OREAT Appeal No.04/2024

17. 16.05.2025 The appeal is taken up through hybrid mode.

2) Heard Mr.K.N.Das, learned counsel for the appellant, Mr.J.Das, learned counsel appearing for respondent nos.1 & 2 and Mr.B.Nayak, advocate appearing on behalf of Mr.P.S.Nayak, learned counsel for the respondent no.3-Authority.

3) The aforesaid appeal has been preferred by the builder-promoter, assailing the order dt.22.11.2023, passed in Adjudication Complaint Case No.27 of 2022, by the learned Adjudicating Officer, wherein the learned Adjudicating Officer has been pleased to pass the following orders : -

"The case of the complainants is allowed on contest against the respondent but without cost. The respondent is directed to pay compensation of Rs.80,00,000/- (Rupees eighty lakhs) to the complainants within a period of 45 days from today, failing which the amount shall carry interest @ 9.70% per annum till total realization. If the above amount is not paid to the complainant within the aforesaid period, the complainants are at liberty to take steps for realization of the said amount by resorting to Sec.40 of the Act read with Rule 26 of the Odisha Real Estate (Regulatory & Development) Rules, 2017."

4) The brief facts leading to filing of the complaint by the respondent nos.1 & 2 are that the appellant being a builder-developer approached late Khetrabasi Nayak (father of respondent no.1 and husband of respondent no.2) for development of multi-storied building over the plot and late

Khetrabasi Nayak agreed with the proposal of the appellant and a development agreement was executed with the appellant on 19.7.2021. As per the said agreement the appellant is entitled to get 51% and respondent nos.1 & 2 being the land owner are entitled to 49%. For effective completion of the project late Khetrabasi Nayak executed an Irrevocable General Power of Attorney in favour of the appellant which was registered on 21.7.2011 before the Sub-Registrar, Bhubaneswar. As per the stipulation in the Development Agreement, the appellant would complete/finish the construction and erection of the building within a period of 45 months from the date of execution of the Development Agreement. According to the complainants the project ought to have been completed on or before dt.9.4.2015 and possession and completion certificate and other documents along with 49% of constructed area of land owner late Khetrabasi Nayak as per his share was to be given. It has been alleged that as per the Development Agreement the appellant did not complete the constructions. It has further been alleged that despite completion of the project the appellant did not hand over possession of 49% of share of residential building/commercial unit to the owner late Khetrabasi Nayak for which he sent a notice to the appellant on 25.2.2018 for payment of rent of 49% of constructed residential building/commercial unit from 9.4.2015 and handing over the possession of finished residential building/commercial unit and to

pay a sum of Rs.20,00,000/- towards delaying the handing over of possession of constructed residential building/commercial unit. The notice/letter issued by late Khetrabasi Nayak fell on deaf ears. However, late Khetrabasi Nayak visited the appellant and the appellant assured him to hand over possession of the building very soon. Due to mental agony, Khetrabasi Nayak expired leaving behind the respondent nos.1 and 2 as his legal heirs and successors in interest. After death of late Khetrabasi Nayak respondent nos.1 & 2 being the claimant of 49% share towards constructed residential house/commercial unit, approached the appellant to hand over possession of the same and occupancy certificate and other documents. But the appellant did not bother to look into the grievance of the respondents. According to respondent nos.1 & 2, due to long inordinate delay they suffered huge losses and the respondents have alleged that the appellant-builder is liable to pay Rs.1,00,00,000/- to the respondent nos.1 & 2 and handing over the possession of the building as per the owner's share and give occupancy certificate. It is further alleged that due to indifference of appellant, the respondents were constrained to file the complaint, claiming compensation amounting to Rs.1,00,00,000/- with interest within a stipulated period of time.

5) The appellant being the respondent filed a reply/counter affidavit challenging the maintainability of the complaint. Apart from the question of maintainability, the appellant being the respondent

also raised the locustandie of the complainant/ respondent nos.1 & 2. It has been stated in the counter affidavit that late Khetrabasi Nayak was a defaulter to pay statutory GST in compliance to handing over of residential flat. According to the appellant, as per the development agreement dt.19.7.2011, the clauses "*whereas the owner has been nourishing the desire to raise a high rise multi storied residential building over the said land in accordance with plan to be sanctioned by Bhubaneswar Development Authority (BDA).*" It is submitted that the BDA accorded sanction under Sub-Section-3 of Section 16 of ODI Act, 1982 dt.12.9.2013 in favour of the appellant for construction as per the description described in the approved plan. Clause-9 of the Development Agreement dt.19.7.2011 wherein it is inter-alia agreed between the parties that the developer/promoter shall make his best endeavour to complete/finish residential building in all respects so as to befit for occupation/habitation within 45 months from the date of signing/execution of this agreement, unless prevented by reasons beyond the control of the promoter. Under the aforesaid facts the stipulated time for completion of flat as per BDA approved plan dtd.11.7.2017 i.e. from BDA i.e. completion of 45 months. The appellant issued allocation of flat to the landowner share duly addressed to Khetrabasi Nayak since 26.3.2015. Further, as per the mandatory compliance GST is to be deposited at the time of either registration or handing over to the share of

owners as per GST Law. Further, it has been submitted in the counter that late Khetrabasi Nayak during his lifetime was requested on several occasions to take over 35 nos. of flats on paying GST. However late Khetrabasi Nayak delayed by taking different plea to arrange statutory GST amount from the prospective purchasers which resulted in delay in handing over possession of the flats.

6) It has further been submitted in the counter-affidavit that late Khetrabasi Nayak during his life time never raised any dispute nor preferred to file any complaint but surprisingly after death of Khetrabasi Nayak the respondent nos.1 & 2 have filed the complaint alleging false and fabricated allegations without any evidence. The appellant at no point of time showed any negligence in handing over the flats. Therefore, the question of paying the respondent nos.1 & 2 to cause deliberate harassment is nothing but blatant falsehood. It has been submitted by the appellant that as per the approved date i.e. 12.9.2013, 45 months were completed on 11.7.2017 and little bit of delay has been occasioned due to non-cooperation of land-lord late Khetrabasi Nayak. Accordingly, the appellant submitted that the allegation made in the complaint are totally false, fabricated and not borne by any record and evidence and the complaint case is liable to be dismissed.

7) The learned Adjudicating Officer basing on the pleadings of the parties framed issues for determination. The learned Adjudicating Officer after analysing the facts dealt all the issues and by

referring to Section 72 of the Real Estate(Regulation and Development)Act, 2016 has passed the order dt.12.11.2013 in AOCC No.27/2022,which is impugned in this appeal.

8) Learned counsel for the appellant in order to substantiate the instant appeal has assailed the order passed by the learned Adjudicating Officer on various grounds as stated here-in-under :

Learned counsel for the appellant submitted that the Development Agreement does not envisage any provision for compensation. Hence, the award made by the learned Adjudicating Officer is absolutely unjustified, uncalled for and illegal. Learned counsel for the appellant further submitted that the impugned order dehorse the Real Estate (Regulation and Development) Act, 2016 and Rules. Learned counsel for the appellant also submitted that the learned Adjudicating Officer has erred in interpreting Section-72 of the Act, which is a general provision for payment of compensation. According to the appellant, the Adjudicating Officer ought to have taken consideration of the condition mentioned in Section 72 of the Act relating to amount to disproportionate gain and unfair advantage wherefrom quantification made as a result of default. In the instant case there has been no case of default as the appellant was all along ready to share of 49% of constructed amount of apartment of the respondents but the respondents on some plea or other defaulted in coming forward to take 49% of the share of the built up area on the pretext of non-payment of GST. Learned counsel

for the appellant further submitted that the award of compensation of Rs.80,00,000/- is a result of gross mistake without quantifying methodology and established formula. Learned Adjudicating Officer has neither narrated any calculation for disproportionate gain nor amount of loss as a result of which, award of compensation is riddled with illegality and wreaks arbitrariness. Learned counsel for the appellant further submits that compensation awarded is highly unjustified, unquantified, unreasonable, excessive and also illegal. Learned counsel for the appellant further submitted that the appellant ought not to have been saddled with excessive award not commensurate with delay in handing over possession and the respondents also are vicariously liable for delay in taking over possession of their share.

9) Learned counsel for the appellant submitted that the appellant in his rejoinder to the show cause filed by the respondents, has refuted the averments of the respondents and reiterating the facts and circumstances mentioned in the appeal petition justifying the reasons for which the appellant is not liable to pay compensation of Rs.80 lakhs awarded by the Adjudicating Officer. Learned counsel for the appellant further submitted that the appellant has questioned this award of compensation of Rs.80 lakhs since the Adjudicating Officer has not followed any quantifying methodology and established formula for calculation of compensation. In the rejoinder it has been further stated that the impugned order of the Adjudicating Officer is highly contradictory and

beyond his scope as no such provision has been made in the Real Estate (Regulation and Development) Act, 2016 for providing compensation to the respondents for mental agony and harassment when the respondents have not prayed for that.

10) Learned counsel for the appellant during course of hearing submitted that the impugned order of compensation has been passed without proper verification of facts and incidental events. Learned counsel for the appellant submitted that the sanctioned/approval order of the B.D.A. for construction of building was obtained on 12.9.2013 but with the condition for conversion of the Kissam of the land from Agriculture to non-agriculture as at condition no.2 of the said order. In compliance to this, late Khetrabasi Nayak had to apply for the same before the Revenue Authority and obtain the new patta with conversion in July, 2017 as evident from the patta. In view of this, the construction works were started only in 2017 and ought to have been completed with 45 months i.e. June, 2021. But the appellant has completed the project in 2019 which is definitely much earlier to said date. The appellant thereafter has offered the father of the respondents to take possession of their shares in 2019, which is much earlier to the completion period. It is further submitted that late Khetrabasi Nayak was offered 49% of shares in 2019 but late Khetrabasi Nayak was bent upon not paying GST. Learned counsel for the appellant further submitted that Clause-9 of Article-3 of the agreement is neither conclusive nor

unconditional and the said clause provides for making all endeavours to complete/finish the said building in all respects so as to befit for occupation/habitation within 45 months from the date of signing/execution of this agreement but carries the condition that if not prevented by act of Govt, any notice or notification of the Government and/or restraint order issued by any court or public Authority. Similarly, it is also not an exclusive and conclusive agreement since in para-22 of the appeal stipulates that on receipt of approval/sanction of the building plan, the builder will start construction work. If both the clauses would be read together then it can be presumed that the stipulated period of 45 months does not include the period of time spent for obtaining the approval of BDA. Though the appellant has applied for the same immediately after signing the agreement in 2011, he got the approval from the BDA only in 2014 and this public authority has put a restraint under condition no.12 of the approval/sanction order for making conversion of agriculture kisam to non agriculture kisam under OLR Act from the Revenue Authority before commencement of construction. Therefore, Clause(2) of the agreement unequivocally speaks that it is the responsibility of the land owner to file papers in the office of Tahasildar, Bhubaneswar for conversion of their land from agriculture land to homestead land and developer will process it and would bear all expenditures for the same. It is abundantly clear that it is the responsibility of the land owner to apply for

the same and only processing would be done by the developer. Accordingly if the conversion application would have submitted by the land owner in time then there would not have been delay but the land owner late Khetrabasi Nayak applied in 2013 and in spite of all efforts made by the appellant the conversions was done only in 2018 as revealed from the ROR. So, the developer cannot solely be held responsible for this delay and default.

11) As against the submissions of the learned counsel for the appellant, Mr.J.Das, learned counsel for the respondents vehemently submitted that as alleged by the learned counsel for the appellant that the start of the construction work in point no.2 on development agreement does not mean that 45 months will start after obtaining the approval of BDA as because the condition stipulated in point no.9. Article 3 says 45 months starts from execution of development agreement. Since development agreement has been executed in the year 2011 and the approval was on 2.9.2013, the appellant was solely responsible for two years delay. According to the learned counsel for the respondents, the appellant deliberately delayed the construction of the project and the same was completed in 2019 much after expiry of the period stipulated in the development agreement and possession of the same has not been handed over to respondent nos.1 and 2 on the date of filing of the complaint.

12) Learned counsel for the respondents further submits that due to such delay in handing over

possession of the owner's share within the stipulated period, the respondent nos.1 & 2 have sustained huge loss. Learned counsel for the respondents submitted that had the appellant handed over the possession of owner's share to late Khetrabasi Nayak within stipulated period as per the development agreement, then he could have let the same on rent basis and could have earned about Rs.8 crores but due to non-completion building and handing over possession by the appellant-builder developer the respondents paid for a nominal amount of Rs.1 crore in handing over the possession of the building as per the owners share and occupancy certificate along with other requisites. Learned counsel for the respondent nos.1 & 2 further submitted that in the complaint it has been clearly mentioned that late Khetrabasi Nayak expired due to mental agony for non-completion of building by the appellant. Learned counsel for the respondents further submitted that the learned Adjudicating Officer has rightly passed the order for payment of compensation amounting to Rs.80,00,000/- (Rupees eighty lakhs) to respondent nos.1 & 2 for illegality and delay committed by the appellant.

13) Learned counsel for the respondents further submitted that the appellant in order to escape from liability has misinterpreted in clause, alleging with the same is not a conclusive one. Fact remains that on the date of execution of the development agreement, a General Power of Attorney was executed on 19.7.2011 and the learned counsel for the respondent nos.1 & 2

have stoutly denied the allegations of the appellant alleging delay on the part of the respondent nos.1 & 2 are completely baseless and without any basis. Accordingly, learned counsel for the respondent nos.1 & 2 have supported the impugned order and have prayed for dismissal of the instant appeal.

14) The Hon'ble Apex Court in the case of 2003, Vol.7, SCC 197 in the case of The Divisional Controller, Ksrtc vs. Mahadeva Shetty and Anr., has propounded the basic principle for awarding compensation in an illuminating, lucid and succinct manner which is extracted here-in-below.

> *"xx xx xx xx xx xx xx xx xx What would be "just" compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of "just" compensation which is the pivotal consideration. Though by use of expression "which appears to it to be just", a wide discretion is vested in the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression "just" denotes equitability, fairness and reasonableness, and non-arbitrariness. If it is not so, it cannot be just."*

15) The Hon'ble Apex Court in paragraph-33 of the judgment in Civil Appeal No.193 of 2015 (Arising out of SLP (Civil) No.32039 of 2012), reported in AIR

SCW 759, in the case Kailash Nath Associates Vs. Delhi Development Authority & Another, has succinctly described the law on compensation for breach of contract under Section – 74 of the Indian Contract Act, by referring to catena of judgment of Hon'ble Apex Court, which reads as follows:

" xx xx xx xx xx xx xx xx
The measure of damages in the case of breach of a stipulation by way of penalty is by ***Section 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in the case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles****. The section undoubtedly says that* ***the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of 'actual loss or damages'; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.*** *xx xx xx xx xx xx xx xx xx* ***The Court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach****.*

Further in paragraph-43 of the said judgment the Hon'ble Apex Court has held that xx xx xx ***"Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section." In paragraph-44 it has been held that the compensation can only be given for damage or loss suffered. If damage or loss is not suffered, the law does not provide for a windfall.***

16) On the cumulative effect of the facts, reasons and judicial pronouncements and taking into account the gamut, conspectus and intricate issues involved, this Tribunal finds that the compensation awarded by the learned Authority appears to be quite exorbitant and disproportionate and not commensurate with the suffering and harassment faced by the respondents nor in consonance with Section 72 of the Real Estate (Regulation & Development) Act, 2016 and therefore is hit by doctrine of proportionality.

17) Accordingly, we hold that the compensation of Rs.20,00,000/- instead of Rs.80,00,000/- would be just, adequate and commensurate to meet the ends of justice. Hence, the impugned order dt.22.11.2023, passed by the learned Adjudicating Officer in Adjudication Complaint Case No.27 of 2022, is modified to the aforesaid extent and the appeal is allowed in part.

18) The appellant is accordingly directed to deposit the compensation amount of Rs.20,00,000/- before the ORERA and on submission of the acknowledgement receipt before this Tribunal, he shall be refunded back the statutory amount deposited by him together with the accrued interest thereon, on proper application and identification.

With the above orders, the appeal is disposed of. Connected Miscellaneous applications are closed.

The records of the learned Authority be returned back forthwith.

Justice P.Patnaik
Chairperson

Shri S.K.Rajguru
(Judicial Member)

Mp

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