

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

SECOND APPEAL NO. 275 OF 2023

Satyam Developers
Thr. Mr. Roshanlal C. Agarwal ...Appellant

Versus

Sama Mohamad Sharif Dalvi And Anr. ...Respondents

....

Ms. Apurva Gupte a/w Mr. Vinayak Tare for the Appellant.

CORAM : JITENDRA JAIN, J.
DATE : 25th AUGUST, 2023.

JUDGMENT (JITENDRA JAIN, J.)

1. This appeal is filed under Section 58 of the Real Estate (Regulation and Development) Act, 2016 (for short “RERA Act”) challenging the order of Maharashtra Real Estate Appellate Tribunal (Appellate Tribunal) dated 22nd July, 2022. The questions of law raised in the appeal memo are reframed as under :

“Q.1. Whether the Appellate Tribunal was justified in upholding the order of the Regulatory Authority on payment of interest under Section 18(1) of the RERA Act ?

Q.2. Whether the Appellate Tribunal was justified in adjudicating the issue of termination of the agreement without any application by any of the parties for setting aside the termination ?”

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Narrative of Events :

2. The Appellant is a promoter of a project called “Swaroop Harmony” located at Santacruz (East), Mumbai. The Respondents are allottees of a flat in the aforesaid project developed by the Appellant promoter.

3. On 2nd June, 2010, the Respondent allottees booked the flat for a total consideration of Rs.51,00,000/- by paying a booking amount. The agreement for sale was executed in the year 2011 between the Appellant promoter and the Respondent allottees. In the complaint, the Respondent allottees stated that as per the agreement, the Appellant promoter was to handover the possession of the said flat to the Respondent allottees within a period of 30 months. However, no possession was handed over till the date of filing the complaint although, the Respondent allottees paid a substantial amount of Rs.46,83,788/- to the Appellant promoter.

4. Since the Appellant promoter did not handover the possession as per the agreements, the Respondent allottees filed a complaint with the Regulatory Authority for claim of interest under Section 18 of the RERA Act. On 20th February, 2020, the Regulatory Authority disposed of the complaint filed by the Respondent allottees and passed order giving following reasons :

- a) As per the agreement produced by the complainant there is no mention about the date of possession and therefore the authority rejected the contention of the Respondent allottees that the date of possession should be within 30 months from the date of registration of the agreement.
 - b) However, in the absence of any date of possession mentioned in the agreement for sale, the date of completion mentioned in MahaRERA registration would be considered as the date of possession which is 31st December, 2017 and since the possession is not given as per the said date, the Appellant promoter is liable to pay interest from 1st January, 2018 till the date of actual possession.
 - c) The contention of the Appellant promoter on termination of the agreement vide notice dated 20th January, 2020 is rejected since the same did not form part of the pleadings during the course of the hearing before the authority.
- 5) Being aggrieved by the said order, Appellant promoter filed an appeal with the Appellate Tribunal on the grounds set out in the appeal memo. No appeal was filed by the Respondent allottees against the order of the Regulatory Authority.
- 6) On 22nd January, 2022, the Appellate Tribunal dismissed the appeal of the Appellant promoter by giving following reasons and confirmed the order of the Regulatory Authority :

a) The Regulatory Authority ought to have called for the certified registered agreement in which the date of possession is mentioned as within 30 months from the date of registration of the agreement.

b) In any case, the Appellate Tribunal observed that the reasonable period of 3 years should be considered as the date of completion of the project and handing over of the possession even if no date is mentioned in the agreement which reasonable period in the instant case would be expiring in December, 2014 but since no appeal is filed by the Respondent allottees, the Appellate Tribunal confirmed the Regulatory Authority's order for the payment of interest to begin from 1st January, 2018.

c) The Appellate Tribunal rejected the reasons mentioned by the Appellant promoter for the delay in completion of the project by relying upon the decision of the Supreme Court in the case of ***Newtech Promoters and Developers V/s State of U.P.***¹

d) The Appellate Tribunal also rejected the contention of the Appellant promoter on the issue of termination of the agreement on the ground that no evidence is produced by the Appellant promoter that there was any default in making payment by the Respondent allottees.

7. It is on this backdrop that the present appeal is filed before this Court challenging the order of the Appellate Tribunal.

1 2021 SCC Online SC 1044.

8. Heard finally the learned counsel for the Appellant on all the issues and perused the voluminous appeal paper book filed by the Appellant promoter.

9. **Submission of the Appellant :** The Appellant contended that the Appellate Tribunal has considered the registered certified copy of the agreement in which the date of possession was mentioned although the same was not produced before the Regulatory Authority and was also not shown to the Appellant promoter and therefore the impugned order is bad in law. The Appellant promoter further submitted that the Appellate Tribunal cannot give reasons and findings which are contrary to the Regulatory Authority. The Appellant further contended that the Appellate Tribunal does not have the power to set aside the termination letter without there being any formal application of the parties for setting aside the same. The Appellant also contended that they are not liable to pay the interest on the ground of the reasons mentioned for delay in the completion of the project. The Appellant, therefore contended that the appeal be admitted and be allowed in favour of the Appellant.

Analysis and Conclusion :

10. **Delay in Date of Possession :** Admittedly, there is a delay in handing over the possession of the flat by the Appellant promoter to the allottee since the agreement was executed in 2011 and possession has not

been given till the date when Regulatory Authority decided the complaint that is till 2020. The Regulatory Authority has observed that in the absence of the date of possession being mentioned in the agreement, the delay would be considered as per the date of completion/possession mentioned with MahaRERA registration which was 31st December, 2017 and since the possession was not handed over by the said date, the Regulatory Authority directed the Appellant promoter to pay interest from 1st January, 2018 till the actual date of possession. Against this finding the Respondent allottees did not file any appeal to the Tribunal although they in their complaint before the authority had claimed interest from the expiry of 30 months from the date of agreement that was executed in 2011. The Appellate Tribunal considered the certified copy of the registered document and came to a conclusion that the agreement mentioned the date of possession as within 30 months from the date of registration of the agreement which period expired in the year 2014. However, since the Respondent allottees had not challenged the order of the Regulatory Authority, the starting date for payment of interest was confirmed by the Appellate Tribunal as 1st January, 2018 which was the date arrived at by the Regulatory Authority. Therefore, whether the Appellate Tribunal was justified in considering the certified copy of the registered document in which the date of possession was mentioned and which according to the Appellant promoter was not produced before the

Regulatory Authority is inconsequential, because the Appellate Tribunal has not changed the starting date of payment of interest as per the certified registered agreement produced before them and the Regulatory Authority took the date mentioned in MahaRERA registration as date of completion. There is no ground in the present appeal that the Appellant promoter was not shown the certified copy of the agreement. In any case, for reasons recorded in subsequent paras this contention is found to be false. Therefore, on this account the contention of the Appellant promoter before this Court does not take the case any further. It is well settled that the Appellate proceedings are continuation of original proceedings and therefore the Appellate Tribunal can confirm the orders of the Regulatory Authority on any other ground as well. Even otherwise, assuming no date is mentioned in the agreement, the Appellate Tribunal considered “reasonable period” of 3 years which also cannot be faulted because even that period expired in 2014 and date of payment of interest as ordered by the Regulatory Authority did not change that is 1st January, 2018. The counsel for the Appellant fairly stated that she has nothing to say on the “reasonable period”. If at all anyone can be said to be aggrieved it was Respondent allottees and the Appellant in so far as date of payment of interest is concerned because the Respondent allottees although entitled to interest for the period prior to 2018 did not receive the same because they did not challenge the original order.

11. The Appellant promoter contended that the Appellate Tribunal has not shown them the copy of the certified registered agreement which has been considered in the impugned order by the Appellate Tribunal. This submission is contrary to the facts on record in as much as the copy of the registered document is available with the Appellant promoter which is evident from the fact that the Appellant promoter had filed various documents before the Regulatory Authority and one of the document as per the Index consists of the registered sale agreement dated 21st December, 2011. On a query being posed by the Court, the Appellant promoter admitted that they have executed the registered document. In the light of this fact, the Appellant promoter cannot make a grievance that the Appellate Tribunal has not shown them the said document since the same is already in the possession of the Appellant promoter. Even otherwise, the said document was considered by the Appellate Tribunal for ascertaining the date of possession. However, the Appellate Tribunal has not given the benefit of interest to the Respondent allottees from the date of possession mentioned in the certified registered document and therefore this ground of the Appellant promoter is inconsequential.

12. In so far as, the reasons for the delay in handing over of the possession is concerned, the Appellant promoter has only given vague and general reasons like delay in vacating the plot by the existing slum

dwellers, limited space available for construction activity, delay in issue of occupancy certificate, dispute between the parties, financial crisis etc. In my view, the said reasons cannot absolve the Appellant promoter from compensating the allottees by way of interest. These are the reasons which are normal incidents of the construction business and which the Appellant promoter is well versed and aware of while agreeing to the date of possession in the agreement with the allottees. Under section 18(1) of the RERA Act, the right of the allottee to the interest is an unqualified right and not dependent on any contingencies or stipulations which the Appellate promoter faces. This issue is now no more *res integra* in the light of Paragraph 25 in the decision of the Supreme Court in the case of ***Newtech Promoters and Developers (supra)***. Furthermore, the Appellant promoter has only made a vague statement without leading any evidence before any of the authorities and therefore even on this account the reasons submitted are to be rejected at the outset. The reasons for the delay are not attributable to the Respondent allottees. The entitlement of interest under Section 18(1) is unqualified and therefore the contention of the Appellant on this issue is to be rejected.

13. The Supreme Court in the case of ***DLF Home Developers Ltd. V/ s. Capital Greens Flat Buyers Association*** has observed that delay in approval of a building plan is a normal incident of a construction project.

The developer would have been conscious of these delays and cannot set up as a defense to resist the claim for compensation before the judicial forums. In my view, the ratio of this judgment of the Hon'ble Supreme Court squarely applies to the facts of the present appeal. The purpose and objective of the Consumer Protection Act and RERA Act being similar, this decision of the Hon'ble Supreme Court, although rendered in the context of the Consumer Protection Act, would apply with equal force for deciding the issue under the RERA Act.

14. The Respondent allottees had addressed various letters to the Appellant promoter wherein it was mentioned that the date of possession was 30 months from the date of the execution of the agreement. However, there is no rebuttal to these letters by the Appellant promoter nor any letter is produced before us. Therefore, the Appellant promoter cannot contend that the Appellate Tribunal was not justified in considering the certified registered document for ascertaining the date on which the possession should have been handed over to the Respondent allottees.

15. **Termination** : In so far as, the contention of the Appellant promoter on termination issue is concerned, the said issue was raised by the Appellant promoter before the Regulatory Authority, as observed by the said authority in Paragraph 11 of its order. It was at the behest of the Appellant promoter that the issue of termination was raised by them i.e.

the Appellant promoter before the Regulatory Authority and the said issue was again raised by the Appellant promoter before the Appellate Tribunal. Therefore, the contention of the Appellant promoter that the Tribunal should not have given any finding on the issue of termination without there being any application on the said issue by any one of the party is contrary to its own stand since the said issue was raised by the Appellant promoter themselves before the Regulatory Authority as well as before the Tribunal. The Appellate Tribunal after hearing both the parties has given a finding and therefore no fault can be found in the impugned order since the Appellant promoter themselves have invited the said adjudication. The Appellant therefore cannot object the Appellate Tribunal's power on this issue.

16. The Appellant promoter contended that the agreement is terminated by virtue of frustration of contract and therefore, the Respondent allottees are not entitled to claim interest. The letter dated 20th January, 2020 on termination by the Appellant promoter is an after thought to frustrate the complaint filed by the allottees with the Regulatory Authority, since it was almost at the fag end of hearing before the Regulatory Authority that this particular letter, terminating the agreement was sent by the Appellant promoter. There is no reason given in the said letter for any default on the part of the allottees so as to entitle

the Appellant promoter to terminate the agreement unilaterally. The said termination letter on the contrary confirms the fact that the allottees are not responsible for the delay in the project and this termination letter appears to be a counter blast to the complaint filed by the Respondent allottees. In the said letter, Appellant promoter admits that the project ought to have been completed within three years but same has not been completed for various commercial reasons specified therein. Therefore, based on this letter itself of the Appellant promoter no fault can be found in the orders of both the Authorities.

17. In view of above, the present appeal is devoid of any merits, totally misconceived and purely based on concurrent findings of facts and therefore no substantial question of law to be arises from the impugned order.

18. **Cost** : The Appellant promoter has raised the issue of termination of agreement before both the lower authorities and now in the present appeal contends that the Tribunal ought not to have adjudicated without any application by any of the parties. This, in my view, is gross abuse of process of law by the Appellant and cannot be permitted. In so far as date of agreement is concerned, the Appellant promoter contended that they were not shown certified copy of registered agreement by the Tribunal although on a query raised by the Court, they

admitted same was executed by them. Also in their own termination letter they have admitted that possession will be given within 3 years. In spite of these admission the Appellant promoter has contended contrary in the present appeal. Therefore this is a fit case for the Court to impose cost on the Appellant promoter for such a conduct. The conduct of the Appellant appears to be to frustrate the claim of the allottees.

19. The appeal is dismissed with cost of Rs.50,000/- to be paid to the Kirtikar Law Library, Bombay High Court, Mumbai on or before 31st October, 2023 and compliance be reported to the Registrar (Judicial-I) of this Court on or before 30th November, 2023. If there is failure to deposit the said cost then Registrar will take appropriate action for recovery of the same from the Appellant including partners and also necessary action be taken in accordance with law for non-compliance of this order, in addition to recovery of the cost.

20. Copy of this order be sent to the Secretary of Kirtikar Law Library, Bombay High Court, Mumbai.

[JITENDRA JAIN, J.]