OREAT Appeal No.69/2024

14)14.05.2025 The appeal is taken up through hybrid mode.

2) Heard Mr.B.Baivab, learned counsel appearing for the appellants, Mr.B.Nayak, learned counsel appearing on behalf of Mr.P.S.Nayak, learned counsel for the respondent no.1-Authority and Mr.A.K.Mohanty, learned counsel appearing for the respondent no.2.

3) Aggrieved over the order dtd. 22.04.2024 of the Odisha Real Estate Regulatory Authority passed in Complaint Case No.240/2023, the appellants who are the respondents no.4 and 6 in the said case have filed this appeal praying to set aside the said order and to hold that Complaint Case No.240/2023 is liable to be dismissed on the ground of maintainability. Respondent no.1 is the Regulatory Authority who has passed the impugned order and respondent no.2 is the complainant of the complaint case.

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

The present respondent no.2 has filed the aforesaid complaint case before the learned Regulatory Authority on 19.07.2023 against the present appellants and four others praying to direct the respondents no.1 and 2 of the complaint case to hand over the four linen rooms (one in each floor of the building) and the society office room at the ground floor to the society for its common use, to remove their unlawful advertising board made up of high frame steel structure with LED light at the roof top of the apartment and also to direct the respondents no.1 and 2 of the complaint case to provide occupancy certificates to all the flat buyers at an early date. It is alleged by the complainant that M/s. Metro Builders (Orissa) Pvt. Ltd. (respondent no.1 of the complaint case) has sold 56 flats to equal number of buyers, but the builders have not yet

provided the occupancy certificates to the buyers in spite of handing over the flats to them since last three years or more. As a result, the society formed by the buyers could not be registered till date. It is further alleged that though the brochure of the project reveals that there shall be a linen room in each floor of the apartment for common use of the allottees of the concerned floor, but the builder-respondent No.1 on receipt of certain considerations have allowed specific allottees of the apartment to occupy those linen rooms. When the other allottees raised objection to it the respondent no.1 of the complaint case informed vide his letter dtd. 29.04.2023 that the linen rooms are not part of the common areas and are the property of the builder. The builder also informed that occupancy certificates had been applied for to the competent authority and would be provided to the allottees on their receipt. It is further alleged that the builder has converted the third lift to bathrooms in each floor and is also trying to sell the linen rooms to the respondents no.3 and 6 violating the terms and conditions of the brochure. Apart from this the builder has also erected two advertisement boards made up of high frame steel structure with LED light at the roof top of the apartment which is dangerous to its residents.

Pursuant to the summons issued by the learned Regulatory Authority, the respondent no.1- builder appeared through its counsel on 11.10.2023. On 15.11.2023 the respondent no.2 appeared through its counsel and a petition to hear the case on the point of maintainability was filed on behalf of respondents Nos.1 and 2 on the same day. On 27.02.2024 respondent no.3 appeared though her counsel. Respondent Nos.4 and 6 also appeared on the same day through their counsel and filed a petition raising objection to the maintainability of the complaint case. On 27.03.2024 the

name of respondent no.5 was struck out from the cause title of the complaint case on the prayer of the complainant on the ground of his death. On the same day the petitions challenging the maintainability of the complaint case were heard and the learned Regulatory Authority passed the impugned order on 22.04.2024 rejecting the same.

5) In the hearing of the appeal, the learned counsel for the appellants has submitted that the project has been completed on 11.01.2017 i.e. prior to the commencement of the RERA Act, 2016. It is further submitted that the completion certificate has been issued by a registered Architect under the ODA Act, 1982 and the builder has applied to the Bhubaneswar Development Authority for occupancy certificate on 29.4.2017 which is also prior to the coming into force of the RERA Act. Even the appellant no.1 has purchased his flat in the project vide Regd. Sale Deed dtd. 28.04.2017 i.e. prior to the commencement of the RERA Act. It is further submitted that the learned Regulatory Authority vide its order dated 20.03.2023 in Complaint Case No.115 of 2019 (DN Oxypark Welfare Association Vrs. D.N.Homes) has dismissed the complaint case on the ground that the project therein was completed prior to the commencement of the RERA Act and so the Act has no application to it. It is further submitted by the learned counsel that when the order dtd. 20.03.2023 of the learned Regulatory Authority in Complaint Case No.115 of 2019 is still in force and has not yet been over-ruled by this appellate Tribunal or any other appellate court, the learned Regulatory Authority has taken a completely different stand in the present case which is highly biased and unreasonable. Referring to the meaning of 'Completion Certificate' in sec. 2 (q), 'Occupancy Certificate' in Section 2 (zf), and 'Competent Authority' in sec. 2 (p) of the RERA Act

and also the provisions relating to prior registration of the real estate project with the Real Estate Regulatory Authority under Section 3 of it, the learned counsel has asserted that the project having been completed before the RERA Act came into force and completion certificate and occupancy certificate having already been obtained, the Complaint Case is not maintainable. The learned counsel has accordingly made the prayer as mentioned earlier in paragraph-3.

6) On the hand learned counsel for the respondent no.2 has submitted that the date of issuance of the Completion Certificate showing the project to have been completed on 11.01.2017 has not been mentioned by the accredited person. It is further submitted that the project has not been actually completed on the date of filing of the complaint case as no occupancy certificate has been issued by the Competent Authority i.e the Bhubaneswar Development Authority. It is further submitted that the petition challenging the maintainability of the complaint case is a misconceived one as RERA Act does not permit preliminary hearing of a complaint case on the point of maintainability. The learned counsel has reiterated that the appellants having not received the occupancy certificate in respect of the project as on 01.05.2017, it is covered under the RERA Act. The learned counsel for the respondent no.2 has further submitted that the project does not have a Completion Certificate as per Section 2(q) of the RERA Act as the Architect issuing the Completion Certificate is not a Competent Authority under the Act. It is further submitted that the Completion Certificate issued in respect of the project is not in accordance with Form-VI of Regulation 67 of the Bhubaneswar Development Authority (Planning and Building Standards) Regulations, 2008 as it does not show the document regarding linkage of all public utility

services such as sewerage, drainage, water supply and electricity to the main public utility system, to have been provided with it. It is further submitted that the Completion Certificate has not been submitted to the Authority for verification and issuance of Occupancy Certificate as per Rule 39 of the Odisha Development Authorities (Common Application Form) Rules, 2016. It is pointed out by the learned counsel that no Occupancy Certificate has been issued by the Authority as the Completion Certificate must have been found to be not in order. It is further submitted that the Completion Certificate has also not been accompanied with the NOC from the Fire Prevention Officer and as such is an incomplete document as per the aforesaid Regulations, 2008. Referring to the order dated 07.12.2022 of the Hon'ble High Court of Orissa in W.P. (C) No.18799 of 2021, the learned counsel has contended that the completion of a project can only be analysed in terms of Section 2(p) and Section 2(q) of the RERA Act. The learned counsel has further referred to the observation of the Hon'ble High Court of Kerala in the case of Alfa Ventures Pvt. Ltd. versus State of Kerala reported in ILR 2022 (3) Kerala-715 wherein it has been held that, Completion Certificate under Rule 22 of the Kerala Munciplity Building Rules, 1999 and the Completion Certificate under the RERA Act are different and the completion certificate in respect of the project Alfa Horizon having not been issued in the manner provided under Section 3 of the RERA Act, is an on-going one on the date of introduction of the RERA Act i.e 01.05.2017. The learned counsel has also drawn attention of this Tribunal to its order dated 15.05.2024 passed in OREAT Appeal No.137 of 2023 wherein it has been observed that the project in question being within the development area of Bhubaneswar, only the BDA is entitled to issue Completion Certificate in

respect of Phase-1 of the project, but the empanelled architect issuing the Completion Certificate is not the kind of Authority as contemplated under Section 2(p) of the Act. With the aforesaid submissions, the learned counsel for the respondent no.2 has termed the appeal filed by the appellants to be devoid of any merit and has accordingly prayed for its dismissal.

7) In rejecting the petition challenging the maintainability of the Complaint Case no.240 of 2023 the learned Regulatory Authority has observed as follows :

> "5. Perused the documents filed by the respondent no.1 and as per the maintainability petition, the completion certificate was obtained from the architect on 11.1.2017, but it was not addressed to the planning authority prior to 1.5.2017 which is the cut-off date. If the project has been completed and related to the pre-RERA the celebrated judgment of the Hon'ble Apex Court i.e. Newtech is applicable. So, the promoter is not liable to register the project within two months from 1.5.2017 under Sec.3 of the Act. But the question arises as to whether the promoter is liable for the violation of other sections of the Act except Sec. 3 and 4. In this case the common area of the project has not been handed over to the allottees/societies and in the meantime the Owners' Apartment Act, 2023 and the Rules thereof were brought by the concerned Government in the year 2024. The four nos. of linen rooms available in each floor of the apartment has to be handed over to the society alongwith other common areas. Where the promoter has not complied with the above, he is liable to enforce the agreement for sale executed by him in favour of each of the allottee. So, the plea taken by the respondent nos.1 and 2 that the project has been completed prior to the enforcement of the RERA Act is not acceptable by this Authority. As the complainant has got a prima facie case with regard to his reliefs sought for in the complaint petition, the said complaint petition is maintainable in the eye of law. Hence, the maintainability petition being filed by the

respondent nos.1 and 2 is hereby rejected by this Authority as the same is devoid of merits. Accordingly, the maintainability petition is disposed of."

The main ground taken by the appellants in their petition dated 27.02.2024 challenging the maintainability of the complaint case was that the project in question has been completed on 11.01.2017 as per the completion certificate issued by the registered Architect under the O.D.A Act, 1982 and this being prior to the date of commencement of the RERA Act, the project is not covered under it and hence the Regulatory Authority lacks jurisdiction to entertain the complaint case. The learned Regulatory Authority in its order has stated the completion certificate to have been obtained from the Architect on 11.01.2017, but not addressed to the planning authority prior to the cut-off date i.e. 01.05.2017. However, except observing that the Newtech judgment of the Hon'ble Apex Court is applicable to the project if it is completed and a pre-RERA one and in such case the promoter is not liable to register the project under Section 3 of the Act, the learned Regulatory Authority has made no analysis to ascertain whether the project is a pre-RERA or a post-RERA one. No discussion has been made as regards the validity of the completion certificate produced by the appellants so as to ascertain if the project was completed prior to the commencement of the RERA Act or not. So, the crux of the matter has not at all been addressed to by the learned Regulatory Authority. The learned Regulatory Authority without deciding whether the project is coming under the fold of the RERA Act or not has erroneously proceeded to ascertain whether the promoter is liable for violation of sections other than sections 3 and 4 of the RERA Act. Only on the basis of the facts such as common areas of the project have not been handed over to the allottees/society and four numbers of linen

rooms (one in each floor of the apartment) are yet to be handed over to the society, the learned Regulatory Authority has arrived at the erroneous conclusion that the complainant has got a prima facie case with regard to the reliefs sought for in the complaint petition and therefore the complaint case is maintainable in the eye of law. However, the applicability or non-applicability of the RERA Act to a project is fully confined to the requirements under Section 3. Section 3 (1) of the RERA Act provides that the promoter is required to apply for the registration of his project within three months of the commencement of the Act if the project is an on-going one on the date of commencement of the Act i.e. 01.05.2017. According to Section 3 (2) (b) of the Act, registration of the real estate project is not required where the promoter has received the 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 reported in 2021 SCC online 1044,** 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. So, from the aforesaid statutory provisions as well as the observation of the Hon'ble Apex Court, it is clear that the date of completion of the project and issuance of completion certificate in respect of it are the deciding factors for applicability of the RERA Act to it. However, if it is claimed that a project is completed prior to the commencement of the RERA Act and accordingly a completion certificate is produced to that effect, the validity of the completion certificate issued under the relevant Act and Rules must be first decided before the project is held to be completed prior to the commencement of the RERA Act. If the Completion Certificate

is found to be valid then the RERA Act is not applicable to the project. Accordingly, a complaint under Section 31 of the Act is certainly not maintainable and no relief under any of the provisions of the RERA Act can also be granted in favour of any aggrieved person.

In view of the above findings, we reject the contention of the learned counsel for the respondent no.2 that the RERA Act does not permit preliminary hearing of a Complaint Case filed under Section 31, because there is no such restricted provision in the Act. Rule 38 of the Odisha Real Estate (Regulation & Development) Rules, 2017 deals with the manner of holding an inquiry by the Regulatory Authority after filing of the complaint by any aggrieved person. Sub-rule 2 (e) of this Rule provides that, after appearance if the respondent does not plead guilty and contests the complaint, the Regulatory Authority shall demand an explanation from him and on the basis of the submissions made if the Regulatory Authority is satisfied that the complaint does not inquire any further inquiry, it may dismiss the complaint. Rule 38 (2) (f) provides that, in case the Regulatory Authority is satisfied on the basis of the submissions made that there is need for further hearing into the complaint, it may order production of documents or other evidence on a date and time fixed by it. These provisions make it amply clear that a preliminary hearing of a complaint under a RERA Act is permissible. In the present case, as the appellants have challenged the very jurisdiction of the Regulatory Authority to entertain the complaint under Section 31 of the RERA Act on the basis of the Completion Certificate showing the project to have been completed on 11.01.2017, we are of the considered opinion that, it is obligatory upon the Regulatory Authority to first decide this point. Our opinion in this regard finds force from

the following observation of the three judge Bench of the Hon'ble Supreme Court of India in the case of Asma Lateef and Anr versus Sahbbir Ahmad and Others decided on 12.01.2024:

> ".....we hold that a decision rendered by a court on the merits of a controversy in favour of the plaintiff without first adjudicating on its competence to decide such controversy would amount to a decision being rendered on an illegal and erroneous assumption of jurisdiction and, thus, be assailable as lacking in inherent jurisdiction and be treated as a nullity in the eye of law....."

8. For the discussions made in the preceding paragraph, we are of the considered opinion that the learned Regulatory Authority having not decided as to whether the project is completed prior to the RERA Act or an ongoing one on the date of its commencement, shall decide the question of maintainability of the Complaint Case on the point of applicability of the RERA Act to the project which is challenged in the petition dated 27.02.2024 by the appellants. Accordingly, we set aside the impugned order dated 22.04.2024 passed by the learned Regulatory Authority in Complaint Case no.240 of 2023 and remand the matter back to the learned Regulatory Authority for fresh consideration of the petition dated 27.02.2024 of the appellants.

The learned Regulatory Authority shall decide the maintainability of the Complaint Case by analysing the validity of the Completion Certificate relied on by the appellants with reference to Section 3 of the RERA Act, the relevant observation of the Hon'ble Apex Court in M/s.Newtech Promoters case and Section 20 of the ODA Act, 1982. As the Completion Certificate relied on by the appellants has been issued by Architect Sri A.K.Muduli in Form-XIV and this Form is prescribed under the ODA (Common Application Form) Rules, 2016, the learned Regulatory Authority shall verify the validity of the Accreditation Certificate of Architect Sri A.K.Muduli under Rule 37 and also his experience as per Rule 38 of the aforesaid Rules to ascertain his competency to issue the Completion Certificate.

Further, the learned Regulatory Authority, shall also verify if application in Form-IV accompanied by a copy of the Completion Certificate has been made by the promoter to the Bhubaneswar Development Authority for issuance of Occupancy certificate under rules 12 and 39 of the aforesaid Rules, or not. It is further seen that though the Completion Certificate issued by Architect Sri A.K.Muduli refers to approved plan no. BP2F-6172/2011 dated 12.09.2013, but the copy of the said plan is not available in the complaint case record. Hence, the respondent no.1 of the complaint case i.e the Managing Director, M/s.Metro Builders (Orissa) Pvt. Ltd., Cuttack is directed to furnish an authentic copy of the said plan before the learned Regulatory Authority for consideration. To verify the aforesaid facts, the learned Regulatory Authority is at liberty to call for the relevant documents from the concerned Architect and Bhubaneswar Development Authority.

While parting with this order, we make it very clear that we have not made any observation on the merit relating to the point of maintainability of the Complaint Case.

The appeal is disposed of on contest against the respondents. Pending I.As are disposed of accordingly.

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 this order to each of the appellants and the respondent no.2.

Justice P.Patnaik
Chairperson

Shri S.K.Rajguru
(Judicial Member)

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

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