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HIGH COURT OF CHHATTISGARH, BILASPUR

MA No. 4 of 2024

(Against the order dated 18-10-2023 passed by the Chhattisgarh Real Estate Appellate Tribunal, Raipur, in Appeal No.63 of 2022 arising out of order dated 23-12-2020 passed by the Real Estate Regulatory Authority, Raipur, in case No.M-PRO-2020-01049)

1. Chhattisgarh Housing Board Through Commissioner, Paryawas Bhawan, Sector-19, Naya Raipur, Atal Nagar, District Raipur (C.G.)

   Wrongly mentioned in the impugned order as Shankar Nagar, Raipur, Dist. Raipur (CG).

2. Executive Engineer (wrongly mentioned as Chief Executive Officer in the impugned order) Chhattisgarh Housing Board, Division-2, Shankar Nagar, Raipur (C.G.)

3. Estate Officer Chhattisgarh Housing Board, Zone-3, Shankar Nagar, Raipur (C.G.)

---- Appellants/Promoter

Versus

1. Smt. Dr. Monika Pathak W/o Shri Navendu Pathak Aged About 51 Years R/o Sai Suraksha Hospital, Near Ashirvad Bhavan, Baron Bazar, Tehsil And District Raipur (C.G.)

---- Respondent/Allottee

And

MA No. 184 of 2023

(Against the order dated 18-10-2023 passed by the Chhattisgarh Real Estate Appellate Tribunal, Raipur, in Appeal No.63 of 2022 arising out of order dated 23-12-2020 passed by the Real Estate Regulatory Authority, Raipur, in case No.M-PRO-2020-01049)

1. Smt. Dr. Monika Pathak W/o Shri Dr. Navendu Pathak Aged About 51 Years R/o Sai Suraksha Hospital, Near Ashirvad Bhavan, Baron Bazar, Tehsil And District- Raipur, CG

---- Appellant/Allottee

Versus

1. Chhattisgarh Housing Board, Through Commissioner, Address- Shankar Nagar, Tehsil And District- Raipur, CG

2. Chief Executive Officer Division- 2, Chhattisgarh Housing Board, Shankar Nagar, Tehsil And District- Raipur, CG

3. Estate Officer, Chhattisgarh Housing Board, Estate Management Zone-3, Shankar Nagar, Tehsil And District- Raipur, CG

---- Respondents/Promoter

For Allottee — Shri Shobhit Mishra, Advocate

For CG Housing Board — Shri Sanjay Patel, Advocate

Hon'ble Mr. Justice Goutam Bhaduri &
Hon'ble Mr. Justice Radhakishan Agrawal

Judgment on Board

Per Goutam Bhaduri, J.

11-3-2024

1. Since both the appeals are against the order dated 18-10-2023 passed by the Chhattisgarh Real Estate Appellate Tribunal, Raipur, (henceforth 'the Tribunal') in Appeal No.63 of 2022 arising out of order dated 23-12-2020 passed by the Real Estate Regulatory Authority, Raipur (henceforth 'the RERA') in case No.M-PRO-2020-01049 they are being heard and decided together by this common judgment.

2. MA No.4 of 2024 is preferred by the Chhattisgarh Housing Board whereas MA No.184 of 2023 is preferred by Dr. (Smt.) Monika Pathak.

3. After hearing the parties, the following question emerges for consideration :

> Whether as against the pleadings of the parties the Court can frame a new issue in its judgment, which may cause prejudice to the parties ?

4. (i) Brief facts of the case are that on 10-5-2011 Dr. (Smt.) Monika Pathak (henceforth 'the allottee') was allotted a house bearing No.Peepal-I/172 in the scheme of the Chhattisgarh Housing Board (henceforth 'the Board') namely; Peepal-I. Subsequently, on the request of allottee, the house bearing No.Peepal-I/167 was allotted for which extra amount of ₹ 10,000/- was paid as transfer fees. The last installment was demanded on 4-3-2015 and, as such, the total amount of ₹ 36,53,434/- was deposited by the allottee. Subsequently, the lease deed was executed after four years of allotment on 24-9-2015. The allottee was given the possession letter on 23-11-2015. When the allottee went for taking possession of the house, she found that the house was in dilapidated condition, as such, frequent e-mails were sent on different date for rectifying the defects. The Estate Officer of the Board asked the Executive Engineer to rectify the defects and, in turn, inform it to the Board. Thereafter, the Estate Officer of the Board again sent e-mail dated 3-12-2015 & 10-12-2015. When nothing had transpired, the allottee eventually sent an e-mail dated 19-7-2019 to the Executive Engineer. Thereafter, legal notice was issued by the allottee and lastly a complaint before the RERA was filed on 26-5-2020.

(ii) In the month of June, 2020 reply was filed by the Board wherein the expert opinion was sought for rectification of the defects pointed out in the house and it was referred that because of inherent defect in the plinth, the cracks on walls had occurred. After coming to know about this fact that the house was still incomplete, the

allottee, on 21-7-2020 withdrew from the project and the Board, in turn, in reply to rejoinder agreed to refund the amount with interest.

(iii) Subsequently, the order was passed by the RERA on 23-12-2020 wherein it was partly allowed and the amount of ₹ 17,152/- as interest was directed to be returned on payment of advance lease rent and adjustment of advance lease amount computing the lease period from the date of handing over of possession and further the Board was directed to rectify the entire defect and handover possession of the house to the allottee.

(iv) Against the order, the allottee preferred an appeal before the Tribunal wherein the Tribunal by its order dated 18-10-2023 has directed to pay interest at the rate of 10.70% per annum for every month of delay on the amount of ₹ 36,53,500/- from 1-1-2016 till handing over of the possession of the house to the allottee. Aggrieved by such order, both the Board and the Allottee are before this Court.

5. Learned counsel appearing for the Board would submit that once the lease deed having been executed, no return of amount can be ordered for unless the lease is surrendered. He would further submit that as per Sections 18 & 71 of the Real Estate (Regulation and Development) Act, 2016 (henceforth 'the RERA Act') in order to adjudicate the quantum of compensation it is to be decided by the competent authority under the Act, not below the rank of District Judge. He would also submit that since the allottee sought for

refund of entire amount that could not be done because lease was existing and as per Section 111 of the Transfer of Property Act (henceforth 'the TP Act'), it can be done by mutual agreement when the lease deed exists and the compensation to the extent of interest @ 10.70% every month could not have been allowed.

6. Learned counsel appearing for the allottee, *per contra*, would submit that the Board has no dispute about the fact that the allottee has withdrawn from the project,which is guaranteed under Section 18 of the RERA Act. He would further submit that having withdrawn from the project, the allottee was entitled to get refund with interest. It is not the case of the Board that the allottee cannot claim refund, therefore, new case cannot be set up on its own by the RERA, which was not pleaded or was fact in issue before any adjudicating authority. Consequently, once the allottee has exercised her option to come out of the project then mandate of Section 18 is required to be followed.

7. We have heard learned counsel appearing for the parties and perused the record. On the pleadings of the parties the question was framed as above.

8. In order to appreciate the facts of this case, the sequence of events would be necessary. On 10-5-2011 the Board allotted the house bearing No.Peepal-I/172 to the allottee. The schedule of payment was shown in the allotment letter. Admittedly, the said allotment in between the allottee and the Board was changed, as the allottee

sought for another house instead of house No.Peepal-I/172. On the basis of same the house No.Peepal-I/167 was allotted for which extra payment of ₹ 10,000/- was paid on 29-6-2011 as transfer fee. The proposed cost of the house was shown as ₹ 34,75,000/-.

9. According to the payment schedule, the payments were made and the letter dated 4-3-2015 would show that the entire payment of ₹ 36,53,434/- was made by the allottee. Thereafter, the lease deed in respect of the land over which the house was to be constructed was executed on 24-9-2015 i.e. after four years of the allotment order. Perusal of the lease deed would show that in a consideration of further ₹ 7,92,000/- which was premium of the land including development charges, the lease deed was executed in favour of the allottee in respect of the plot wherein the house No.Peepal-I/167 was to be erected. In respect of the house separate amount was paid and on 23-11-2015 the allotment letter was issued of the house No.Peepal-I/167.

10. The record would show that on 26-11-2015 and 2-12-2015 the allottee complained about the defects in the house. This include that the doors of the house including the main gate were not painted. It was covered with full of dirt and dust and the wooden work was not attended yet. The wall plaster, window grills were not proper. The entire electricity work was required to be reviewed and rectified.

11. The allottee made a request by e-mail to correct the same, which was followed by another mail dated 2-12-2015. Pursuant thereto, the

Estate Officer asked the Executive Engineer of the Board to rectify the defect in the house. Despite such follow up action, it is evident that still the defect was not rectified. Exchange of e-mails continued on 3-12-2015, 19-7-2019 and 20-8-2019. Since the defect was not rectified, the legal notice was sent on 6-1-2020 to the Board and when no action was taken, a complaint was filed before the RERA on 26-5-2020.

12. Reply was filed by the Board. Para 13 of the same would show that after the defects were pointed out by the allottee, the same were inspected by the Testing and Consultancy Cell – Department of Civil Engineering from the National Institute of Technology (NIT), Raipur. After inspection on 23-5-2018 by Annexure - 'D' the defects in the house were highlighted by the NIT, therefore, fresh tender was was issued to rectify the defects. The report of the NIT dated 23-5-2018 is quoted below for ready reference :

> No.1029/Consultancy/Civil/2018 Raipur, Dated 23/05/18
>
> To,
> The Additional Commissioner
> C.G. Housing Board
> Head Office, Naya Raipur (C.G.)
>
> Subject: Expert opinion for foundation settlement of 3 BHK House at Boriyakala, Raipur.
>
> Reference: Your letter No. 805/Addl.C./TS/2018, Naya Raipur, 06.03.2018
>
> **1.0 : Preamble**
>
> C.G. Housing Board, vide letter No. 805/Addl.C./TS/2018, Naya Raipur 06.03.2018 reported that some of the houses constructed at housing colony Boriyakala have shown cracks in the walls and requested NIT Raipur for expert opinion for rectification of these houses.

A technical team comprising of Dr. G.D. Ramtekkar, (Professor) and Dr. R.K. Tripathi, (Professor) was constituted by the department of Civil Engg. NIT Raipur to visit the site and give its opinion for rectification.

2.0 : Technical Investigation

The technical team from NIT Raipur, visited the site on 29.03.2018. During the visit Mr. S.K. Sahu (E.E.) and Mr. Pankaj Mishra (A.E. Civil) from C.G. Housing board were also present at the site.

Following are the observations during the visit:

(i) Some of the brick walls of the houses have been found to have diagonal cracks signifying the differential settlement of foundation.

(ii) In some of the walls horizontal cracks have been observed which may be because of the settlement of the walls or may also be due to the shrinkage of plaster particularly at locations of concealed electric pipe or RCC and brick work joint.

(iii) Varandah floor has been observed to be badly settled and undulated primarily because of the improperly compacted / stabilized soil filling. It has also been observed that the filling has been done with the available black cotton soil which is prone as well and shrink under change in condition of moisture leading to settlement and cracks in the building elements.

(iv) Inner ground floors have not been observed to have any settlement or damage because of the reason that they have been constructed as reinforced concrete slabs as reported by the CGHB officials present during the visit.

(v) No cracks have been observed in the RCC Structural elements such as columns, beams and slabs.

(vi) The structural drawings of the houses reveal that the foundation has been designed with SBC of soil at 1.5m below the ground level as 20 T/Sq.m. However a test pit dug in the nearby location revealed that the soil is black cotton soil up to a depth of 3.0m below ground. In such situation foundation settlement may not be ruled out.

3.0 : Suggested rectification

(i) In the varandah floor, either the filled up soil (BC Soil) should to stabilized with suitable physical or

chemical methods or should be completed replaced by non expensive soil such as murum. A proper ramming of the filled-up soil in layers must be done and then RCC flooring as shown in fig. 1 should be laid. Tiles may be laid over the RCC floor.

(ii) Below the plinth beams of all the outer walls and at any inner one-brick wall having diagonal cracks should be provided with RCC wall as shown in fig.2. This will reduce the pressure intensity below the foundation and thus reduce the chances of further settlement.

(iii) All the walls with cracks should be replaced with new brick walls with the provision of RCC ties as shown in fig.3.

(iv) If any RCC structural element such as beam, column footing or slab is observed with any crack during the rectification operation, the same must be strengthened properly by suitable strengthening methods such a jacketing.

(v) All the work of rectification must be carried out under strict supervision of CGHB Engineers and necessary safety precautions as per BIS guidelines must be adhered to during all operations.

13. After such defects came to fore, another pleading was placed before the allottee wherein specifically it was pointed out that since the plinth of the house has shrunk as such the cracks were developed in the house, therefore, without rectification of plinth, defects could not be rectified and the entire house was required to be demolished. As such, the allottee withdrew from the project. The reply to the rejoinder filed by the Board before the RERA would show that the Board came out with a plea that since there was a defect in construction, the concerned contractor was blacklisted and they are ready to return the entire amount deposited with interest of 7.5%. It was further stated that if the allottee do not want the house, the surrender deed is required to be executed. According to the Board,

since the lease of surrender could not be executed, the amount was not paid.

14. Section 111 of the TP Act laid down the procedure for determination of lease, which can be by express surrender by the mutual agreement and Section 111 (f) also speaks about implied surrender. When the documents are examined in this case, it would show that the advertisement and initial allotment was for the house and it was confined to the land. The allotted house was to be constructed over it. The entire price of the house/ superstructure was paid to the tune of ₹ 36,53,434/- and during such course, the lease deed was executed on 24-9-2015 by payment of separate condition.

15. Perusal of the lease deed, which was meant for the land shows that a premium of land was received by the Board apart from the released amount. The facts of this case would show that the possession letter was issued to the allottee on 23-11-2015. When the allottee went to take possession of the house, they found that the house is in a dilapidated condition and was not habitable. With the passage of time when the dispute reached to the RERA, before the RERA the Board came out and revealed the fact that after the house was got inspected, major defects were found including defect in the plinth, which caused cracks in the walls, therefore, the allottee came out of the allotment, as the Board was unable to give possession of the house as per the terms of Section 18 of the RERA Act.

16. It is obvious that the Board was showcasing the fact of complete habitable house and in the name of allotment of house, the entire amount was deposited. Section 18 of the RERA Act contemplates that it would be within the right of the allottee to withdraw from the project in case the promoter is unable to give possession of the apartment, plot or building. Initial letter was for allotment was in respect of house, therefore, when the major defects were pointed out it is not expected that the allottee would be compelled to take the house in dilapidated condition, which is not habitable, by forfeiting her rights.

17. Admittedly, possession of the house was not given, which has been made clear in the rejoinder when the fact was unearthed from the report of the experts of the NIT in the subject. The contention of the Board that they were ready to return the amount of deposit conditionally that if the allottee executes a deed of surrender in respect of lease cannot be appreciated for the fact that the Board advertised for the house and surrender of lease of land, which was separately executed cannot be a barrier since the allottee has withdrawn from the project. The project would be meant for allotment of house, not the lease. The doctrine of merger in the case which primarily the question of intention which depends on the circumstances would apply in this case, as it would take the act of the allottee within the implied surrender of lease, therefore, the fact that return of amount of ₹ 36,53,434/-, which was meant for the house, would dominate the track to decide the rights of the parties.

18. Accordingly, we hold that the finding of the RERA and the Tribunal went beyond the pleadings and cases of the parties to hold that the allottee was not entitled or claim return of ₹ 36,53,434/- and answer the same in favour of the allottee to hold that she is entitled to receive refund of ₹ 36,53,434/-, the amount which was deposited for the house/superstructure.

19. With respect to return of amount of compensation, Sections 18 & 71 of the RERA Act they decide such course of action. For sake of brevity, relevant provisions of Section 18 (1) of the RERA Act is quoted below :

> **18. Return of amount and compensation.** (1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—
>
> > (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or
> >
> > (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,
>
> he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:
>
> Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

20. Section 71 of the RERA Act also provides power to adjudicate compensation under Sections 12, 14, 18 and 19, which contemplates that the Authority shall appoint in consultation with the appropriate Government one or more Judicial Officer as deemed necessary. Relevant part of Section 71(1) with its proviso clause is quoted below for ready reference :

> **71. Power to adjudicate.--**(1) For the purpose of adjudging compensation under Sections 12, 14, 18 and Section 19, the Authority shall appoint in consultation with the appropriate Government one or more judicial officer as deemed necessary, who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard:
>
> Provided that any person whose complaint in respect of matters covered under Sections 12, 14, 18 and Section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986, on or before the commencement of this Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under this Act.

21. Reading of Section 18 of the RERA Act would show that if it gives the allottee a power to withdraw from the project without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under the Act. In the instant case, the allottee has not sought for any compensation, but has only sought for return of amount deposited for the

superstructure, therefore, the submission of the Board that for determination of compensation is required to be adjudicated cannot be appreciated as Section 18 operates in two fields. One is for return of amount deposited in case the promoter fails to deliver possession within time, apart from the fact the compensation can also be claimed. In order to decide the compensation, Section 71 of the RERA Act would come into play, which is not a case herein as the rights have been confined to only return of amount deposited.

22. The Chhattisgarh Real Estate (Regulation and Development) Rules, 2017 (henceforth 'the Rules, 2017') has been made in exercise of powers conferred by Section 84 of the Real Estate (Regulation and Development) Act, 2016, State Government, hereby, makes the rules for regulation and development of real estate in the State of Chhattisgarh. Chapter V of Rules of 2017 speaks about rate of interest payable of the promoter and the allottee and the timelines for refund. Rule 17 of the Rules of 2017 whch is relevant is reproduced hereinunder:-

> **17. Rate of interest payable of the promoter and the allottee.-** The rate of interest payable by the promoter to the allottee or by the allottee to the promoter, as the case may be, shall be the State Bank of India Prime Lending Rate plus two percent.

23. Further Section 2 (za) of the Act, 2016 which defines the interest postulates that the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof. For the sake of brevity Section 2 (za) with explanation (i) (ii) are reproduced hereinbelow:-

> 2 (za) "**interest**" means the rates of interest payable by the promoter or the allottee, as the case may be.
>
> *Explanation*.—For the purpose of this clause—
>
> (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;
>
> (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;

24. Reading of Rule 17 of the Rules, 2017 would show that the rate of interest payable by the promoter to the allottee shall be the State Bank of India Prime Lending Rate plus two percent.

25. In the instant case the interest has been allowed at the rate of 10.70%, which is two percent above the State Bank of India Prime Lending Rate. The entire amount was deposited for the superstructure/house on 15-4-2015. Since the promoter failed to deliver possession of the habitable house to the allottee as per Section 18 of the RERA Act, we deem it proper to direct that the allottee would be entitled to refund of entire amount deposited by her in respect of the superstructure/house in question along interest at the rate of 10.70% per annum w.e.f. 15-4-2015 on yearly rest.

26. Applying the well settled principles of law and for the reasons mentioned hereinabove,

- Appeal bearing MA No.184 of 2023 preferred by the allottee - Dr. (Smt.) Monika Pathak is **allowed to the extent indicated above**; and

- Appeal bearing MA No.4 of 2024 preferred by the promoter - Chhattisgarh Housing Board is **dismissed**.

27. There shall be no order as to cost(s).

Sd/- Sd/-

(Goutam Bhaduri)
Judge

(Radhakishan Agrawal)
Judge

Gowri

CASE NOTE

If the promoter fails to give possession of the habitable house, the allottee cannot be compelled to take possession of such dilapidated house and claim/demand refund of the entire amount deposited in respect of such house/ superstructure according to section 18 of the Real Estate (Regulation and Development) Act, 2016.

यदि संप्रवर्तक रहने योग्य मकान का कब्जा देने में विफल रहता है, तो भू–संपदा (विनियमन और विकास) अधिनियम, 2016 की धारा 18 के अनुसार आबंटिती को ऐसे जीर्ण–शीर्ण मकान का कब्जा प्राप्त करने और मकान/अधिसंरचना के संबंध में जमा की गई सम्पूर्ण राशि के प्रतिदाय का दावा/मांग करने हेतु मजबूर नहीं किया जा सकता है।