OREAT Appeal No.57/2023

28) 14.07.2025 The appeal is taken up through hybrid mode.

2) Already heard Mr. D.C.Dhal, learned counsel appearing for the appellant and Mr. K.C.Prusty, learned counsel appearing for the respondent.

3. Aggrieved over the order dated 20.05.2022 passed by the Odisha Real Estate Regulatory Authority (herein after referred to as the 'learned Regulatory Authority) in Complaint Case No.195 of 2021, the appellant has filed this appeal against the respondent praying to set aside the said order. The appellant was the respondent in the aforesaid Complaint Case wherein the respondent was the complainant.

4. Facts and circumstances leading to the filing of the present appeal are as follows:-

On 26.10.2021 the present respondent filed the aforesaid complaint case before the learned Regulatory Authority submitting that pursuant to the advertisement published by the appellant-promoter, he had applied for a flat of EWS category in the project 'Dumduma Phase VII', a multi-storied residential apartment complex at Dumduma, Bhubaneswar for MIG, LIG and EWS category. The complainant has so far paid an amount of Rs.4,22,324/- out of a provisional sale price of Rs.7,43,000/- as per the demand of the respondent. However, thereafter the complainant was not allowed to make payment of the balance amount of Rs.3,33,650/-. It is alleged by the complainant that though the

scheduled date of the delivery of possession of the flat was on 31.12.2019, but even after the expiry of a period of more than one and half year, the respondent-promoter was not handing over it to him intentionally. The complainant accordingly prayed before the learned Regulatory Authority for a direction to the respondent-promoter to hand over the flat to him immediately.

Pursuant to the summons issued by the learned Regulatory Authority, the respondent-promoter appeared through its counsel on 1.12.2021 and filed its written show cause to the complaint petition on 18.4.2022. It was admitted by the respondent in its show cause that pursuant to its floating the scheme for a multi-storied residential apartment complex for EWS, LIG and MIG category of flats at Dumduma, Phase-VII during December, 2015, the complainant applied for an EWS category of flat. Vide its letter dtd. 22.11.2016 the respondent provisionally allotted an EWS flat in favour of the complainant for a provisional cost of Rs.7,43,000/- with the payments scheduled from 31.12.2016 till 31.12.2019. The final cost was to be intimated later on. The respondent claimed that when the complainant had deposited 04 out of the 08 instalments i.e. a total of Rs.4,22,324/-, he was intimated not to deposit any further amount due to some unavoidable circumstance. Like the complainant other allottees were also informed in this regard and the delay in construction of EWS flats of the project due to the unavoidable circumstance was within the knowledge of all the allottees. The

respondent-promoter claimed that there were encroachments on the project land and though several exercises were made by it with the help of City Enforcement Monitoring Committee for eviction of the encroachers, the same could not be effectively carried out due to heavy protest by the encroachers at the site. Citing the aforesaid circumstance as the reason behind delay in construction of the EWS category houses of the project, the respondent-promoter has assured that it is trying to resolve the issue by again trying to carry out the eviction of the encroachers and relocating the area as far as practicable and in the worst case if eviction is not possible, then refund will be made to the allottees as per the provision of the scheme and conditions of the brochure. Drawing attention of the learned Regulatory Authority to the fact that the complainant has not yet paid full cost of the flat and giving him option to take back his deposit, the respondent has given assurance that the case of the allottees including the complainant will be decided as quick as possible. With the aforesaid submissions, the respondent prayed to dismiss the complaint petition as not tenable.

The learned Regulatory Authority after taking into account the pleadings of the parties and the documents relied upon by them and also on hearing the respective counsels at length passed the impugned order dtd.20.5.2022 directing the respondent to hand over the possession of the flat in question in favour of the complainant after its completion and after obtaining

Occupancy Certificate in conformity with Section 11 (4) (f) read with section 17 of the RERA Act, to pay interest on the amount of Rs. 4,22,324/- @9.50% per annum, compounding quarterly from 1.1.2020 till the date of delivery of possession and to comply with the directions within a period of six months making it clear that in the event of the respondent's failure to comply with the order, the same shall be enforced as per law.

5. In the hearing of the appeal the learned counsel for the appellant has submitted that the appellant-Board has got no machinery for removal of the encroachment and therefore it intimated the Bhubaneswar Development Authority about the encroachment seeking removal of the same through City Enforcing Monitoring Committee, but vide its report dtd. 3.09.2021, the Enforcement Officer-II has intimated that eviction of the encroachers could not be carried out due to heavy protest of encroachers. It is the contention of the learned counsel for the appellant that when it is not possible to remove the encroachers even by the government machinery and the appellant-Board has brought this fact to the notice of learned Regulatory Authority, the impugned order directing the appellant-Board to hand over the possession of the flat in favour of the respondent should not have been made. It is further submitted that as the appellant is not a bank or a financial institution and as the brochure is clear about the circumstance under which refund together with the interest thereon has to be made, the learned Regulatory

Authority has erroneously awarded a compound interest of 9.50% on the amount deposited by the respondent. It is further submitted that though clause-(h) of the brochure under the heading "Allotment" provides that earnest money is free from interest charging, but the learned Regulatory Authority has awarded compound interest even on this amount. The learned counsel for the appellant has drawn the attention of this Tribunal to the fact that the amount paid by the respondent is inclusive of tax and the appellant has paid the tax amount to the government, but the learned Regulatory Authority has committed error by making it liable to pay the respondent even the amount received as tax. Terming the impugned order as illegal and unjust, the learned counsel for the appellant has made the prayer as already mentioned earlier in paragraph-3.

6. On the other hand, the learned counsel for the respondent has submitted that the plea of encroachments on the project land and the inability to remove the said encroachments even by the state machinery like the City Enforcing Monitoring Committee, is not legally acceptable. The learned counsel for the respondent has claimed that after floating advertisement for the EWS category houses in the project and accepting part consideration money from the respondent, the appellant is duty bound to hand over the possession of the flat after its completion and obtaining occupancy certificate in view of the obligation imposed u/sec. 11 (4) (f) read with section 17 of the RERA Act and therefore in

failing to discharge its obligation, the appellant has to pay interest on the amount paid by the respondent. Terming the impugned order of the learned Regulatory Authority as lawful and just and the appeal to be not maintainable under law as well as facts, the learned counsel for the respondent has prayed for its dismissal.

7) As it appears from the brochure, the project 'Dumduma Phase-VII', a multi-storied residential apartment complex was launched in the year 2015 by the appellant-promoter inviting applications from the public through the brochure for MIG, LIG and EWS category houses. The project having not been completed and no completion certificate in respect of it having been issued by the competent authority prior to 1.05.2017 i.e. the date of commencement of the RERA Act, there remains no doubt that it is an ongoing one and hence comes under the fold of the Act. The view of the learned Regulatory Authority in the impugned order that the Act has application to the project is not disputed by the appellant-promoter.

There is no dispute between the parties that the respondent had applied for an EWS category of flat in the aforesaid project in December, 2015 and has so far paid Rs.4,22,324/- to the appellant-promoter as per demand. It is also not disputed that it is the appellant-promoter who has asked the respondent-allottee not to pay the balance amount. It is further not disputed that the appellant-promoter has failed to complete the construction and make delivery of possession of the

house in question to the respondent till date due to encroachments on the project land.

As regards the alleged delay in the delivery of possession of the house in question, it is seen that the brochure mentions the project period as 36 months from the date of signing of work agreement. There is no sale agreement between the parties, but the allotment letter dtd.22.11.2016 issued by the appellant to the respondent clearly shows that the likely date of handing over of possession of the house in question will be 31.12.2019. So, as on the date of filing of the complaint case, a delay of more than 21 months in completing the project appears to have occasioned. The brochure contains the categorical term that no interest will be paid by the Board in case of delay in construction due to the factors beyond the control of the Board. Under the heading 'Force Majeure' in the brochure it is provided that, if the construction of the houses is delayed for the reasons of force majeure, the OSHB shall entitled to be a reasonable extension of time stipulated for delivery of possession of the asset. 'Force Majeure' has been stated to include inordinate delay in approval of tenders, delay on account of non-availability of steel, cement or any other building materials/labour or water supply or electric power back-up or slow down strike or due to dispute with the construction agency employed by OSHB, civil commotion or war or criminal action or earthquake or any other act of God, delay in certain decisions/ clearances from statutory bodies or any notice, order, rule or notification

of the government or any other public or competent authority or for any other reason beyond the control of OSHB. The inclusion of so many aspects in 'Force Majeure' exhibits an arbitrary interpretation of the term in the brochure by the OSHB for its own advantage, particularly when the same brochure clearly provides that for any default by allottee in payment of instalment as per schedule, simple interest @ 18% per annum on overdue amount will be levied for the defaulted period and the allotment may be cancelled for default in two consecutive instalments. For the purpose of section 6 of the RERA Act, the expression 'Force Majeure" shall mean a case of war, flood, drought, fire, cyclone, earthquake or any other calamity caused by nature affecting the regular development of the real estate project. As the project in question is under the fold of RERA Act, 'force majeure, for delay in its completion can only include the aforesaid circumstances as per Section 6 but not the other circumstances as included in the brochure. The aforesaid terms in the brochure which make only the allottee liable to pay interest in case of default in payment of instalments, but not the promoter in case of delay in delivery of possession of the houses are certainly one sided clauses. In the case of **Pioneer Urban Land and Infrastructure Ltd. Vrs. Govindan Raghavan reported in 2019 SCC online SC-458**, the Hon'ble Apex Court have made it clear that, incorporation of one sided clauses in an agreement constitutes an unfair trade practice as per Sec. 2 (r) of the Consumer Protection Act,

1986 since it adopts unfair methods or practices for the purpose of selling the flats by the Builder.

The project being under the fold of the RERA Act, the appellant-promoter is not entitled to keep a clause in the brochure which will be violative of respondent-allottee's right to interest u/sec. 18 (1) of the Act. The circumstance of the present case i.e. encroachment of the project land by slum dwellers and the inability of the appellant to remove the encroachments is not a reason beyond the control of the appellant because of the fact that the encroachments on the project land are not an over-night development or a development after the publication of the brochure. While advertising for the project the appellant was well aware of the fact of encroachments on the project land and therefore, it's pea that inspite of its approach to the Bhubaneswar Development Authority and the attempt by the City Enforcing Monitoring Committee, the encroachments could not be removed because of mass protest by slum dwellers, is not acceptable. The appellant should not have made advertisement inviting public to apply for the EWS, LIG and MIG category of houses in the project without first ensuring the project land to be free from encroachments. The state has a responsibility to protect public land and ensure it is used for its intended purpose. Individuals allotted land by the state should not suffer due to the state's failure to evict the encroachers from that land. Hence, the respondent being

a legitimate allottee, his right u/sec. 18 (1) (b) proviso must be safeguarded.

The appellant is a statute created constructing agency which is engaged in housing and development activities in the State. It provides houses to all sections of the society including EWS and LIG categories at affordable price. However, considering the nature of its function, relating to the project, it is certainly a 'Promoter' as contemplated u/sec. 2 (zk) of the RERA Act and hence is bound to discharge its obligations as per the provisions of the Act. In the present case, the appellant having failed to fulfill its contractual obligation of completing the project and deliver the possession of the house in question to the respondent-allottee within the stipulated time in the allotment letter and the respondent having not intended to withdraw from the project, he shall be paid by the appellant interest for every month of delay, till the handing over of the possession of the house in question, in accordance with Section 18 (1) (b) of the Act, at the rate as prescribed under Rule 16 of the Odisha Real Estate (Regulation & Development) Rules, 2017 i.e. SBI Marginal Cost of Lending Rate Plus two percent. The contention of the appellant that the appellant is not a loanee and the respondent is not a bank so as to be entitled to interest from it on his payment is misconceived and not acceptable in view of the statutory obligation imposed on it under section 18 (1) (b) proviso. The further contention of the appellant that out of the amount deposited by the appellant, tax

has been paid to the government and therefore he is not liable to pay interest on the deposited amount, is also not acceptable in view of the fact that the liability of the appellant to pay tax to the government in respect of the project is immaterial and irrelevant to the right of the respondent to claim of the possession of the house in question and interest on his amount paid to the appellant.

8. In view of the discussions made in the preceding paragraph, we are of the considered opinion that the challenge made by the appellant-promoter to the impugned order except the nature of interest, is without merit. The impugned order dtd. 20.05.2022 directing the appellant to hand over the flat in question to the respondent after its completion and after obtaining the occupancy certificate is hereby confirmed but subject to payment of the balance agreed amount by the respondent-allottee to the appellant-promoter. The impugned order directing the appellant to pay interest on the amount of Rs.4,22,324/- from 1.1.2020 till the date of delivery of possession of the house in question is also confirmed but rate of interest payable shall be in accordance with the Rule 16 of the ORERA Rules, 2017 i.e. SBI Marginal Cost of Lending Rate Plus two percent as on the date of impugned order i.e. 20.5.2022 which comes to 9.20% (7.20 + 2%).

The appeal is accordingly disposed of on contest against the respondent.

Accounts Officer of this Tribunal is directed to calculate the interest payable by the appellant-promoter at the rate prescribed under Rule 16 of the ORERA Rules, 2017. The same shall be paid to the respondent-allottee from the statutory amount deposited by the appellant-promoter after expiry of the appeal period. The balance amount, if any, be refunded to the appellant alongwith accrued interest on proper identification.

Send an authentic copy of this order alongwith the record of the complaint case to the learned Regulatory Authority for information and necessary action. Also send a copy of the impugned order each to the appellant-promoter and the respondent.

Justice P.Patnaik
Chairperson

Shri S.K.Rajguru
(Judicial Member)

(Dr. B.K.Das)
(Tech./Admn. Member)

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