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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.113 OF 2022

WITH

INTERIM APPLICATION NO.1974 OF 2021

WITH

INTERIM APPLICATION NO.479 OF 2021

Jayesh Tanna, Director of ITMC Developer Pvt. Ltd. .. Appellant

Versus

Radha Arakkal & Ors. .. Respondents

...

Mr.Karan Bhosale i/b Ms.Nidhi Chheda for the Appellant.
Mr.Aseem Naphade i/b Ms.Chaitra Rao for the Respondents.

...

CORAM: BHARATI DANGRE, J.
DATED : 02nd MAY 2022

JUDGMENT:-

1. The present appeal, filed under Section 58 of the Real Estate (Regulation and Development) Act, 2016 (**for short, "the RERA"**), deserves admission on the following substantial questions of law :-

"1. Whether the Impugned Order-2 dated 4th November, 2020 passed by the Appellate Tribunal suffers from

perversity/illegality on account of the disregarding and not dealing with the argument advanced on Section 62 of the Indian Contract Act, 1872 alongwith relevant case laws?

2. Whether the Appellate Tribunal was correct to hold in the Impugned Order-2 that the mere presence of Allottees will not amount to consent for extension of date of possession despite of the fact that the Respondent nos.1 and 2 themselves in their original complaint before the RERA authority relied upon and did not dispute the concerned Minutes of the meetings and correspondence evidencing extension of the date of possession ?

3. Whether the Impugned Order-2 dated 4th November, 2020 passed by the Appellate Tribunal suffers from perversity/illegality in view of the fact that it wrongly holds that the learned Member of the RERA tribunal has considered all relevant aspects of the matter and dealt with submissions of both sides correctly and properly concluding that the Appellant herein failed to handover possession as per agreed date and therefore Respondent nos.1 and 2 are entitled to a refund under Section 18 of RERA?"

2. Admit.

3. Heard learned counsel Mr.Karan Bhosale i/b Ms.Nidhi Chheda for the appellant and learned counsel Mr.Aseem Naphade i/b Ms.Chaitra Rao for respondent Nos.1 and 2.

4. Since the parties expressed consensus to argue the appeal finally, the compilation of documents being placed on record, they have advanced arguments towards hearing of the

appeal in the wake of the substantial questions of law formulated above.

5. Respondent Nos.1 and 2 are the complainants, who filed the complaint under Section 31 of the RERA, seeking a direction against respondent No.1-M/s. International Trading & Manufacturing Company (appellant before this Court) to return the entire consideration paid by them alongwith interest, including compensation in terms of Section 18 of the RERA, at the rate which shall be the highest Marginal Cost of Lending plus 2% from the date of payment till it's realization. Refund of the amount paid towards registration and stamp duty, was also prayed for.

6. The above relief was sought, by inviting attention of the regulatory authority to the default committed by the respondent-developer, who had floated a project under the name and style "Sai Sapphire" constructed on land bearing CTS No.4A/1A/2A, part at Kurla, Vikhroli, Mumbai. The complainants narrated that they had selected a flat bearing No.203, admeasuring 1350 sq.ft. on the second floor of the said project for total consideration of Rs.1,50,12,500/- (Rupees One Crore Fifty Lakhs Twelve Thousand Five Hundred only). The negotiations and the transactions were alleged to have been

completed through 'Indiabulls Distribution Services Ltd.' and respondent No.1, on receiving the first payment on 02/08/2014, assured the complainants to deliver the possession of the flat within a period of 15 months. A registered agreement for sale was executed on 20/01/2015 and the complainants specifically averred that they were regular in making the payment, which was due towards the consideration amount and the total consideration paid by the complainants was set out to be Rs.1,11,09,250/- i.e. 74% of the total price of the flat, commensurating with the construction of 12 slabs. Apart from this, a sum of Rs.7,80,800/- was paid towards registration and stamp duty and, further, sum of Rs.7,06,786/- was paid alongwith service tax and value added tax.

7. The grievance of the complainants before the authority was about the delivery of possession of the flat in terms of clause 10 of the agreement for sale, which specified the date to be July, 2015. Since, the project did not progress and remained standstill from June 2014, the grievance was sought to be raised with the respondents, upon which an assurance came that the possession would be delivered four months later than the period which was stipulated in the agreement for

sale. Reposing trust in the respondents, the complainants waited for completion of the project, but when even after 15 months, the project remained incomplete and the last assured date of possession, being December 2016 also expired in February, 2017, the complainants sought withdrawal from the project and communicated this to respondent No.1, seeking refund of the amount. With no response from respondent No.1 and noticing that the project came to be registered with MahaRERA website by respondent No.1 in 2017, declaring the proposed/revised date of completion as 31/03/2019, the complainants lodged the complaint, since they were not ready to wait any further and sought refund of the amount.

The complaint was entertained by MahaRERA, Mumbai and by order dated 11/04/2018, the following direction was issued to the respondents :-

> "1. Respondents shall refund the amount mentioned in purshis marked Exh.'A'. with simple interest at the rate of 10.05% per annum from the date of receipt or payment to the Government as the case may be, till they are refunded Exh. 'A' shall form the part of this order.
>
> 2. The respondents shall pay the complainants Rs.20,000/- towards the cost of the complaint.
>
> 3. The charge of the aforesaid amount shall be on the flat booked by the complainants till its repayment.

> 4. Complainants shall execute the deed of cancellation of the agreement for sale, at respondents' cost on satisfaction of their claim."

8. Formulating the points for consideration as to whether the respondents had failed to deliver the possession of the flats on the agreed date and whether the complainants are entitled to get refund of the amount, the first forum, referred to Section 18 of the RERA, which is a provision permitting the allottee to claim the refund of the amount alongwith interest at such rate, if the promoter fails to deliver the possession on the date specified in the agreement. Recording that the respondents have not disputed that they have not handed over possession of the flats on the agreed date, and finding the explanation offered for delay to be unjustified, the relief came to be granted in favour of the complainants to the above effect.

9. Being aggrieved by this order, an appeal was preferred before the Maharashtra Real Estate Appellate Tribunal, which dismissed the appeal on 04/11/2020.

The Appellate Authority did not find favour with the submissions of the promoter that, the date of handing over possession was extended by the promoter, after holding the meetings with the flat purchasers, which included one of the complainants and by attending the meetings, she has

consented for extension of date of handing over possession of the flat upto the year 2018. An argument was also advanced on behalf of the promoter that the date of completion of project was extended by the promoter at the time of effecting registration of the project with MahaRERA. As against this, the complainants/allottees did not dispute that they had attended some meetings with other flat purchasers, but they denied that they have ever consented for extension of date of handing over possession and moreover, the minutes of the meetings did not bear their signatures, indicating that they had conceded to the extension.

In the background of the rival contentions, the Appellate Authority recorded as under :-

> "13. We would like to point out that, there is no substantial and credible evidence to show that Allottees had consented for extension of date of possession. Allottees might have attended meetings with another flat purchasers whenever builder conveyed such meetings. Mere presence of Allottees will not amount to consent for extension of date of possession. Similarly, minutes of meetings are not signed by Allottees and therefore are not binding on the Allottees. Payment made by Allottees even after the date of possession was over cannot be accepted as piece of evidence to show that Allottees had given consent for extension of date of possession. It is true that there is absolutely nothing on record to show that Allottees had voluntarily and unequivocally consented for extension of the date of possession. There is no substantial evidence to show that date of possession is extended mutually by Promoter and Allottees. Minutes of the meetings cannot override the terms and conditions of the agreement for sale."

10. Recording that, right continue in the allottee from withdrawing the project and claiming refund of amount with interest in terms of Section 18 of the RERA, the order passed by the Member & Adjudicating Officer, MahaRERA, Mumbai, was found to be rightly passed and no indulgence was granted to the promoter, while dismissing the appeal.

Being aggrieved by the said decision, the present appeal is filed.

11. The learned counsel for the appellant, Mr.Bhosale would submit that the complaint filed by the complainants was premature, since on registration of the project with MahaRERA, the appellant had notified the date of completion as 31/03/2019 and the complaint was filed prior to this date i.e. December 2017. He would submit that the agreement entered into with the complainants stood renewed/novated, as from time to time, the time for completion of the project was extended in the meetings held by the promoter, which was duly attended by Mrs.Radha Arakkal , one of the complainants. Mr.Bhosale would insist upon the wordings applied in Section 18 of the RERA, which contemplate a situation where the promoter fails to complete or is unable to give possession of an apartment, plot or building, in

accordance with the terms of the agreement for sale or, as the case may be, duly complete by the date specified therein and, he would therefore raise a question as to whether in the meetings convened by the promoter, which were attended by one of the complainants, the existing agreement stood substituted.

Per contra, the learned counsel for respondent Nos.1 and 2 would specifically rely upon Section 92 of the Indian Evidence Act and would submit that the terms and conditions stipulated in the registered agreement cannot be modified, altered or substituted by an oral contract or disposition and the terms of the registered agreement can be altered, rescinded or varied only by subsequent registered document and not otherwise. His submission is, under law, if a document is required to be reduced into writing, the parties to such a document cannot be permitted to lead oral evidence to substantiate any subsequent arrangement, which has effect of modifying the earlier written document.

The learned counsel would place reliance upon the decision of the Hon'ble Supreme Court in the case of ***S. Saktivel (Dead) by LRs Vs.M.Venugopal Pillai & Ors. (2000) 7 SCC 104*** and in the case of ***Chandrakant Shankarrao Machale***

Vs. Parubai Bhairu Mohite (Dead) through LRs (2008) 6 SCC 745.

12. In the wake of the rival contentions involving a question for determination, whether the terms of written agreement can be altered by an oral agreement, it is necessary to refer to Section 92 of the Indian Evidence Act, which reads thus :-

> **"92. Exclusion of evidence of oral agreement.-...**
>
> Proviso (1) ....
>
> Proviso (2) ...
>
> Proviso (3) ...
>
> Proviso (4).- The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents."

The aforesaid section thus contemplate that in order to establish the existence of any subsequent oral agreement, which has the effect of rescinding or modifying the original contract/agreement or disposition of property, proof will have to be adduced, necessarily by the one who assert it.

Where the agreement between the parties is a written agreement, the parties are bound by it's terms and conditions. Once the contract is reduced into writing, by operation of Section 91 of the Indian Evidence Act, it not open for any of the

parties to prove the terms of the contract with reference to some oral or documentary evidence, to find out the intention of the parties. Under Section 92 of the Indian Evidence Act, where a written instrument contains the terms agreed between the parties, then it is not open to the parties to lead any oral evidence to ascertain the terms of the contract and it is only when the written contract itself does not contain the whole of the agreement or if there is any ambiguity, then oral evidence can be permitted to be adduced, to prove the other conditions, provided it is not inconsistent with the written contract.

13. As far as the present case is concerned, the agreement was entered into between the parties and the parties are, therefore, bound by it's terms and conditions. When the agreement for sale entered into between the parties is perused, it clearly contemplated the consideration for flat No.203, agreed to be sold to the complainants and it also stipulated the schedule of payment.

Clause 10 in the said agreement cast a responsibility on the developer to give possession of the flat to the purchaser before July 2015 and the purchaser agreed that, if the possession is delayed due to any of the contingencies

stipulated in the agreement, as contemplated in sub-clauses (a) to (f), in that event the period of possession shall automatically stand extended. Clause 11 of the agreement specifically contain the following recital :-

> "11. If the Developers fail or neglect to give possession of the said premises to the Purchaser b the prescribed date as aforesaid on account of reason beyond his control and of his agents as per the provisions of section 8 of Maharashtra Ownership Flats Act, then the Developers shall be liable on demand to refund to the Purchaser the amounts already received by him in respect of the Flat with simple interest at nine percent per annum from the date the Developers received the sum till the date the amount and interest thereon is repaid. Till the entire amount and interest thereon is refunded by the Developers to the Purchaser, he shall, subject to encumbrances, if any, have charge on the said plot as well as the construction or building thereon."

14. On failure to meet the deadline of July, 2015 as specified in the agreement and since it is not the case of the developer that the delivery was delayed on account of either of the stipulations contained in sub-clauses (a) to (f) of clause 10, where the period of possession could have automatically stood extended, when the promised delivery date of July 2015 was not adhered to. Three years down the line, since there was no compliance, a notice was forwarded to the builder, seeking a refund.

The learned counsel Mr.Bhosale has vehemently submitted that when one turns to the notice, the reason

projected is, need of money since the daughters of the complainants wanted to go abroad for education and he would submit that the reason for withdrawal of backing out of the project was not it's non-completion, by itself.

I do not consider this to be ground worth consideration or dispute the claim of the complainants that, they wanted to walk out of the project because it was getting delayed. Merely asking about update on the project from the builder/developer will not denude the complainants of their right to claim refund in terms of Section 18, which permitted such refund if the promoter fails to complete or is unable to give possession of the flat in accordance with the terms of the agreement for sale before the duly specified date therein. Sub-section (3) of Section 18 cast a duty on the promoter to pay compensation to the allottees in case of his failure to discharge the obligation imposed on him under the Act or the rules and regulations made thereunder or in accordance with the terms and conditions of the agreement for sale. Sub-section (4) of Section 19 confer a right upon an allottee to the following effect:-

"**19. Rights and duties of allottees** :

(1) ...

(2) ...

(3) ...

(4) The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder."

15. The defence of the promoter that the complainants have attended the subsequent meetings and thereby they have accorded their implied consent is of no consequence, since not a single doucment has been brought on record, which would establish that the complainants have consented to the extension of the time-line to 17/09/2016 and, subsequently, as indicated in the meeting dated 17/09/2016, by 14 to 15 months. The minutes of the said meeting placed on record with regard to the presence of the complainant-Mrs.Radha Arakkal and the decision reflected in minute No.6, resolving that the construction work of "Sai Sapphire" shall start in the first week of December 2016 and endeavour shall be made to complete "Sai Sapphire" between 14 to 15 months, do not in any manner indicate the consent of Mrs.Radha Arakkal, particularly when a right is conferred upon the

investor/purchaser to seek a refund on account of the time-line for delivery of possession, being not adhered to.

Pertinent to note that even as on date, as per the learned counsel for respondent Nos.1 and 2, the project is not complete and the flat is not available for delivery of possession to the complainants/respondents. The breach of the condition in the agreement is thus apparent and merely on the ground that an oral arrangement was worked out with consent of one of the complainants to extend the period of completion of project, resulting in depriving the right vested in the complainants under Section 18 of the RERA, cannot be argued.

16. The document which is reduced into writing can only be altered, varied, added, subtracted, rescinded by executing a subsequent document in the like manner i.e. in writing and merely an oral agreement will not have the effect of changing/ altering the original terms and conditions of the agreement, which is reduced into writing. If a party has entered into an agreement, which is reduced in writing, the parties shall be permitted to modify its terms and conditions or substitute the same, by executing another contract/agreement reduced into writing. Where under a law, a contract or disposition is required to be writing and the same has been reduced in

writing, it's terms cannot be modified, altered or substituted by oral contract or disposition and no parol evidence will be admissible to substantiate such a oral contract or disposition.

The Hon'ble Supreme Court in the case of ***S. Saktivel*** (supra), has summarised the legal position in the following words :-

> "6. In sum and substance what proviso (4) to Section 92 provides is that where a contract or disposition, not required by law to be in writing, has been arrived at orally then subsequent oral agreement modifying or rescinding the said contract or disposition can be substantiated by parol evidence and such evidence is admissible. Thus if a party has entered into a contract which is not required to be reduced in writing but such a contract has been reduced in writing, or it is oral, in such situations it is always open to the parties to the contract to modify its terms and even substitute by a new oral contract and it can be substantiated by parol evidence. In such kind of cases the oral evidence can be let in to prove that the earlier contract or agreement has been modified or substituted by a new oral agreement. Where under law a contract or disposition is required to be in writing and the same has been reduced to writing, its terms cannot be modified or altered or substituted by oral contract or disposition. No parol evidence will be admissible to substantiate such an oral contract or disposition. A document for its validity or effectiveness is required by law to be in writing and, therefore, no modification or alteration or substitution of such written document is permissible by parol evidence and it is only by another written document the terms of earlier written document can be altered, rescinded or substituted. There is another reason why the defendant-appellant cannot be permitted to let in parol evidence to substantiate the subsequent oral arrangement. The reason being that the settlement deed is a registered document. The second part of proviso (4) to Section 92 does not permit leading of parol evidence for proving a subsequent oral agreement modifying or rescinding the registered instrument. The terms of registered document can be altered, rescinded or varied only by subsequent registered document and not otherwise. If the oral arrangement as pleaded by the

> appellant, is allowed to be substantiated by parol evidence it would mean re- writing of Ext.A/1 and, therefore, no parol evidence is permissible."

17. Upon arriving at the conclusion, that the agreement entered into between the parties, which has been reduced into writing cannot be substituted or stand novated by a subsequent oral understanding, the substantial questions of law formulated above, are answered in the negative. By upholding the impugned orders passed by MahaRERA and the Appellate Authority, the appeal is dismissed.

Upon dismissal of the appeal, pending interim applications do not survive and stand disposed off.

(SMT. BHARATI DANGRE, J.)