OREAT Appeal No.117/2023

30) 28.03.2025 The appeal is taken up through hybrid mode.

2) Already heard Ms. S.Mohapatra, learned counsel appearing for the appellant, Mr.P.P.Sahoo, advocate appearing on behalf of Mr. B.P.Tripathy,learned counsel for the respondent no.1-Authority and Mr. S.Rehman, learned counsel appearing for the respondent no.2.

3) Being aggrieved over the order dated 22.06.2023 of the learned Adjudicating Officer of the Odisha Real Estate Regulatory Authority, Bhubaneswar in A.O.C.C No.22 of 2022, the appellant has preferred this appeal before this Tribunal. The appellant-promoter was the complainant and the respondent no.2 was the only respondent in the aforesaid A.O.C.C No.22 of 2022. The respondent no.1 of this appeal is the learned Odisha Real Estate Regulatory Authority, Bhubaneswar.

4) The facts and circumstances of the case leading to the filing of the present appeal are as follows :

The appellant promoter filed the aforesaid A.O.C.C. before the learned Adjudicating Officer, Odisha Real Estate Regulatory Authority, Bhubaneswar on 26.09.2022 submitting that the present respondent no.2 alongwith Shri Ashok Kumar Meher and Smt. Sanjukta Meher mutually entered into an agreement with the appellant on 2.8.2011 for construction of a high-rise multi-storied residential building namely 'Sefali Enclave' agreeing to owners-promoter share at 35% : 65%. The appellant obtained the plan approval from the B.D.A. vide letter No.18556 dtd. 8.8.2012. The appellant approached the respondent no.2, one of the aforesaid three owners of the project land, to provide necessary support to hand over the

land and for road clearance, but no support was extended. The appellant therefore paid Rs.7,00,000/- to purchase the passage to the project land and informed the respondent no.2 as well as the other two owners. The project was developed with much difficulty and expenses by the appellant as per the terms and conditions of the building plan approval order dtd.8.8.2012 of the B.D.A. It is alleged that, though the other two owners paid Rs.2,00,000/- each to the appellant towards purchase of the passage to the project, but the respondent no.2 did not pay anything to the appellant violating the term of the mutual agreement dtd.9.11.2015. As per the mutual agreement between the three owners of the project land including the respondent no.2 and the appellant, two flats i.e. flat no.304 (805 sq. ft.) and flat no.106 (950 sq. ft.) fell to the share of the respondent no.2 and the total area of the two flats was 62 sq. ft. more than the agreed share of 1693 sq. ft. allotted to the respondent no.2 through mutual understanding. The appellant alleged in the complaint petition that though he sent a request letter to the respondent no.2 to pay the required amount towards the excess land area allotted to him and also towards development fee, road clearance fee, service tax etc. before occupying the allotted flats of his share, the respondent no.2 did not pay anything and forcibly occupied flat no.106 without the knowledge of the appellant where he is staying at present. It is categorically alleged in the complaint petition that, though the other two land owners paid all the required charges and taxes to the appellant, the respondent no.2 refused to pay any charge towards GST and after the appellant filed a report against the respondent no.2 at the Airfield Police Station, Bhubaneswar, the respondent no.2

though agreed to pay the outstanding dues on the basis of a compromise reached between him and the appellant but still did not pay the same. The aggrieved appellant therefore was constrained to approach the learned Adjudicating Officer of the ORERA with the aforesaid complaint case praying for a direction to the respondent no.2 to pay it a total compensation amount of Rs.26,63,768/-, which included the road purchase expense, cost of 62 square feet excess share, GST, damage for forcible occupation of flat no.106, society maintenance charge in respect of flat no.304 and damage for harassment.

In response to the summons issued by the learned Adjudicating Officer, the respondent no.2 appeared through his counsel on 19.10.2022 and filed written show cause to the complaint petition on 23.11.2022. In his show cause the respondent no.2 took the plea that even after repeated requests by him the appellant has not yet provided the completion certificate in respect of the project issued by the authority. It is further alleged that though the appellant was to complete the construction work of the project within 12 months from the date of sanction of the building plan and accordingly the project was to be completed by 7.08.2013 and the appellant was also not prevented by any reason beyond his control, the completion certificate of the project has not been obtained and therefore the appellant has certainly failed to comply with the terms of the agreement dtd. 17.12.2012. The respondent no.2 in his show cause to the complaint petition has pointed out that the claim of the appellant in respect of road clearance was earlier raised by it in his show cause in the Complaint Case No.288/2019 filed by the respondent no.2 before the learned ORERA but the claim was

rejected vide order dtd. 24.09.2021. As regards the allotment of the two flats i.e. flat no.304 in the 3rd floor and flat no.106 in the 1st floor of the project which had fallen to his share, the respondent no.2 has claimed that the appellant-developer in its allotment letter dtd.17.12.2012 has confirmed the allotment of the two flats in his favour as per the agreement dtd. 2.8.2011. The allotment letter dtd.17.12.2012 also shows the super built of area of the flat no.304 as 1076 sq. ft. and that of flat no.106 to be 1376 sq. ft. in accordance with the agreement dtd. 2.8.2011. The respondent no.2 has claimed to be in possession of flat no.106 with due consent of and delivery of possession by the appellant. The respondent no.2 has further pointed out that though the appellant had demanded a sum of Rs.17,19,700/- in his show cause to the complaint case No.288/2019, the ORERA had ordered the payment of only Rs.5,72,000/- by the respondent no.2 to the appellant with a direction to the appellant to hand over flat no.304 to the respondent no.2. Though the respondent no.2 requested the appellant to hand over the flat no.304 on receipt of Rs.5,72,000/- vide a letter issued vide registered post dtd. 1.11.2021, the appellant has not yet complied with the order of the learned ORERA. Claiming that the demand for Rs.26,63,768/- by the appellant despite the rejection of his claim for GST charge in Complaint Case No.288/2019 proves his malafide intention, the respondent no.2 has asserted that he has never violated any term of the contract dtd.2.8.2011. Claiming that the matter in dispute has already been decided directly in issue between him and the appellant in the earlier complaint case No.288/2019, the respondent no.2 has asserted that the present complaint case is not maintainable in

the eye of law and also the compensation claimed by the appellant being illegal and in violation of the order dtd. 24.9.2021 passed by the learned ORERA in C.C. No.288/2019 is not entertainable. With the aforesaid submissions the respondent no.2 has prayed for dismissal of the complaint case.

On the basis of pleadings of the parties and the documents filed by the appellant, the learned Adjudicating Officer framed three points for consideration and on hearing the learned counsels for the parties, dismissed the complaint case as not maintainable vide the impugned order dt. 22.6.2023 solely on the ground that there is no provision in the RERA Act under which a builder can claim for compensation against an owner of the land on which the real estate project has been constructed.

5) In the hearing of the appeal, the learned counsel for the appellant has submitted that the learned Adjudicating Officer has failed to take note of the fact that the respondent no.2 comes within the meaning of 'allottee' as defined under section 2 (d) of the RERA Act and is therefore liable to abide by all the duties and obligations of the allottee towards the promoter as laid down in the RERA Act. It is further submitted that as per the meaning of 'interest' in section 2 (za) of the RERA Act, the rate of interest chargeable from the allottee by the promoter and which the promoter is liable to pay to the allottee, in case of default, are equal and so the obligation to pay compensation under the Act should also be equal in respect of both. It is further submitted that as the allottee shall be responsible to make necessary payments like the share of the registration charges, municipal taxes, water and

electricity charges, maintenance charges, ground rent etc. in the manner and within the time as specified in the sale agreement and shall also be liable to pay interest at such rate as may be prescribed for any delay in payment towards any of the aforesaid amount or charges, he is also liable to pay compensation like the promoter and the same can be adjudged under section 71 of the Act. Referring to the observation of the learned Adjudicating Officer that he is empowered under section 71 of the Act to decide compensation as envisaged under Sections 12,14, 18 and 19 of the Act, the learned counsel for the appellant has contended that, the Adjudicating Officer should have allowed the compensation prayed for by the appellant as the same was only the amount which the respondent no.2 being an allottee is legally liable to pay to the appellant under section 19 (6) & (7) of the RERA Act as per the terms mutually agreed upon between them. With the aforesaid submissions, the learned counsel for the appellant has prayed to set aside the impugned order dt.22.6.2023 of the learned Adjudicating Officer in AOCC No.22 of 2022 together with interest @18% per annum on the amount of Rs.26,63,768/- and also costs by the respondent no.2.

6) On the other hand, the learned counsel for the respondent no.2 has submitted that the appeal is not maintainable being barred by the principle of res judicata. It is further submitted that though in the allotment letter there is an excess area of 62 sq. ft. of both the flats but at the spot there is no such excess area and so the amount of Rs.17,19,700/- claimed by the appellant is a disputed one. It is further submitted that as physical possession of flat no.304

was not delivered to him inspite of his several requests, he had filed complaint case No.288/2019 before the ORERA. It is further submitted that there has been no forcible occupation of flat no.106 as alleged by the appellant. It is further submitted that inspite of the rejection of the claim for GST and road expenses made by the appellant in CC No.288/2019, the appellant has again asked for compensation for the same before the Adjudicating Officer, but the same has been rightly dismissed. Making further allegation that only to drag the execution case filed by the respondent no.2 before the Civil Judge (Sr. Divn.) Bhubaneswar for executing the order passed by the ORERA in C.C. No.288/2019, the appellant has filed this appeal, the learned counsel for the respondent no.2 has prayed for dismissal of the appeal with costs.

7) As against the prayer of the appellant-promoter in the complaint case (AOCC No.22/2022) for a total compensation of Rs.26,63,768/- (Rs.2,00,000/- for road purchase expenses, Rs.1,62,068/- towards 62 sq.ft. of excess share, Rs. 9,47,700/- for GST on flats no.106 and 304, Rs.5,88,000/- for forcible possession of flat no.106 and causing a loss of Rs.7000/- per month for seven years, Rs.1,26,000/- towards society maintenance charge of flat no.304, Rs.1,40,000/- for maintenance of the same flat for seven years and Rs.5,00,000/- towards damage for causing harassment), the learned Adjudicating Officer in dismissing the aforesaid complaint case as not maintainable vide the impugned order dtd. 22.6.2023 has specifically observed as follows :

> ".....Therefore, in terms of Sec. 71 (1) of the Act, Adjudicating Officer is empowered to decide compensation as envisaged under section 12,

> 14,18 and 19. Besides Sec. 12,14,18 and 19 there is no other provision in the RERA Act dealing with compensation. Sections 12,14,18 and 19 speak about payment of compensation to allottee in case of default by builder/ promoter. There is no provision in the entire RERA act to show that a builder can claim and file a case for compensation against an owner of land over whose land a project is constructed. Since there is no provision enabling a builder to file a compensation case or claim compensation against owner of land, the present case is not maintainable....."

As already mentioned earlier in paragraph-5, the appellant in this appeal has assailed the impugned order of the learned Adjudicating officer mainly on the point that the respondent no.2 even though is a co-owner of the project land, but on the basis of the development agreement dtd.2.08.2011 he having been allotted two flats of the project i.e. 'Sefali Enclave' is certainly an 'allottee' under section 2 (d) of the RERA Act and as section 2 (za) of the Act casts a liability on the allottee to pay an equal rate of interest like the promoter in case of default and section 19 (6) & (7) of the Act casts a duty on the allottee to make necessary payments in accordance with the agreement for sale to the promoter together with the liability to pay interest at the prescribed rate for delay in making such payments, the respondent is bound to pay the compensation prayed for and the learned Adjudicating Officer by dismissing the complaint case as not maintainable has certainly failed to appreciate the aforesaid facts and also to exercise his power under section 71 (3) of the Act.

On the other hand, the respondent has justified the impugned order of the learned Adjudicating Officer terming it to be correct as per law and facts.

(IX)

It is clear from the provisions of the RERA Act that the Regulatory Authority and the Adjudicating Officer are two different kinds of authorities under it and though both are empowered to entertain a complaint under section 31 of the Act from an aggrieved person for violation or contravention of provisions of the Act or Rules or Regulations made there-under against any promoter, allottee or real estate agent, as the case may be, but their powers of adjudication under the Act are different. The Regulatory Authority is not competent to try a complaint instituted for compensation and similarly an Adjudicating Officer is not entitled to determine any question other than compensation under sections 12,14,18 and 19 of the Act. In the case of **M/s Newtech Promoters and Developers Pvt. Ltd. Vrs. State of U.P. and others reported in 2021 SCC online 1044**, the Hon'ble Supreme Court of India have vividly discussed the powers of the Regulatory Authority and the Adjudicating Officer under the Act. The relevant observation of the Hon'ble Apex Court in the said case is as follows :

> "From the scheme of the Act of which a detailed reference has been made and taking note of power of adjudication delineated with the regulatory authority and adjudicating officer, what finally culls out is that although the Act indicates the distinct expressions like 'refund', 'interest', 'penalty' and 'compensation', a conjoint reading of Sections 18 and 19 clearly manifests that when it comes to refund of the amount, and interest on the refund amount, or directing payment of interest for delayed delivery of possession, or penalty and interest thereon, it is the regulatory authority which has the power to examine and determine the outcome of a complaint. At the same time, when it comes to a question of seeking the relief of adjudging compensation and interest thereon under Sections 12,14,18 and 19, the

> adjudicating officer exclusively has the power to determine, keeping in view the collective reading of section 71 read with Section 72 of the Act. If the adjudication under Sections 12,14,18 and 19 other than compensation as envisaged, if extended to the adjudicating officer as prayed that, in our view, may intend to expand the ambit and scope of the powers and functions of the adjudicating officer under Section 71 and that would be against the mandate of the Act, 2016."

Going through section 19 of the Act which deals with rights and duties of allottees, it is found that, provision for compensation has been made only for the allottee in sub section 4 of it which provides as follows:

> (4) "The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made there-under."

There is absolutely no provision for payment of compensation to the promoter by the allottee in the entire section 19. Though the rate of interest payable by the promoter to the allottee and by the allottee to the promoter, in case of default, are equal as per section 2 (za) (i) of the RERA Act read with rule 16 of the ORERA Rules, 2017, but this in no way leads to the inference that the liability for payment of compensation in absence of any express statutory provision or rule is also equal in case of promoter and allottee.

As the appellant has put emphasis on sub-sections (6) & (7) of Section 19 of the RERA Act in his assertion that

like the promoter, the respondent no.2-allottee is also liable to pay compensation for breach of duties under these provisions, the same need an analysis. The provisions are quoted below :

> "(6)Every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13, shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.
> (7)The allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6)."

It is clear from a plain reading of sub section (6) that, the allottee is duty bound to make necessary payments to the promoter which he is liable to pay under the agreement for sale in accordance with the manner and time schedule as specified therein and is also under an obligation to pay his share in the registration charge, municipal taxes, water and electricity charges, maintenance charges, ground rent and other charges, if any. Sub section (7) provides for payment of interest by the allottee at the prescribed rate in case of delay in payment of any of the charges payable under sub-section (6). The payments contemplated under sub-section (6) indicate payments for consideration money of the apartment, plot or building and the aforesaid other charges including some statutory payments. None of the payments under sub-section (6) implies the payment of compensation. As already mentioned earlier, payment of compensation under section 19 is a liability of the

promoter only in case of his default to give possession of the apartment, plot or building, as the case may be, to the allottee. On the other hand, it is expressly provided in sub section (4) that compensation for the aforesaid default is an entitlement of the allottee. Thus, a conjoint reading of section 71 and sub section (4) of section 19 of the RERA Act makes it clear that the adjudicating officer under the Act is empowered to decide the prayer for compensation under section 19 made only by the allottee against the promoter but not by the promoter against the allottee. The appellant is misconceived of the fact that the payments which the allottee is liable to make under sub-section (6) can be adjudicated by the adjudicating officer under section 71. The liability of the allottee under sub-section (6) can only be decided by the Regulatory Authority. The above mentioned observation of the Hon'ble Supreme Court of India in **Newtech case (Supra)** has made it crystal clear as to what matters can be decided by the Regulatory Authority and what decision is in the domain of the Adjudicating Officer under the Act. The amounts under different heads which the appellant has claimed to be due to it from the respondent no.2 may be asked for in a complaint before the Regulatory Authority, but not as compensation before the Adjudicating Officer because there is no provision for compensation by an allottee to a promoter under the Act. The respondent no.2 being one of the three owners of the project land has got two flats to his share as per the development agreement dated 2.8.2011 and therefore having stepped into the shoes of

an allottee, he is not liable to pay the compensation prayed for by the appellant.

8) For the discussions made in the preceding paragraph, we are of the considered opinion that the impugned order of dismissal of the complaint case by the learned Adjudicating Officer on the specific ground mentioned therein is absolutely correct as per law and facts and hence requires no interference by this Tribunal. In the result, the appeal being devoid of any merit stands dismissed on contest against the respondents. Pending I.A. is disposed of accordingly.

Apart from uploading this order in the official website of the OREAT, today itself, office is directed to send an authentic copy of this order alongwith the record of the complaint case to the learned Authority for information and necessary action. Also send a copy of this order each to the appellant and respondent no.2.

Justice P.Patnaik
Chairperson

Shri S.K.Rajguru
(Judicial Member)

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