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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
INTERIM APPLICATION NO. 11611 OF 2024
IN
SECOND APPEAL NO. 503 OF 2024

Dhruva Wollen Mills Pvt. Ltd. … Applicant
Vs.
Bijon Dhirendra Talukdar … Respondent

Mr. Mayur Khandeparkar aw. Mr. Abir Patel and Ms. Lavina Bhargava i/b. M/s. Wadia Ghandy & Co. for the Applicant.
Mr. Vikramjit Garewal a/w. Mr. Bhushan Bhadgale i/b. Mr. Ruturaj Bankar for the Respondent.

CORAM : GAURI GODSE, J.

DATE : 19th AUGUST 2024

P.C.

1. This interim application is for seeking stay the execution and operation of the impugned order. The impugned order directs the appellant to refund the amount paid by the respondent with interest @ 2% from the date of receipt of payment till the actual realisation of the amount.

2. Learned counsel for the appellant submits that the respondent

had filed an application for return of amount under clause (a) of sub-section (1) of Section 18 of the Real Estate (Regulation and Development) Act, 2016 ["RERA"]. He submits that the respondent had opted to exit from the project on the ground that the date of possession was extended and hence he demanded the return of his amount.

3. Learned counsel for the appellant further submitted that by allotment letter dated 19th June 2019, the terms and conditions of the allotment were agreed between the parties. He submitted that the respondent had opted for a scheme which permitted the purchaser to make payment of 9% of the total consideration at the time of allotment and the balance of 91% was to be paid at the time of handing over possession. He submitted that in terms of clause 20 of the terms and conditions of the allotment letter it was mutually agreed that on termination or cancellation of reservation of the flat the entire amount paid by the flat purchaser would be forfeited by the appellant and the flat purchaser would have no right or claim against the reserved flat.

4. He further submitted that the date of possession was not agreed upon at the time of agreeing the terms and conditions of the allotment.

He further submits that since respondent had opted for the scheme of 9% and 91% there was no obligation to execute a registered agreement. He submitted that since there was no time period fixed for handing over possession, the respondent was not entitled to exit from the project on the ground of delay in handing over possession. He relies upon the decision of the Apex Court in the case of ***Fortune Infrastructure (Now known as M/s. Hicon Infrastructure) and Another Vs Trevor D'lima and others***[1] and submits that the Apex Court has taken a view that in the event there was no agreed date, reasonable time to be taken into consideration would be a period of three years for completion of the project and handing over of possession. He thus submits that even if respondent is to be held entitled to seek return of the refund amount, the application filed under clause (a) sub-section (1) of Section 18 would be premature. He thus submits that the respondent is not entitled to any return of the amount and in view of the terms and conditions of the allotment letter the appellant is entitled to forfeit the amount paid by the respondent and respondent would also have no claim against the reserved flat.

5. Learned counsel for the appellant further submits that as per the

1 (2018) 5 SCC 442

impugned order the entire amount is already deposited before the RERA Appellate Tribunal. He thus submits that the claim, if any of the respondent is already secured. Hence, during the pendency of the Second Appeal, the execution of the impugned order be stayed.

6. Learned counsel for the respondent relied upon clause (C) of Section 4 of RERA and submitted that at the time of registration of the project appellant had declared the estimated date of completion of the project is December 2019. He further relies upon sub-section (3) and sub-section (4) of Section 19 and submits that if the promoter fails to comply with the terms and conditions under the RERA and complete the project, the flat purchaser would be entitled to refund of the entire amount. In support of his submission learned counsel for the respondent relied upon the decision of this Court in the case of ***Bombay Dyeing & Manufacturing Company Limited Vs Ashok Narang and Another***[2].

7. Learned counsel for the respondent in particular relied upon the observation of this Court in paragraphs 43 and 44 of the Judgment. He thus submits that this Court has taken a view that even in the absence of execution of the agreement under the rights and liabilities of the

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promoter the flat purchaser would be entitled to refund and in the event there is a delay in completion of the project. He thus submits that in view of the specific provisions and more particularly Section 19 of the RERA respondent would be entitled to a refund of the entire amount and the appellant would not be entitled to forfeit the amount by relying upon the terms and conditions of the allotment letter.

8. He thus submits that the applicant is not entitled to grant of any interim relief and thus the respondent be permitted to withdraw the amount deposited by the appellant.

9. In response to the aforesaid submissions made on behalf of the respondent, learned counsel for the appellant relied upon Section 6 of the RERA and submitted that the date declared at the time of registration of the project cannot be considered as the relevant date for completion of the project and handing over of possession to the flat purchasers. He submits that under Section 6 there is a provision for extension of the date declared at the time of registration of the project. He thus submits that there is no substance in the argument made on behalf of the respondent that the appellant would not be entitled to forfeit the amount as per terms and conditions of the allotment letter.

10. With reference to the decision of this Court in the case of ***Bombay Dyeing*** learned counsel for the appellant submits that in facts of the said case, the promoter had accepted the amount in excess of 10% of the cost of the apartment; hence the observation and the legal principle settled in the said decision as referred to in paragraph 43 of the Judgment are in context of the facts of the said case. He submits that in the facts of the present case, the respondent had agreed to a scheme of 9% and 91% and thus only by making payment of 9% of the total consideration the respondent was able to reserve a flat without making payment of the further consideration amount.

11. Learned counsel further relied upon a correspondence dated 15th April 2019 by which the flat purchaser was intimated that the possession date mentioned as 2024 would be for the entire project. He thus submits that in any event the flat purchaser was intimated that the estimated date for the project would be 2024. Hence the application filed for a refund was premature.

12. I have gone through the basic facts of the present case. There is no dispute that the respondent had opted for the scheme of 9% and

91% and thus there was no obligation to register the agreement as any amount in excess of 10% of the consideration amount was admittedly not accepted by the promoter.

13. The execution of the terms and conditions in the allotment letter are not disputed. There is a specific term in the allotment letter that in the event of cancellation of the booking, the entire amount would be forfeited by the appellant and the respondent would not be entitled to raise any claim or right in respect of the reserved flat.

14. I do not see any substance in the reliance placed by the learned counsel for the respondent in the other correspondence by way of email which is annexed to the interim application for submitting that the applicant would not be entitled to extend the date of possession beyond the date declared at the time of registration of the project. Respondent had agreed to the terms and conditions of the allotment. In the absence of a registered agreement the appellant at this stage cannot claim any right based on the provisions of Section 19.

15. In view of the aforesaid admitted facts of the case, prima facie, I am of the opinion that the application filed by the respondent under

Clause (a) of sub-section (1) of Section 18 is premature as there was no date agreed for completion and handing over of the possession. Admittedly, only payment of 9% of the total consideration was paid. In the absence of any agreed date upon handing over of possession and in view of the specific terms in the allotment letter with regard to forfeiture, I am prima facie of the opinion that the appellant would be entitled to seek forfeiture of the amount, and the respondent would not be entitled to claim any right in respect of the reserved flat.

16. Thus, in the event the amount is permitted to be withdrawn by the respondent, prejudice would be caused to the right of the appellant. However, since the amount is already been secured by the appellant no prejudice will be caused to the right of the respondent. In the event the respondent succeeds, he would be entitled to get the amount with interest as the amount is already secured.

17. The Second Appeal is already admitted on the question of law framed in the order passed in the Second Appeal. Hence, during the pendency of the Second Appeal, there will be an interim stay in terms of prayer clause (a).

18. The RERA Appellate Tribunal shall issue necessary directions for investing the amount already deposited by the applicant in the nationalised bank during the pendency of the Appeal.

19. Interim Application is allowed in the aforesaid terms.

[GAURI GODSE, J.]