

S/L 48
19.01.2021
Court. No. 19
GB

C.O. 19 of 2021

Emami Realty Limited
Vs.
Vikash Kumar Bathwal

(Through Video Conference)

Mr. Tanmoy Mukherjee,
Mr. Amal Kumar Saha,
Mr. Iresh Paul.

... for the Petitioner.

Mr. Aniruddha Chatterjee,
Mr. Siddhartha Banerjee,
Ms. Saheli Sen,
Mr. Rajib Mullick,
Ms. Gargi Manna.

... for the Opposite Party.

The revisional application has been filed by the opposite party in Complaint Case No.COM-000158, which is pending before the Designated Authority, Housing Industry Regulatory Authority, West Bengal.

The petitioner is aggrieved by an order dated December 29, 2020 passed by the learned West Bengal Housing Industry Appellate Tribunal in HIAT/Misc. Appeal-003 of 2020. By the order dated December 29, 2020, the learned Appellate Tribunal refused to expunge the undertaking made by the learned advocate for the petitioner before the learned Tribunal on November 27, 2020. The learned Tribunal further

refused to stay the operation of the order of the Designated Authority dated February 25, 2020 and, inter alia, held that the fact that the learned advocate for the petitioner had submitted his client/petitioner had 'no objection' in handing over the flat to the complainant and his father, had been correctly recorded and such decision of the Appellate Tribunal was on the basis of the records, the Vakalatnama and the notarized application which was filed on behalf of the petitioner before the authorities concerned.

Mr. Tanmoy Mukherjee, learned advocate appearing on behalf of the petitioner submits that the learned Appellate Tribunal had totally misconstrued the order of this Court which had directed the petitioner to apply before the authority which had recorded the concession in case the petitioner's contention was that the said undertaking and/or concession given by the learned advocate was not authorized by the petitioner. Mr. Mukherjee submitted that this Court had recorded that unless it was established that the concession or undertaking given by the client to the lawyer was authorized and evidence of the same was available before the Court, the Court could not record such concession and as such, on this established principle of law, the learned Appellate Tribunal ought to have recalled the order

dated November 27, 2020 and stayed the order impugned before the learned Appellate Tribunal passed by the Designated Authority dated February 25, 2020 and proceeded with the hearing of the appeal on its own merits.

Mr. Mukherjee relied on the decision of ***Himalayan Coop. Group Housing Society*** versus ***Balwan Singh and Others*** reported in ***(2015) 7 Supreme Court Cases 373*** in support of his contention. Mr. Mukherjee further submitted that disposal of the appeal by the Tribunal by the order dated November 27, 2020, thereby affirming the order of the Designated Authority to conclude delivery of possession to the complainant and his father by executing the deed of conveyance and recording the concession of the petitioner amounted to denial of an opportunity to the petitioner to urge several questions of law and fact before the Tribunal. He submitted that the net effect of the said concession as recorded by the Appellate Tribunal was that the Appellate Tribunal proceeded as if the petitioner did not have any grounds of challenge before the Appellate Tribunal. Mr. Mukherjee further submitted that the learned Advocate was never authorized by a letter or by any written or oral instruction to make any concession or give an undertaking on behalf of the petitioner and as

such, the matter could not be adjudicated upon, on the basis of such concession.

The facts of the case are that, a deed of lease was registered and executed on April 10, 2007 between the Governor of West Bengal and Oriental Sales Agencies India Private Limited in respect of Premises No.2, Jessore Road, Kolkata-700028 for a term of 99 years commencing from April 16, 2007. Thereafter, by a registered deed of lease dated April 30, 2011 the petitioner being the developer entered into a development agreement with the lessee for building a residential segment. The development agreement contained a covenant that the developer was authorized and empowered to enter into agreements for transfer and assignment in respect of an apartment/flat/unit constructed spaces, car parking spaces and servant berth, forming a portion of the residential segment with any third party.

The covenant further provided that the sub-lessee would apply to the developer for allotment of a particular apartment/flat/unit in a tower forming a part of the residential segment which was referred to as the application for allotment. On the basis of such covenant, the opposite party and his father made an application for allotment of a flat and by an agreement to sub-lease dated March 29, 2015, entered into

between the petitioner/developer, the Oriental Sales Agencies India Private Limited and the opposite party and his father, it was agreed that flat/unit (A6-701) on the seventh floor of the tower no. A6, forming part of the residential segment having super built up area of 1150 sq. ft. together with the right to park in the basement and right of use of common facilities would be allotted to the opposite party and his father for a consideration of Rs.60,02,500/-. As there was delay in handing over the aforementioned flat, the petitioner filed a complaint before the Designated Authority, Housing Industry Regulatory Authority, West Bengal with certain grievances. The said complaint was filed under the provisions of Section 31 of the West Bengal Housing Industry Regulation Act, 2017 (hereinafter referred to as the 'said Act').

By an order dated February 25, 2020 the learned Designated Authority directed that the delivery of physical possession should be concluded and also granted liberty to the petitioner to amend the written submissions by fixing the matter for hearing on a subsequent date. Aggrieved, the petitioner preferred an appeal under Section 44 of the said Act which was registered as HIAT/Misc. Appeal-003 of 2020. The points urged in the appeal were that the Designated Authority under the said Act did not have jurisdiction

to hear the complaint as the agreement between the parties was entered into before coming into effect of the said Act; that delivery of possession could not be completed without the opposite party abiding by the terms and conditions of the agreement; that the interim order passed would be detrimental to the interest of the petitioner; that the opposite party did not have the right to claim any compensation as the opposite party always had knowledge of the fact that the project would be completed belatedly for reasons beyond the control of the developer.

By an order dated November 27, 2020 the learned Appellate Tribunal held that the objection as to non-joinder of party namely, the non-joinder of Ajay Kumar Bathwal who was also one of the sub-lessees to the agreement could be rectified if the delivery of possession was given to both Vikash Kumar Bathwal and Ajay Kumar Bathwal as the sub-lessees.

The learned Tribunal also came to the conclusion that the compliance of the terms and conditions required by the petitioner in the memo of delivery of possession were beyond the scope of the agreement as held by the Designated Authority, but the learned Tribunal refrained from making any observation over the alleged conditions and made the

same subject to the final adjudication of the Designated Authority.

The learned Tribunal upon finding that the entire consideration money had been paid, arrived at the conclusion that there could not be any impediment to the delivery of physical possession of the booked property in terms of the original agreement. The learned Tribunal also directed that the father be joined in the execution of the deed of conveyance to be executed by the developer in terms of the deed of agreement. The learned Appellate Tribunal refused to interfere with the observations of the Designated Authority with regard to the illegal imposition of additional terms and conditions, thereby restricting the rights of the parties. The learned Tribunal left the Designated Authority to decide on the other reliefs and claims. However, while passing the order dated November 27, 2020, the learned Appellate Tribunal recorded the fair submission of Mr. Banerjee, learned Advocate for the petitioner, who had stated that the petitioner did not have objection in handing over the possession if both the proposed sub-lessees would be joined in the deed of conveyance. This order was challenged before this Court on the ground that the learned Tribunal misdirected itself by recording a concession of the learned advocate of the petitioner

and in passing the order on the basis of such concession, without considering the case of the developer. The revisional application was registered as C.O. 1573 of 2020. This Court by an order dated December 16, 2020 disposed of the revisional application giving liberty to the petitioner to apply before the Appellate Tribunal for expunging the observation made by the court with regard to the consent given by the learned Advocate on behalf of the petitioner, in case it was the contention of the petitioner that such consent was wrongly recorded in the absence of any authorization from the petitioner. The learned Appellate Tribunal was directed to dispose of any such application that may be filed by the petitioner. Thereafter, the petitioner filed an application in terms of the liberty given by this Court and the order impugned was passed by the learned Appellate Tribunal, inter alia, holding that the submissions made through the learned Advocate was correctly recorded. The learned Advocate was authorized by Vakalatnama and also the petition filed through the learned Advocate were documents in proof thereof and the concession made by the learned Advocate was not wrongly recorded. The learned Tribunal held that there was no scope to reopen the appeal for any purpose and the petitioner was directed

to conclude delivery of possession of the booked flat in terms of the agreement executed between the parties. A cost of Rs.30,000/- was imposed.

The petitioner has challenged the aforementioned order before this Court in the instant revisional application. There is no quarrel with the proposition of law laid down by the Hon'ble Supreme Court in the matter of Himalayan Coop. Group Housing Society (supra) relied upon by Mr. Mukherjee, wherein it has been held that a lawyer must be specifically authorized to settle and compromise a claim and mere appointment or engagement would not ostensibly or impliedly authorize him to bind his client to a compromise or settlement. The relevant portion of the paragraph no. 22 of the said judgment is quoted below:-

“22(d). The law is now well settled that a lawyer must be specifically authorised to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise/settlement. To put it alternatively that a lawyer by virtue of retention, has the authority to choose the means for achieving the client's legal goal, while the client has the right to decide on what the goal will be. If the decision in question falls within those that clearly

belong to the client, the lawyer's conduct in failing to consult the client or in making the decision for the client, is more likely to constitute ineffective assistance of counsel."

Now coming to the arguments of Mr. Mukherjee, I find from the order of the Tribunal that the Appellate Tribunal had addressed the questions raised in the appeal by the petitioner, which was after all an appeal from an interim order. Even though it was recorded that the learned advocate for the petitioner had fairly submitted that the developer did not have any objection to execute the deed of conveyance in favour of both the father and the son, that is, Vikash Kumar Bathwal and Ajay Kumar Bathwal, the Appellate Tribunal recorded the reasons as to why the order of the Designated Authority did not call for any interference at the stage of an appeal against an interlocutory order. The Appellate Tribunal however left the points raised by the petitioner to be decided before the Designated Authority.

I do find application of mind by the learned Appellate Tribunal while deciding the issues and the contention of Mr. Mukherjee that the Tribunal passed the order solely on the concession of the learned Advocate, is not accepted. The Appellate Tribunal also

dealt with the question of non-joinder of parties and directed that the developer would execute the deed of conveyance in favour of both the persons who had entered into the agreement with the developer.

With regard to the propriety of the order of the Designated Authority, I find that the order has been modified by the learned Appellate Tribunal thereby directing the developer to execute the deed of conveyance in respect of both the sub-lessees. The Designated Authority also granted liberty to the petitioner to amend the pleadings in order to bring on record the averments with regard to maintainability etc. The Designated Authority upon coming to a finding on the basis of the records that the petitioners had themselves given a notice of delivery of physical possession of the flat to the complainant and also taking note of the admission of the petitioner that the complainant had fulfilled all the requirements to get physical possession and there were no payments due, directed that the flat be handed over to the opposite party and report of complains should be filed. However, the Designated Authority made a mistake by making an observation at the interim stage that the additional terms and conditions restricting the rights of the parties could not be imposed. This finding was also upheld by the Appellate Tribunal which, in my

view, was not proper. The question whether the additional terms and conditions would be applicable should be decided during the final adjudication on the basis of evidence on record by the Designated Authority.

Hence it is directed that possession should be handed over to the complainant-opposite party and his father within 48 hours from date. The possession memo will only contain mention of the fact that possession was being handed over to the sub-lessees. The sub-lessees will sign the same acknowledging delivery of possession. No additional terms and conditions will be specified in the possession memo. The additional terms and conditions which the petitioners want to enforce will be decided at the final hearing of the complaint before the Designated Authority. The observations made by the Designated Authority in paragraph 6 of the order and the observations made by the learned Appellate Tribunal with regard to the imposition of additional terms and conditions are set aside. The observation made as to the concession given by Mr. Niladri Banerjee learned Advocate is also expunged. In any event, the said observation did not influence the Appellate Tribunal to pass the order as the Appellate Authority had applied its independent mind while passing the order dated

November 27, 2020. The question of jurisdiction of the authority under the said Act and maintainability of the proceeding before the authority under the said Act are to be decided before the Designated Authority. The direction for payment of cost is set aside. Parties are at liberty to file all documents relied upon before this Court, before the Designated Authority. This Court has only considered the prima facie case with regard to the direction to hand over possession.

A prima facie case has been made out by the opposite party. There is an admission on the part of the petitioner that the entire amount of consideration for allotment of the said flat has been received by the petitioner from the opposite party. Thus the entitlement of the opposite party to get an allotment is not in question. The only question raised by the complainant-opposite party in the proceeding was with regard to imposition of the additional terms and conditions and right to compensation which will be decided at the final hearing along with all the points raised by the petitioner. The petitioner is granted four weeks' time to file the amended written submission before the designated authority. The opposite party shall file written rejoinder to the amended written submission within one week thereafter.

With regard to the decision of ***Lavasa Corporation Limited versus Jitendra Jagdish Tulsiani*** reported in ***2018 SCC OnLine Bombay 2074*** sought to be relied upon by the opposite party on the proposition that an allottee would include a sub-lessee if it was a long term lease, shall be relied upon by the opposite party at the hearing. The learned Designated Authority shall expedite the hearing of the complaint case and dispose of the same within six weeks thereafter.

With the above observations the orders dated February 25, 2020 and January 13, 2021 passed by the Designated Authority as also November 27, 2020 and December 29, 2020, passed by the learned Appellate Tribunal are modified to the above extent.

The revisional application is disposed of.

There will be, however, no order as to costs.

Urgent Photostat certified copy of this order, if applied for, be given to the parties on priority basis.

(Shampa Sarkar, J.)