IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
(APPELLATE SIDE)

Present:
The Hon'ble Justice Rai Chattopadhyay

W.P.A No. 21494 (w) of 2017

Salt Lake AG Block Sourav Abasan Shop Owners Welfare Association & Anr.
Vs.
The State of West Bengal & Ors.

For the Petitioners	: Mr. Probal Mukherjee, Sr. Adv.
	: Ms. Shebatee Datta,
	: Mr. Rahul Auddy,
	: Mr. Aditya Gooptu.
For the KMDA	: Mr. Satyajit Talukdar.

Heard on: **29/11/2023**

Judgment on: 04/03/2024

<u>**Rai Chattopadhyay, J.**</u>

1. A bunch of demand notices, all dated April 3, 2017, and issued by the respondent no.2, individually to the members of Petitioner No. 1/Society are assailed in this writ petition. The writ petitioners have prayed for setting aside of the same.

2. Facts leading to filing of the writ petition, may be mentioned, as herein below:-

3. Members of the petitioner No.1/Society responded to an advertisement of 2004, of the respondent No. 2, for grant of long term lease of 99 years, of shops, office spaces and residential apartments at "Sourav Abasan" Phase II, at AG Block, Sector II, Bidhanager, Kolkata – 700091, to the successful allotees, by way of lottery. They purchased the offer document, i.e, the brochure and application forms. On the understanding of the declaration made in the brochure, to be true and final, as regards the area, pricing or completion of the project within the stipulated time, they applied to participate in the lottery and had succeeded ultimately. The entire price money was paid to avail benefit of discount, as disclosed in the brochure. On March 1, 2010, those applicants were handed over the possession of the allotted shops/commercial places, along with civil, electrical and mechanical works, common area and common facilities.

4. The writ petitioners say that after the actual possession was taken up, pursuant to the letter of respondent No. 2, dated April 6, 2010, a major deviation, in terms of the measurement of the allotted portion, could be noticed. It is stated that in spite of depositing price for the shop floor space of 97 sq.ft. (as mentioned in the brochure), they have been allotted floor space of 77 sq.ft. only.

5. Two years passed without any pitfall, but not thereafter. A letter dated September 13, 2012, of the respondent No.2, was received by all the allottees. Vide the same, the respondent No. 2 demanded a sum of Rs. 2000/- per sq.ft. towards cost of common space/area, to all the individual shop owners. A written representation against the same was submitted immediately thereafter, on October 11, 2012.

6. Later, on December 5, 2014, the respondent No.2 had issued a further letter, addressed to the writ petitioner No.2, that is, the Secretary of

Petitioner No.1/Society, for realisation of service tax @ 12.36% and lease rent @ Rs. 5/- per sq.ft. from each shop owner. In response and protest, the writ petitioners submitted another letter dated December 11, 2014.

7. Finally, the impugned demand notices were issued, dated April 3, 2017, to each of the shop owners, individually, which reads as follow:-

"Sub: Demand Notice

Sir,

The undersigned is directed to request you to deposit the amount of ***Rs.3,20,065/- (Rupees Three Lakh Twenty Thousand Sixty Five)*** *only towards cost of common space after adjustment of 5% penal interest, penal interest @ 15% for delay payment and Service Tax @ 15% including cess on cost of common space and cost of shop.*

The same amount is payable by Bank Draft/Pay Order in favour of ***Kolkata Metropolitan Development Authority*** *to the office of the Deputy Secretary, Estate (M&M) Unit, KMDA, Unnayan Bhawan, Salt Lake, Kolkata – 700091 in one lump within 30(thirty) days from the date of the issuance of this letter.*

The Calculation is given below in details*:*

Cost of common space (87 sq.ft. @Rs. 2000/- per sq.ft.)	*Rs. 1,74,000/-*
Less: 5% penal interest for delay handling over of possession	*Rs. 26,585/-*
(27.07.07 to 22.04.10)	***Rs. 1,47,415/-***
Add: Penal Int.@ 15% for delay payment of cost of common space	*Rs. 1,17,450/-*
Add: Service Tax @ 15% on cost of shop	*Rs. 29,100/-*
Add: Service Tax @ 15% on cost of common space	*Rs. 26,100/-*
TOTAL	***Rs. 3,20,065/-***

Thanking You,

Yours faithfully."

The sum total of demand made to the respective allottee, though varied, but the contentions made in the said demand notices, remained same, for all the recipients. These are – demand notices, issued by the respondent No. 2, to the shop owners respectively, who are the members of writ petitioner No. 1/Society.

8. Those notices are assailed in the writ petition. Mr. Mukherjee, while representing the writ petitioners, has submitted those to be unjust, unfair, arbitrary and illegal. Mr. Mukherjee has strongly relied upon the offer document, i.e, the "brochure", issued by the respondent No. 2 and the letter of allotment dated April 6, 2010, issued to the respective purchasers. He says that the "brochure" is the literal representation of what has been offered. The same is also the basis for the intending purchasers, to form opinion leading them to apply for purchase. Therefore, according to Mr. Mukherjee, such a representation as to the property, is not subject to any variability subsequently, without information of the persons, whose offers, made on the basis of such a representation, has been accepted and acted upon in this case, by delivery of possession of shop rooms. By referring to a decision of the Hon'ble Apex Court reported in ***(2003) 2 SCC 355*** (***B.L. Sreedhar & Ors. vs. K.M. Munireddy (dead) & Ors.***), Mr. Mukherjee says that, in that case the doctrine of estoppel by representation would step in to restrain any subsequent variability of the clauses in initial offer document, i.e, "brochure".

9. By referring to the annexed price index along with the "brochure", Mr. Mukherjee has submitted that the prices of the individual unit mentioned therein is unqualified, final and firm prices. He says that once the respondent having represented about the prices in the brochure, cannot unilaterally change the same on any pretext whatsoever.

10. Mr. Mukherjee has further stated that the offer price as mentioned in the “brochure” is with respect to the individual unit of the shops/commercial spaces/residential apartments, which should be considered to have borne in itself the price of the common area, which is the integral part of any unit, situated within the same premise. The writ petitioners are aggrieved that though the respondent itself have relied on the stipulations of the information brochure, so far as in the event of cancellation of any allotment is concerned, the other part of the same document regarding the prices is being unjustly and arbitrarily denied by them, resulting into issuance of the impugned demand notices. The petitioners say that the demand notices as impugned in this case are not maintainable being dehors the terms of agreement and understanding between the parties. The writ petitioners have prayed for setting aside of the impugned demand notices.

11. Mr. Talukdar is representing the respondents in this case. On behalf of the respondents he has put forth the principal point of objection as regards the very maintainability of the writ petition. He points out that possession of the unit was handed over to the individual allottees. It is stated further that the demand notices were issued to the individual shop owners, with respect to the particular unit owned by them individually. Mr. Talukdar submits that, under the circumstances, the writ petitioner No. 1/Society/organisation of the shop owners, would not be entitled to espouse the cause of the individual shop owners, before this court. He elaborates that a person can approach a court of equity only when is aggrieved of violation of his right, due to any inaction or illegality caused by an authority, which is within the meaning of 'State' or any of its instrumentality. According to Mr. Talukdar, the writ petitioner/Society would have no grievance against the respondent in this case. As such the same would have no cause of action to put forth in this writ petition. On this Mr. Talukdar has relied on a judgment of this Court, i.e, ***Ganeshgarh Tenants Welfare Association vs. The Calcutta Municipal Corporation & Ors.*** reported in ***(2002) SCC OnLine Cal 319***. The Hon'ble Co-ordinate Bench held that unless an association formed to protect the interest of groups like that of consumers/tenants etc has been affected by an order of the authority, it cannot maintain a writ petition to challenge the same.

12. It is stated further that the said writ petitioner/Society has not even pleaded any prejudice or jeopardy, having been suffered by it, due to any of the alleged action of the respondents herein. Hence, according to Mr. Talukdar, the writ petition filed by the Society, would not be maintainable. On this a judgment has been referred to reported in ***(1989) 1 CHN 474 (Sand Carrier's Owners' Union & Ors. vs. Board of Trustees for the Port of Calcutta & Ors)***. The Hon'ble Co-ordinate Bench of this Court held that an unincorporated association would not be a legal person and as such a writ petition by it would not be maintainable.

13. By strongly relying upon the stipulations made in the information brochure, Mr. Talukdar has submitted that neither the area of individual unit as shown in the information brochure, nor the price of the unit shown there in, were final. He says that the brochure itself has provided that the price mentioned therein is only 'provisional', and is subject to revision without notice. He has further pointed out to the relevant stipulations made in the said brochure that the decision of the respondent/KMDA would be final and binding upon the buyer with regard to the final amount of sale price. Therefore, the respondents have put forth an argument that, it reserved the right as regards the determination of price of a unit and the individual shop owners, having applied on the basis of the information brochure, have agreed to the same.

14. The respondent has also put up its case that the shop area disclosed in the information brochure was approximate only and the price mentioned therein was only tentative. The same was subject to change after construction and at the behest of the respondent/KMDA. It is stated that the price mentioned in the information brochure did relate to the operational and management cost only and did not include a portion of common area cost. That, by dint of the notices challenged in this writ petition, the said respondent has demanded the common area cost which the respondent is legally entitled to receive and the property owners are liable to pay, as the demand does not relate to any operational or management cost but for the additional area, which the owners would eventually enjoy. Hence it is stated that there is no legal infirmity regarding the said demand notices and on this score too, the writ petition would be liable to be dismissed.

15. The writ petitioner No.1 is a Society, registered under the West Bengal Societies Registration Act, 1961. The writ petitioner No.1 being an association of the shop owners, all the individual allottees, against whom the respondent/KMDA has issued demand notices (as impugned in this writ petition), happen to be the members of the said society. The writ petitioner No.2 is the Secretary and office bearer of the writ petitioner no.1. *Locus standi* of the writ petitioners have been challenged in this case, thereby giving rise to the challenge as to the very maintainability of the writ petition. It is necessary to see if the said Society is empowered under the law to espouse grievance of its individual members or not. In this regard this Court may follow ratio of a decision of the Hon'ble Apex Court, reported in ***(1997) 3 Supreme Court Cases 681*** [***State of Uttar Pradesh vs Chheoki Employees Co-operative Society Limited***], where it has been held by the Court that a registered Co-operative Society has the right to represent its members, as the corporate aggregate. Ratio of this judgment has again been relied on by the Apex Court in a three Judges Bench decision reported in ***(2022) SCC Online SC 1404*** (***Bengal Secretariat Cooperative Land Mortgage Bank and Housing Society Limited vs. Aloke Kumar***).

16. It is trait that a registered Society can sue on behalf of its members. That the respective purchasers of shop rooms are members of the writ petitioner no. 1/Society is a fact undisputed in this case. It has not escaped attention of the Court that letters dated April 6, 2010, i.e, the possession letter, though issued to the individual allottees, still mention that ***"****The estate with the common areas and facilities shall be under management of the writ petitioner No.1/Society.****"*** It was also stipulated that meter connection for electric supply should be made at the behest of the said Society. No doubt, by referring as stated above, the respondent/KMDA has already conceded to the writ petitioner's rights as to the allotted property, though individual unit is being owned by separate shop owners. It should also be noted that the impugned letter dated December 5, 2014, has been issued to the writ petitioner No. 2, being in the capacity of the Secretary of the writ petitioner No. 1/Society. This should fortify Court's findings as above regarding status of writ petitioners *qua* the individual allottees, who owned the respective units. The writ petitioner No. 1 being in overall management of the allotted property, therefore, would be eligible to espouse cause of the said allottees, before the Court as the impugned notices have ultimately prejudiced the rights and interests of the members of the Society. In the case of ***Swati Ulhas Kerkar & Ors. vs. Sanjay Walavalkar & Ors.*** reported in ***(2021) 14 SCC 57***, the Hon'ble Supreme Court has held that indubitably the Co-operative Society is competent to espouse the cause of its members. Thus understood, the objection regarding maintainability of challenge by the writ petitioners with regard to the orders of the respondent/KMDA issued to its individual members, cannot be countenanced. As a matter of fact, one of the impugned notices, i.e, dated December 5, 2014, has been issued to the writ petitioner No. 2, being the Secretary of the writ petitioner No. 1/ Society. The same affecting rights of the Society, would be self explicit and evident. Therefore, this Court finds no substance with regard to the arguments challenging the *locus standi* of the writ petitioner no. 1 and the maintainability of the writ petition, as advanced by the respondent. The writ petition is maintainable in its present form.

17. The writ petitioners say that after the process of allotment having been completed, by handing over possession of the unit to the respective allottees, any demand issued as outstanding price for the common area or service tax would only be non-est and futile. Per contra, the respondent would say that the price paid by the individual allottee, in terms of the brochure, would only be provisional and/or approximate price, subject to final decision of the respondent.

18. So far as the merits of the case is concerned, the offer document, i.e, brochure issued to seek application forms for allotment of shop rooms and others in a residential complex, has formulated the basic stipulation on which the jural relationship between the parties would depend. The brochure has mentioned, amongst others, regarding the number of the units of shop/commercial space/residential apartment to be sold out, approximate area thereof and the sale price, per unit. Notable is that though the area of the unit has been mentioned in the said brochure to be '*approximate*', the sale price per unit is not qualified with any such word. In view of the same the submission made on behalf of the writ petitioner that the sale price as was declared in the brochure was the *firm price, per unit* and the same would include price of the incidental area like common area, appears to be cogent.

19. The information brochure would assume sufficient importance in this case. The following information put forth through the same are relevant :-

> **"***Provisional price payable for each type of permanent shop and commercial space are as shown in Table 1 and Table 2.*
>
> *This is subject to revision without notice. The decision of KMDA in regard as to final amount of sale price shall be binding upon the buyer. The areas shown in the above Tables are approximate areas. Any variation in the said areas will not modify the **Sale Price** of any unit. Floor area means built up area which includes the proportionate area of the common spaces.*
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> ** ** ** ** ** **
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> *Floor plans may be modified as per instruction of the municipal authority.*
>
> *Note:*
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> ** ** ** ** ** **
>
> **The above information and other terms and conditions contained in the brochure are merely illustrative and not exhaustive.***"**

20. Relevant is to note that in the information brochure the authority though has mentioned the area allottable in approximate terms but has mentioned the sale price per unit in absolute terms. The same, if read with the relevant provision of the information brochure as extracted above, i.e, **"***any variation in the said areas will not modify the sale price of any unit***"**, should invariably show that the unit price as declared in the information brochure would be the final unit price, not subjected to any condition of variability. The respective allottees would be required to pay the said price per unit to the authorities subject to the total area allotted to them respectively.

21. On consideration of the same as discussed above, the claim of the respondent authority of the additional price for common area appears to be in derogation and contrary to the said stipulations made in the information brochure.

22. A strong objection has been raised by the respondent authority on the ground that the area to be allotted was subjected to variability and thus the subsequent common space, which has been added to the respective portion of the individual allottees, would require payment of additional cost for the said area by them. Unfortunately, this submission of the authority shall also not be tenable in view of the stipulation made in the said document that, floor area would mean build up area including the proportionate area of the common spaces. The meaningful and reasonable reading of the said clauses of the information brochure should suggest that the firm sale price of a unit would not modify at any subsequent point of time and the floor area of a unit would include build up area and the proportionate area of the common space together. So far as the particular facts of the instant case is concerned, it does not escape attention that, the floor area allotted to the recipients respectively, has not subsequently been enhanced, before claiming additional common area cost.

23. Adequate attention must also be paid to the written communications made between the parties. A letter dated February 25, 2010, is by the authority to the writ petitioner no. 2 on the subject matter **"***Handing over of both civil and electrical works for common areas and common uses ………..***"**. The document dated March 1, 2010, is a making over instrument, by dint of which the possession has been made over by the authority in favour of the allottees, stating them to be the members of the writ petitioner no. 1 and the subject mention therein is as follows :-

> **"***Subject: Handing over the Building with both Civil, Electrical & Mechanical works for common areas & common facilities ect. of (G+8) commercial cum residential building at AG-104, Sourav Abasan, Salt Lake Sector II, Kolkata-700091.***"**

24. The possession letter dated April 6, 2010, relies upon the terms and conditions as mentioned in the information brochure. Needless to mention and at the cost of reiteration, it is stated that from the discussions as made above, one can find the relevant terms and conditions as against the described property allotted thereby. This would further be fortified with the stipulations made in the said letter itself that

> **"***the estate with the common areas and facilities shall be under management of Co-operative Housing Society.*
>
> ** ** ** ** ** **
>
> *KMDA shall have no liability or responsibility in any manner whatsoever for the maintenance and management of the estate including all common areas, structures, fixtures, installations and facilities.***"**

25. Thus, it is seen that time and again, while delivery of possession to the respective allottees were being made, the authority itself has mentioned about delivering the allotted unit along with the common area and other civil and electric facilities. In a housing complex, where a number of families comprising numerous heads would reside, the common area therein would facilitate the free movement of a large number of people within the housing complex. Common area, contrary to the area individually and personally owned, would be allowed to be enjoyed by all the unit owners within the said premises, who also enjoys specified floor area under his personal occupation or possession. The common area he would share with every other unit holders in the same housing complex to facilitated free ingress and egress and as well as movement through staircases, landing, corridors and other areas of the housing complex where one or every of the occupants might require to roam around and have access. Thus, the common area in a housing complex is integral to each and every unit thereof, be it residential, commercial shop, garage etc. Proportionate common area of each unit holder cannot be separated and segregated, to measure it or assessment of its price separately. The same would be an integral area as regards each unit of the housing complex and the price of the each unit would naturally include the price of the common area, to which the respective unit holder should have access to, in order to use his property in a viable manner.

26. According to the respondent authority at the time of delivery of possession to the respective allottees, the common area cost was not included in the price, which the allottees were invited to pay, by dint of the impugned notices. It appears to be a farfetched concept not practically feasible. This should further be fortified from the decision of the authority itself to quote a concrete and firm price for the individual units.

27. The said authority would place enough reliance on the averments made in the information brochure that the price quoted therein would be only '*provisional*', as per stipulations made in the information brochure. It would also place reliance on the stipulations therein that the such provisional price would be subject to revision at the behest of the said authority, without notice to the individual allottee and the decision of KMDA as regards the sale price would be final and binding upon the buyer. Therefore, as the learned advocate on behalf of the said authority has emphasised, that the authority would be a rightful claimant of the cost of common space and other charges with respect to the said allotted property.

28. May some dates, relevant for the purpose of discussion as regards the above issue, be mentioned here. The last date of sale of brochure was on March 15, 2004, whereas the last date of submission of application form by the intending purchasers was on April 7, 2004. Record further reveals that handing over notice was dated February 25, 2010, whereas the taking over of the same was concluded on March 1, 2010. Therefore, the 'Possession Advise', i.e, possession letter was issued by the said authority on April 6, 2010, by dint of which the actual possession of the property was handed over to the respective allottees. The question is, if the clause as enumerated in the information brochure regarding the quoted price to be provisional and amenable to change at the behest of the respondent authority, should survive in perpetuity or not. Or in other words, at what relevant point the price of the unit would be final. It is noted that there is no specific stipulation in the information brochure as to when the power of the respondent authority in terms of the said brochure to modify the price of the unit would cease. Or at what point finality in terms of property price, would be reached at. Here the ratio of the decision of the Supreme Court in ***B. L. Sreedhar's case (supra)*** shall be squarely applicable. The Court has relied upon the words of Lord Wright, in *Canada & Dominion Sugar Co. Ltd.* v. *Canadian National (West Indies) Steamships Ltd.* [(1946) 3 WWR 759 : 1947 AC 46] WWR at p. 764.)

"The essential factors giving rise to an estoppel are, I think —

(a) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation was made.

(b) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation was made.

(c) Detriment to such person as a consequence of the act or omission where silence cannot amount to a representation, but, where there is a duty to disclose, deliberate silence may become significant and amount to a representation. The existence of a duty on the part of a customer of a bank to disclose to the bank his knowledge of such a forgery as the one in question was rightly admitted." (Per Lord Tomlin, Greenwood v. Martins Bank [1933 AC 51 : 1932 All ER Rep 318 : 101 LJKB 623 : 147 LT 441 (HL)] , All ER p. 321 C-E.)

The Court has further held in the said case, as follows :

"19. *Estoppel, then, may itself be the foundation of a right as against the person estopped, and indeed, if it were not so, it is difficult to see what protection the principle of estoppel can afford to the person by whom it may be invoked or what disability it can create in the person against whom it operates in cases affecting rights. Where rights are involved, estoppel may with equal justification be described both as a rule of evidence and as a rule creating or defeating rights. It would be useful to refer in this connection to the case of Depuru Veeraraghava Reddi v. Depuru Kamalamma [AIR 1951 Mad 403 : (1950) 2 MLJ 575] where Vishwanatha Sastri, J. observed : (AIR p. 405, para 7)*

"Estoppel though a branch of the law of evidence is also capable of being viewed as a substantive rule of law insofar as it helps to create or defeat rights which would not exist and be taken away but for that doctrine.…"

20. *Of course, an estoppel cannot have the effect of conferring upon a person a legal status expressly denied to him by a statute. But where such is not the case a right may be claimed as having come into existence on the basis of estoppel and it is capable of being enforced or defended as against the person precluded from denying it."*

29. The fairness of actions, decisions or standards of conduct of the respondent authority would be evaluated on the fundamental concept of reasonableness of such action. The test of reasonableness and/or arbitrariness is the critical benchmark, for evaluation of the justifiability of respondent's action. Decision of the respondent authority must qualify and cross this benchmark, to be sustained in the eye of law. The reasonableness test is a standard used to assess the appropriateness and fairness of a particular action, decision, or behaviour, in a given context. It seeks to determine whether the conduct in question aligns with what a reasonable person would do in similar circumstances. Any allegation of baselessness, arbitrariness or capriciousness of an administrative decision, would always be amenable to judicial review and in case fail to attend the benchmark, would be vitiated.

30. The relationship between the buyer and the seller would subsist till the actual possession of the property is handed over to the buyer, on payment of the consideration money. Receipt of the consideration money from the respective allottees is not denied in this case. The actual physical possession of the property is handed over on April 6, 2010, upon payment of the consideration money. The respective part performance terminates at that point of time. The reasonable conclusion would be that the liability of the buyer ceases at the point of receiving the property upon payment of consideration money. His liability could not be stretched beyond this point. The authority's right under the information brochure for revision of the unit price, on whatever pretext, would extend to a specified period till when both the parties would be performing their respective parts under the contract. The date of handing over actual physical possession of the property is the particular date in this regard. By no stretch of imagination or reasonableness the liability of the buyer for payment of further cost with respect to the purchased property can be extended beyond this point of time. The respondent's performance under the terms of performance, cannot be considered to have been reasonable. An unconscionable action would be unenforceable. Objective standard of the decision of the respondent, being balanced with the potential prejudice and competing interests involved, particularly in the context of factual background of the instant case, cannot be said to have qualified the tests of reasonableness. Instead, the supervening arbitrariness of the unilateral decision and action of the respondent authority, would render the same unsustainable and be vitiated. Thus, in considered opinion of this Court the impugned notices dated April 3, 2017, i.e, issued after seven years from the date of actual handing over of possession of the property to the respective buyers, are beyond authority and jurisdiction of the respondent/KMDA. The same suffers from unreasonableness and arbitrariness and thus is liable to be set aside.

31. On the discussion as above this Court finds the writ petition to be eligible to succeed.

32. Writ petition being W.P.A No. 21494 (w) 2017 is allowed. The impugned demand notices dated 03.04.2017 and 19.05.2017 issued by the respondent/KMDA, as challenged in this case, are set aside.

33. The writ petition no. WPA 21494 (w) of 2017 is disposed of along with connected applications, if any.

34. Urgent photostat certified copy of this judgment, if applied for, be given to its parties on usual undertaking.

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RAI CHATTOPADHYAY

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Date: 2024.03.04 13:42:45 +05'30'

(**Rai Chattopadhyay,J.**)