OREAT Appeal No.119/2023

20)28.02.2025 The appeal is taken up through hybrid mode.

2) Already heard Mr.K.C.Prusty, learned counsel appearing for the appellant, Mr. S.N.Das, learned counsel appearing for the respondent no.1 and Mr. P.P.Sahoo, Advocate appearing on behalf of Mr. B.P.Tripathy, learned senior counsel for the respondent no.3 -Authority. Respondent no.2-land owner has been set ex parte for default in appearance inspite of due service of summons on him.

3) Aggrieved over the impugned order dtd. 29.5.2023 passed by the Odisha Real Estate Regulatory Authority (hereinafter referred to as learned Authority) in Complaint Case No.296/2022, the appellant-promoter who was the respondent no.1 in the said case has preferred this appeal against the respondents praying to set aside the same. The respondent no.1 was the complainant of the complaint case and the respondent no.2 was also the respondent no.2 therein. The respondent no.3 of this appeal is the learned Authority who has passed the impugned order.

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

On 7.09.2022 the respondent no.1 of the appeal filed the aforesaid complaint case before the learned Authority submitting that the respondent no.2 is the owner of the land under Khata No.365/1998, Plot No.852/3118 with an area Ac.0.301 in Malipada mouza. The respondent no.2 entered into a development agreement with the appellant, a builder, on 24.12.2012 and also executed a General Power of Attorney in his favour for construction of a multi-storied

building on the aforesaid land with all amenities as per the building plan. The building plan of the project named 'Sobhagya Enclave', a S+3 storied residential building, had the approval of the B.D.A., Bhubaneswar vide letter no.5025 dtd. 7.02.2014. The respondent no.1 desirous of purchasing a flat in the project negotiated with the appellant and accordingly 2-BHK flat No.202 at the 2nd floor of the project with a super built up area of 1281 sq. ft., which had fallen to the share of respondent no.2, was agreed to be sold for a consideration price of Rs.30,00,000/-. After execution of sale agreement on 12.7.2018 and payment of full consideration price, the flat was purchased by the respondent no.1 from the respondent no.2 vide Regd. Sale Deed dtd. 27.8.2018. The appellant and the respondent no.2 gave the impression to the respondent no.1 that the project was registered with the ORERA and registration certificate would be provided after delivering possession to her. The respondent no.1 got the delivery of possession of her flat on 24.9.2018 with a notarized document which disclosed that the appellant would be responsible for construction deficiencies and other amenities of the project. It is alleged that, after taking possession the respondent no.1 faced various difficulties in the project and even after her repeated conveyance of grievance, she was not listened to by the appellant and the respondent no.2. It is alleged by the respondent no.1 that the project is still not registered under the ORERA and even after rejection of application for registration no appeal has been preferred. It is further alleged that no completion certificate and occupancy certificate in respect of the project have been issued by the

competent authority and during a short span of period the building has developed multiple cracks. It is further alleged by the respondent no.1 that her entire flat has been affected by seepage, the entire drainage system is not functioning leading to the basement being inhabitable. It is further alleged that, there are no rain water harvesting system and fire fighting system and also no proper parking space has been allotted to the respondent no.1 even after taking price for the same. It is further alleged that the marble floor of the flat of the respondent no.1 has been completely cracked due to poor quality of work and there is water logging in the balcony. With the aforesaid claims and allegations, the respondent no.1 prayed before the learned Authority for a direction to the respondents to register the project with the ORERA and to provide her a copy of it, to obtain completion certificate and occupancy certificate from the competent authority, to provide fire safety facilities, to install rain water harvesting system, to carry out repairing work of the structural defects of the project, to provide parking area as per her entitlement, to provide proper drainage system and to take up repairing work of her unit with regard to the aforesaid damages. Apart from these, the respondent no.1 also prayed to grant her a compensation of Rs.15,00,000/- for her mental agony and torture.

Pursuant to the issuance of summons, the appellant and the respondent no.2-owner appeared through their respective counsels, but only the appellant-promoter filed his show cause to the complaint wherein he has not disputed the facts such as the respondent no.2 is

the owner of the project land, the execution of the development agreement dtd. 24.12.2012 between him and the respondent no.2 for construction of the multi-storied building with all amenities as per the approved building plan, the execution of the General Power of Attorney by the respondent no.2 in favour of the appellant on the date of execution of the development agreement, the approval of the building plan of the project by the B.D.A., Bhubaneswar vide letter no.5025 dtd. 7.02.2014 to construct the S+3 storied residential apartment named 'Soubhagya Enclave' and the payment of a consideration amount of Rs.30,00,000/- for the 2BHK flat no.202 in the 2nd floor of the project with an area of Ac.1281 sq. ft. In this regard, the appellant has claimed that the flat in question had fallen to the share of the respondent no.2-owner and was allotted to him on 25.11.2016 followed by delivery of possession on 28.1.2017. The appellant in his show cause to the complaint has also not disputed the fact relating to the execution and registration of sale deed in respect of the flat in question by the respondent no.2 in favour of respondent no.1 on 27.8.2018 and has taken the plea that the transaction being one between the respondent no.1 and the respondent no.2, he is no way concerned with it. As regards the allegation of the respondent no.1 that the project was not registered with the ORERA and that she was promised by the appellant and the respondent no.2 to be provided with the registration certificate after taking delivery of possession of her flat, the appellant has claimed that the flat in question having been allotted to the respondent no.2 as owner's share and delivery of possession having been

made to him vide letter dtd. 28.1.2017, he (the appellant) is no way responsible for non-registration of the project. Citing the same reason, the appellant has also taken the plea that since six years have already been elapsed from the date of possession of the flat by the respondent no.2-owner, he is no way responsible for any construction deficiency or non-compliance of the amenities of the project as alleged. Categorically denying the allegations of the respondent no.1 with regard to the defects and deficiencies in the project as well as her flat, the appellant has taken the specific plea that the respondent no.1 having purchased her flat from the respondent no.2-owner and being in possession of the same, he is not liable to any compliance.

The respondent no.2 was set ex parte for his default in appearance and after the case was heard from the respondent no.1 and the appellant, the impugned order dtd. 29.5.2023 was passed wherein the learned Authority directed the appellant to get the project registered u/secs. 3 and 5 of the Real Estate (Regulation & Development) Act, 2016 with it, to provide fire safety facility and to install rain harvesting system in the project with a further direction to the appellant-promoter to comply with the order within a period of two months making it clear that in the event of his failure, the same shall be enforced as per law.

5) In the hearing of the appeal, the learned counsel for the appellant-promoter has submitted that the learned Authority has committed error in directing the appellant to get the project registered u/secs. 3 of the RERA Act with it, to provide fire safety facility and to install rain water

harvesting system in the project as the project has already been completed prior to the coming into force of the RERA Act i.e. 1.5.2017. It is further submitted that the complaint case itself is not maintainable against the appellant as the sale deed in question has been executed between the respondent no.2-land owner and the respondent no.1. It is further submitted that the flat in question being under the possession of the respondent no.2-land owner prior to the coming into force of the RERA Act, the respondent no.1 is not entitled to any relief from the appellant. Claiming that the respondent no.1 is not an allottee under the appellant and therefore, the complaint was not maintainable before the learned Authority, the learned counsel for the appellant has made the prayer as mentioned earlier in paragraph-3.

6) On the other hand, the learned counsel for the respondent no.1 has submitted that as the appellant has admitted the agreement for sale in respect of the flat in question to have been made on 12.7.2018 and the sale deed in respect of it to have been executed and registered on 27.8.2018, the project in question is deemed to have been admitted as an ongoing one and therefore, it is required to be registered with the ORERA. It is further submitted that the appellant has not yet obtained the completion certificate and occupancy certificate of the project from the BDA and therefore, the impugned order of the learned Authority directing the appellant-promoter to register the project under the RERA Act is not illegal. The learned counsel has pointed out that the direction to provide fire safety facility and install rain water harvesting system being for the welfare and benefit of the allottees of the

project, there is no error in it. The learned counsel for the respondent no.1 has drawn the attention of this Tribunal to the fact that the appellant having not obtained the completion certificate and occupancy certificate relating to the project, it has not been possible on the part of the allottees to register their welfare society and the appellant even though is bound by the statute to maintain the project till the said society is formed, has kept himself away from the project avoiding its maintenance. Dismissing the claim of the appellant that the project was completed prior to the coming into force of the RERA Act, the learned counsel for the respondent no.1 has pointed out that had it been so the appellant would have produced the completion certificate and the occupancy certificate, but the same are not available with him till date. Claiming that the appellant is not entitled to the relief prayed for, the learned counsel for the respondent no.1 has prayed to dismiss the appeal.

7) As already mentioned in paragraph-4 the appellant-promtoer has not disputed the following facts :

i) The respondent no.2 is the owner of the project land and the appellant has constructed the project i.e. apartment named 'Saubhagya Enclave' following the development agreement executed between him and the respondent no.2 on 24.12.2012

ii) The B.D.A., Bhubaneswar vide its letter no.5025 dtd. 7.02.2014 has approved the building plan of the project.

iii) The flat in question i.e. 2-BHK flat no.202 in the 2nd floor of the apartment with an area of 1281 sq. ft. had fallen to the share of the respondent no.2-owner and while

he was in possession of the same sold it to the respondent no.1 for a price of Rs.30,00,000/- vide regd. Sale deed dtd. 27.08.2018 following the sale agreement dated 12.7.2018 between them.

8) The appellant-promoter has challenged the impugned order of the learned Authority directing him to get the project registered under sections 3 and 5 of the RERA Act, to provide fire safety facility and to install rain water harvesting system on the plea that the project has already been completed prior to the coming into force of the RERA Act i.e. 1.5.2017. As regards the applicability of the RERA Act, Section 3 (1) of it provides that application by the promoter for registration of the projects within three months from the commencement of the Act is necessary which are ongoing on the date of commencement of the Act. Under Section 3 (2) (b) of the Act, registration of the real estate project is not required where the promoter has received completion certificate prior to the commencement of the Act. In the case of M/s. Newtech Promoters and Developers Pvt. Ltd. Vrs. State of U.P. and others decided on 11.11.2021, the Hon'ble Supreme Court of India have made it clear that, projects already completed and to which completion certificate has been granted before the commencement of the Act are not under its fold. At the same time, it will apply after getting the ongoing projects registered under section 3 to prospectively follow the mandate of the Act, 2016. The Hon'ble Apex Court has further observed in the said case that, all ongoing projects that commenced prior to the Act in respect to which completion certificate has not been issued are covered

under this Act. So, both as per the RERA Act and the decision of the Hon'ble Supreme Court in Newtech Promoters case (Supra), it is the issuance of completion certificate which is the deciding factor for applicability of the RERA Act to a project. In the present case, no completion certificate in respect of the project has been produced by the appellant-promoter and no explanation has also been offered regarding the same. Para-6 of the impugned order of the learned Authority reveals that on calling for the registration file bearing No.RP167 of 2018, the learned Authority found that the appellant-promoter had applied for registration of the project admitting the project to be an ongoing one, but subsequently he could not provide the documents and his prayer for registration was rejected. The appellant-promoter has not disputed these facts in the appeal memo. It is therefore not established by the appellant-promoter that the project has already been completed prior to the commencement of the RERA Act.

The further plea of the appellant-promoter in assailing the impugned order is that the sale deed dtd.27.8.2018 relating to the flat in question being one between the respondent no.2 and the respondent no.1, the complaint against him is not maintainable. However, the appellant-promoter should take note of the fact that as per section 31 (1) of the RERA Act any aggrieved person may file a complaint with the Authority or the Adjudicating Officer, as the case may be, for any violation or contravention of the provisions of the Act or the Rules and Regulations made there-under against any promoter,

allottee or real estate agent, as the case may be. Undisputedly, the appellant is the promoter in respect of the project in view of the development agreement executed between him and the respondent no.2-owner on 24.12.2012. So, even if the flat in question had fallen to the share of the respondent no.2-owner as per the development agreement and he was delivered possession thereof since 28.1.2017 and the sale deed dtd. 27.8.2018 was executed between the respondent no.2-owner and the respondent no.1-purchaser, but the fact still remains that the respondent no.1 is the allottee of the flat in question of which the appellant is the promoter. This is because section 2 (d) of the RERA Act defines an 'allottee' as follows :

> "allottee in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer of otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent."

The respondent no.1 having subsequently acquired the allotment of the flat in question through sale is certainly the allottee of it and the appellant having constructed the project for the purpose of selling all or some of the flats in it, is undoubtedly the promoter in respect of the project as a whole. The assertion of the appellant that the respondent no.1 is not an allottee under him is therefore not acceptable. The facts that the flat in question was in possession of the respondent no.2-owner and that the sale deed dtd. 27.8.2018 is in between the

respondent no.2 and the respondent no.1 are quite immaterial with regard to the liability of the appellant in respect of the project as a promoter.

The project being an ongoing one as on the date of the commencement of the RERA Act, the appellant-promoter is bound to register it with the learned Authority as per section 3 of the Act. The appellant-promoter has not disputed the finding of the learned Authority that he is responsible to obtain completion certificate and occupancy certificate from the local authority as required under section 11 (4) (b) of the RERA Act. He has also not disputed the fact that fire safety facilities and rain water harvesting system installation are not there in the project. The appellant-promoter is therefore liable to comply with the directions of the learned Authority with regard to these requirements.

9) In view of the discussions made in the preceding paragraph, we are of the considered opinion that the appeal filed by the appellant-promoter has got no merit and accordingly the same stands dismissed on contest against the respondent nos.1 and 3.

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 to the appellant.

Justice P.Patnaik
Chairperson

Shri S.K.Rajguru
(Judicial Member)

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