics, the whole purpose of the law will be defeated and frustrated.

16. The learned Advocate General attempted to point out to us that at the root of the matter is the issue whether RERA applies to projects which are incomplete or in progress prior to the enactment being brought into effect, or whether it can be extended to projects, or parts of projects, that have been completed before the RERA came into force. Therefore, for the adjudication of such an important legal issue, the Chairperson of the Authority thought it fit to constitute a Full Bench. That is an

administrative act and therefore, this court should not interfere in its writ jurisdiction.

17. Mr.Madon, learned senior counsel for the present second respondent, would submit that the issue whether the Act applies or does not apply to the project does not arise in the facts and circumstances of the case. Similarly, the issue as to whether the composition of a Full Bench was justified or not also does not arise in the facts and circumstances of the case. He submits that we must, therefore, not decide any such issue. It would be entirely academic and very possibly obiter.

18. Upon a careful perusal of the writ petition and annexures thereto, we are of the opinion that the rights and equities can be balanced by keeping all courses open for the parties and at the same time ensuring that the adjudication in the complaints is not delayed.

19. We direct that the Adjudicating Officer, to whom the complaints are addressed, will now take up the complaints for adjudication in accordance with law. While adjudicating them, he will consider the objection to the jurisdiction and powers of the Authority raised by Lodha Developers Limited. All objections

touching this aspect are kept open for being raised. Equally, we allow the petitioners to raise appropriate pleas in defence of their stand that the order of the Adjudicating Officer of 12th September, 2018 clinches the issue, more particularly because it is directed against the same developer in respect of the same project and that the said order has attained finality. We direct that the objections shall not be treated as preliminary nor shall any finding only on the point of jurisdiction be rendered. The complaint as a whole should be taken up and decided in accordance with law. We direct the Adjudicating Officer to deal with all objections while passing the final orders in the complaint. We trust that the Adjudicating Officer will take into consideration all the orders and deal with the submissions of the parties on that basis. He will pass a reasoned/ speaking order as required by the law.

20. The writ petition is disposed of by clarifying that this court has not expressed any opinion on the rival contentions.

(S.C.DHARMADHIKARI, J.)

(G.S.PATEL, J.)