

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

**SECOND APPEAL NO.318 OF 2022
WITH
INTERIM APPLICATION NO.2259 OF 2022
IN
SECOND APPEAL NO.318 OF 2022**

Kapstone Constructions Pvt. Ltd. ... Appellant

V/s.

Nitin K. Parab and Ors. ... Respondents

Mr. Karl Tamboly a/w. Mr. Abir Patel, a/w Protyusha Thanawala,
Advocate i/by. Wadia Ghandy & Co., for the Appellant.

Mr. Santosh Gavade, Advocate for the Respondent Nos.1 and 2.

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CORAM : S. M. MODAK, J.

RESERVED ON : 29TH AUGUST 2022

PRONOUNCED ON : 11TH NOVEMBER 2022

JUDGMENT :-

1. The only short question involved in this appeal is “whether the first appellate court was right in allowing an application for amendment moved by the complainants during pendency of the appeal?” First appeal was preferred by the complainants thereby challenging the order dated 18/12/2018 passed by Maharashtra Real Estate Regulatory authority, Mumbai. The Authority dismissed the complaint filed for grant of compensation.

2. When an appeal was preferred, the complainants moved an application seeking comprehensive amendment. The appellate tribunal allowed it as per the order dated 21/12/2020. This order is

challenged by the Developer by way of this appeal.

3. I have extensively heard learned Advocate Shri Karl Tamboli for the appellant & learned adv. Shri Santosh Gavade for the respondents. Also perused their written submission & judgments.

Scope of Second Appeal

4. Any order passed by the appellate tribunal can be challenged before this Court under the provisions of Section 58 of RERA ACT. It can be filed on the grounds specified under the provisions of Section 100 of C.P.C. Even though, the grounds of appeal are borrowed, there is difference in between the provisions of Section 58 of Real Estate Regulatory Authority (RERA) Act on one hand & the provisions of Section 100 of CPC on the other hand. Under Section 100 of CPC, only decree can be challenged whereas under Section 58 of RERA Act, any decision/order passed by the appellate tribunal can be challenged. Such decision/order can be passed during pendency of an appeal or it can be passed at the end of the proceeding (which has the effect of culminating the proceedings).

5. In this case, the imugned order is passed at an interim stage of the appeal and it has not culminated the proceedings. When such is the nature of order which is challenged u/s 58 of 2006 Act before this Court, the provisions of Section 100 of CPC need to be considered on that background.

6. At the same time, it is true that the provision of CPC are not binding on the appellate tribunal and the rules of evidence

contained in Indian Evidence Act are not applicable. The tribunal has only to follow principles of natural justice. So also the tribunal can regulate its own procedure (Section 53).

FACTS

7. On this background, the facts of the case need to be looked into. The original authority dismissed the complaint for compensation on following background :-(Page 34)

- a) Complainant purchased an apartment in wing 'F', project "Rustomjee Azziano" at Thane as per registered agreement for sale dated 11/04/2017.
- b) Complainant taken possession in March 2018.
- c) There is allegation that the developer has changed the layout of wing 'K' & constructed two additional flats in open space.
- d) Layout was amended without consent of complainants.
- e) Hence compensation is claimed.

Developer's case

- a) Possession of the apartment with common area in terms of sanctioned plan annexed to the agreement was handed over.
- b) At that time, complainant has handed over consent letter dated 23/03/2018- mentioning of inspection of the apartment & amenities & about their satisfaction.
- c) Alleged violations in wing 'K' is different from MAHA RERA registered project & complainants are not allottees.

Decision

8. Complainants have failed to point out any violations of RERA, 2016 in the said project & hence complaint was dismissed.

9. At the time of filing of complaint, the complainant has not appointed an advocate but they contested it on their own. Appeal memo is on Page 88 to page 107 & annexures at Page 109 to Page 146. Even in appeal initially they have not appointed an advocate. The amendment application was moved by an advocate (page 148). In nutshell the following are the reliefs/ particulars pleaded in the application:-

- a) Independent parking space initially allotted but later on unilaterally changed to puzzle parking.
- b) Delay in completing the project and not handing over possession to other allottees.
- c) There was open space of 12.32 mtrs but it was reduced to **3.10 mtrs.**
- d) Additional relief of imposing penalty on developer.
- e) Injuncting developer from creating third party interest.
- f) To provide suitable parking (page 167).

These are in short the nature of amendment. All details are not reproduced.

10. It was opposed by the developer. The appellate tribunal while allowing amended prayer gave following reasons:-

- a) Court should be extremely liberal in granting amendment

prayer unless serious prejudice is caused to the other side.

- b) Court should not attach higher technical approach.
- c) It should not be allowed when there is fundamental alteration of pleadings.
- d) It should be allowed when there is no material inconsistency in between original pleadings & proposed amendment.
- e) The object of order 6 Rule 17 of CPC is to avoid multiplicity of suits.

11. The above are some of the general principles which weigh the mind of the court while dealing with the prayer for amendment. While considering the facts (on the background of above referred principles), appellate tribunal observed:-

- a) Amendment is relevant to the dispute & necessary for the determination of the dispute.
- b) Appellant intend to give more particulars to the case in respect of dispute by seeking an amendment.
- c) Amendment sought are not inconsistent with original pleadings.
- d) There will be no fundamental alteration of the pleadings.
- e) No serious prejudice will be caused to respondent.
- f) Dispute under RERA is beneficial & social legislation.
- f) Principle of natural justice has to be followed.

12. Both the sides relied upon various judgements dealing with the issue of amendment at trial stage & the appellate stage. There is strong reliance on the provisions of Order 6 Rule 17 of CPC

on behalf of the appellant.

13. The argument is that even after start of the trial, the amendment cannot be allowed liberally. If such is the provisions of law, the argument is such prayer need to be dealt with very strictly at all appellate stage. Submission is opposed on behalf of respondents.

14. After considering the submissions, this court feels to remand the matter to the appellate tribunal. It is for the reason that the appellate tribunal has overlooked the fact that the prayer for amendment was made at an appellate stage. On reading the impugned order, there is nowhere reflection about considering the parameters at an appellate stage. The principles reiterated are the general principles for dealing with the amendment. I will give reasons for arriving at this conclusion.

15. No doubt the provisions of C.P.C. are not applicable to the proceedings under RERA ACT but it does not mean that the proceedings are unregulated. It is also true that this Act is enacted for protecting the interest of consumers in the Real Estate Sector & separate mechanism is created for speedy dispute redressal. But at the same time, it is true that the tribunal has to follow principles of natural justice. Right of hearing, unbiased approach & procedural fairness are some of the components of natural justice. A person against whom there is no grievance made at initial stage gets a right to oppose other party if such grievance is made at later stage.

16. A litigant who is fighting case on his own does not makes

a grievance & makes it before appellate forum when represented by an advocate, their case cannot be considered sympathically particularly when they are educated & filed a complaint containing full of judgements. What is important is under the garb of fair opportunity to the complianants, the tribunal has over looked the stage when prayer for amendment is made. There is no observation why prayer for amendment is accepted at an appellate stage.

17. This is important because the developer gets a chance to oppose the amendment made before the appellate stage. This is so because when the complaint got dismissed, the rights are crystalised before one court (rightly or wrongly). So the appellate court was bound to consider this aspect. Unfortunately it is absent in the order.

18. There is one more angle, once the amendment containing new prayers is allowed, question arises whether appellate court can legally deal with those new grievances when the appeal is finally heard. In that eventuality the appellant got right to ask for remand. All these factors were over looked by the appellate Court. The amendment is allowed as if it is filed before the original court.

19. As this aspect is missing, this Court does not find it appropriate to express any view on merits but to remand the matter. That is why none of the judgements relied upon by both the sides are considered. Because there are observations in those judgments about dealing with amendment at an appellate stage. Conclusion arrived in those judgments are reasoned conclusions. In present matter, there is absolutely no reasonings why amendment is allowed at an appellate

stage. So order cannot withstand the scrutiny of law. Hence needs to be set aside. This Court refrained itself from expressing any opinion on merits but to remand the matter. Let the Appellate Court decide as to whether the amendment sought can be allowed at on appellate stage.

20. Hence substantial question of law is answered in the negative and following order is passed.

ORDER

- 1) The appeal is partly allowed.
- 2) The matter is remanded for fresh hearing of the amendment application to the appellate tribunal.
- 3) Parties to appear before the appellate tribunal on 28th November 2022.
- 4) Appellate tribunal to decide the application expeditiously.
- 5) Appellate tribunal to decide the amendment application in the light of observations as mentioned above.
- 6) Appeal is disposed of in above terms. Interim application, if any, is disposed of.
- 7) Parties to bear their own costs.

(S. M. MODAK, J.)