OREAT Appeal No.94/2024

11) 16 .04.2025 The appeal is taken up through hybrid mode.

2) Heard Mr. K.C.Prusty, learned counsel appearing for the appellant, Ms.P.T.Jema, learned counsel appearing for the respondent no.1 and Mr. B.Nayak, advocate appearing on behalf of Mr. P.S.Nayak, learned counsel for the respondent no.2-Authority.

3) Aggrieved over the order dated 20.4.2024 passed by the learned Odisha Real Estate Regulatory Authority in Complaint Case No. 273 of 2023, the appellant who was the respondent therein has filed this appeal praying to set aside the said order. The respondent no.1 of this appeal was the complainant of the complaint case and the respondent no.2 is the learned Regulatory Authority who has passed the impugned order.

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

On 23.8.2023 the present respondent no.1 filed the aforesaid complaint case before the Regulatory Authority submitting that he had entered into an agreement with the appellant on 19.7.2012 to purchase a flat in the project 'Hi-Tech Brundaban" and had paid an amount of Rs.1,17,000/- out of the agreed consideration amount of Rs.7,80,800/- till 19.1.2017. The appellant promised the respondent no.1 to sell flat no.2/C3-18 and to execute the sale in respect of it as well as register it within three to four years. The appellant however neither completed the flat nor gave its possession to the respondent no.1. Subsequently, the respondent no.1 found that the appellant was behind the bars for cheating in various cases but while behind the bars it was trying to sell the flat in

question to another person for some more money. When the respondent no.1 asked the appellant he demanded enhanced flat cost at the prevalent market rate i.e. Rs.3200/- per square feet of super built up area. It is further submitted by the respondent no.1 that he had paid the amount of Rs.1,17,000/- in cash to the appellant and the rest amount was to be paid by him at the time of execution of sale deed in his favour. The appellant though promised the respondent no.1 to hand over the flat to him in the year 2017 but till now has not given possession of the same. On 3.4.2014 the appellant informed the respondent no.1 that there has been a delay of 14 months in completion of the construction as the Director of the Company was in judicial custody since the last 14 months and the company was going through a financial crisis. Subsequently on 18.3.2014 the appellant demanded an amount of Rs.2,78,745/- to the respondent no.1 towards roof casting and reiterated the said demand on 20.12.2016 and 28.8.2017. The respondent no.1 has alleged that, all of a sudden on 17.7.2023 the appellant intimated him through a letter that the allotment of the flat in his favour was cancelled and the amount paid by the respondent no.1 would be refunded. The appellant also intimated the respondent no.1 that the construction of the flat was completed. When the respondent no.1 asked for twenty days time on his health issue to deposit the entire money and take possession of the flat vide his letter dtd. 26.7.2023, the appellant vide his letter dtd.5.8.2023 demanded the payment at the present market rate i.e. Rs. 3200/- per square feet. This demand of the appellant according to the respondent no.1 is totally unfair as per law. The respondent no.1 claimed that although he had to pay only a balance amount of Rs.6,63,800/- to the appellant

at the time of execution and registration of the sale deed in respect of the flat and had approached the appellant to execute as well as register the sale deed in respect of the flat in his favour, the appellant has avoided it on some plea or other. The respondent no.1 was therefore compelled to approach the learned Regulatory Authority through the complaint case praying for a direction to the appellant to execute the necessary sale deed in his favour within a stipulated time period, to hand over the flat as per the mutually agreed terms and conditions dtd.19.7.2012 and to pay an amount of Rs.5,00,000/- towards compensation for deliberately harassing him by not executing the sale deed in respect of the flat.

Pursuant to the summons issued by the learned Regulatory Authority, the appellant appeared through its counsel and filed its written show cause to the complaint petition wherein it took the plea that the complaint case is not maintainable. The respondent no.1 did not pay the amount as per the agreement inspite of demand for the same by the appellant. The respondent no.1 even did not pay the whole of the booking amount of Rs.1,95,200/- and paid only Rs. 1,17,120/-. Denying the claim of the respondent no.1 that the balance amount was to be paid after the execution of the sale deed, the appellant claimed that there is categorical stipulation in the sale agreement that delivery of possession of the flat was to be made on receipt of apartment cost in time as well as other costs. The appellant claimed that it had demanded Rs.2,78,745/- towards roof casting work on 18.3.2014, but the same was not paid by the respondent no.1. Subsequently, the appellant again made a demand of Rs.4,68,600/- on 28.8.2017 but the respondent no.1 failed to pay this amount

also. As a result, the appellant cancelled the allotment of the flat vide letter dtd. 17.7.2023. The appellant further submitted that the Directors of the Company were in judicial custody for 14 months in a criminal case instituted by the EOW, Crime Branch, Odisha and they had to deposit Rs.63,55,49,277/- as per the Hon'ble Supreme Court's order for their release on bail. Due to the deposit of this huge amount and freezing of the bank account, there was no business transaction and only after their release on bail, they started the construction of the flat and accordingly the appellant made correspondence to the respondent no.1 for the aforesaid payment of Rs.2,78,745/- towards roof casting. The appellant asserted that as per clause-12 of the sale agreement, the builder shall not incur any liability for delay in completion of the apartment for any circumstance beyond his control. Denying the claim of the respondent no.1 that after his initial payment of Rs.1,17,120/- he was supposed to pay the balance amount of Rs.6,63,800/- only at the time of registration of the sale deed, the appellant asserted that this fact has nowhere been mentioned in the sale agreement. It is further asserted by the appellant that apart from not paying the whole of the booking amount, the respondent no.1 has also not adhered to the terms of the sale agreement with regard to payment of the balance agreed amount and as a result the cancellation of the flat in question had to be made vide correspondence dtd. 17.7.2023. It is claimed by the appellant that when allotment of the flat has been cancelled, the sale agreement is deemed to have been terminated and the respondent no.1 being no more an allottee, the question of handing over of the flat to him does not arise and the complaint case is also not maintainable. With

the aforesaid submissions, the appellant prayed for dismissal of the complaint case.

It may be noted here that on the date of final hearing of the complaint case i.e. 2.4.2024 the learned counsel for the respondent no.1 (complainant) filed a petition praying for amendment of the complaint petition by substituting the only prayer to refund the principal amount of Rs.1,17,000/- with interest @ 9.70% to the respondent no.1 (complainant) for the earlier prayers for executing the sale deed, handing over of the flat and payment of compensation of Rs.5,00,000/- to him. The amendment prayed for was allowed on the same day by the learned Regulatory Authority.

The learned Regulatory Authority on perusal of the pleadings of the parties and hearing their respective counsels and also taking into account the documents on record which were filed only by the respondent no.1 (complainant) directed the appellant vide the impugned order dtd.20.4.2024 to refund the amount of Rs.1,17,000/- to the respondent no.1 along with interest @ 9.50% per annum w.e.f. 19.7.2015 till the date of refund, within a period of two months from the date of the order, and it was made clear in the order that in the event of failure by the appellant to comply with the direction, the respondent no.1 was at liberty to enforce the order for realization of the dues according to law.

5) In the hearing of the appeal the learned counsel for the appellant has submitted that the impugned order for refund of Rs.1,17,000/- to the respondent no.1 is erroneous in view of the fact that the respondent no.1 has not paid the entire cost of the flat i.e. Rs.7,80,800/- as per clause-4 of the sale agreement dtd. 19.7.2012. The impugned order is also erroneous for the reason that the learned Authority has

ignored clause-12 of the sale agreement which exempts a builder from any liability in case of delay in completion of the apartment beyond the stipulated time, if the delay is on account of circumstances beyond the control of the builder. It is further submitted that the allotment of flat in question has been cancelled for non-payment of the balance agreed price by the respondent no.1 and though in case of cancellation the builder is entitled to deduct 10% from the amount deposited by the purchaser towards service charge, but the learned Regulatory Authority has passed order directing refund of amount with interest and this being contrary to the sale agreement is liable to be set aside. It is further submitted that the learned Regulatory Authority has ignored to note that the complaint case has been filed in the year 2023 whereas the sale agreement has been executed on 19.7.2012 i.e. after a lapse of 11 years and hence is barred by the law of limitation. It is further submitted that the complaint case is also not maintainable as the sale agreement dtd. 19.7.2012 has expired after 36 months and the same being before 1.5.2017 i.e. the date on which the RERA Act came into force, the respondent no.1 is not an allottee under the appellant. It is further submitted that there being no clause in the sale agreement for refund of amount with interest and the RERA Act being not in existence on 19.7.2015 i.e. the date from which the interest has been ordered to be payable, the impugned order is erroneous and is liable to be set aside.

6) On the other hand, the learned counsel for the respondent no.1 has submitted that the appellant in its letter dtd. 3.04.2014 had informed the respondent no.1 that the Directors of the company were in judicial custody since 14 months and therefore the project work could not proceed

further. The appellant has not been able to complete the project as per the terms of the agreement and to deliver possession of the flat to the respondent no.1, but still is demanding the balance amount as per the market value i.e. Rs.3200/- per square feet in contravention of the terms of the agreement. It is further submitted that when the appellant has demanded payment towards roof casting of the flat in the years 2014, 2016 and 2017 and the flat has not been completed within the agreed period, the issuance of the letter dtd.17.7.2023 to the respondent no.1 that the allotment of the flat was cancelled due to non-payment of the amount is illegal. It is further submitted that the sale agreement between the parties is still subsisting and as the appellant has illegally and arbitrarily cancelled the allotment of the flat vide its letter dtd. 17.7.2023, the cause of action for filing the complaint case certainly arose in the year 2023 and therefore the contention of the appellant that the complaint case having been filed 11 years after the date of sale agreement is not maintainable, is without any force. It is further submitted that when the appellant has admitted to have received an amount of Rs.1,17,000/- from the respondent no.1 towards the part consideration amount and also to have failed to complete the housing project within the stipulated time as per the sale agreement for the reason that the Directors of the company were in judicial custody, the respondent no.1 is entitled to get back his deposited amount with interest as per section 18 of the RERA Act for the loss sustained by him due to the delay in completion of the project. Asserting the fact that it was only due to the negligence of the appellant, the respondent no.1 did not get his flat though he was ready to purchase the same by paying the balance consideration amount, the learned

counsel for the respondent no.1 has submitted that the impugned order for refund of the amount of Rs.1,17,000/- with interest on the basis of the documents filed by the respondent no.1 in the light of his amended prayer in the complaint petition, is justifiable. With these submissions, the learned counsel for the respondent no.1 has prayed for dismissal of the appeal being without any merit.

7) The sale agreement in respect of the flat in question i.e. Flat No.2/C3-18 of the project has been executed between the appellant and the respondent no.1 on 19.7.2012 and as per this agreement the appellant was to complete the construction of the flat and deliver its possession to the respondent no.1 within a period of 30 months with a grace period of 6 months (36 months in total) from the date of execution of the agreement upon receipt of the apartment cost in time as well as other costs. The agreed total cost of the flat is Rs.7,80,800/-. The appellant has never claimed to have completed the project in its pleading and no completion certificate in respect of it has been produced. Attested true copy of the correspondence dtd. 28.8.2017 from the Project in-Charge of the appellant to the respondent no.1 shows the appellant to have completed the roof casting work of the project by that time and to have made a demand for Rs.4,68,600/- towards the said work from the respondent no.1. All these facts taken together make it clear that the project was an ongoing one on the date of commencement of the RERA Act i.e. 1.5.2017 and hence under its fold.

The project is within the purview of the RERA Act but the sale agreement dtd. 19.7.2012 under Annexure-1 of the complaint case is found to be not a registered one as required under section 13 (1) of the RERA Act. The sale

agreement shows the appellant to have received a total an advance amount of Rs.1,17,000/- till 20.4.2012 and therefore the advance amount being more than 10% of the total cost of the flat in question, the acceptance of the same by the appellant in absence of a registered written agreement for sale is certainly violative of section 13 (1) of the RERA Act. So, when the agreement for sale deed 19.7.2012 under Annexure-1 is not in accordance with law, the contention of the appellant that the respondent no.1 has not even paid the whole of the booking amount as per the sale agreement and therefore is not entitled to be refunded back his deposit with interest, is not acceptable.

As per the unregistered sale agreement dtd. 19.7.2012, the appellant was to complete the construction of the project within a total period of 36 months from the date of its execution and as such the date by which the project was to be completed was 18.7.2015. It is an admitted fact between the parties that the project has not been completed within the stipulated time as per the sale agreement dtd. 19.7.2012. As regards the delay in completion of the project, the appellant has taken the plea that as the Directors of the company were in judicial custody for 14 months in an EOW case instituted by the Crime Branch, Odisha, the company was running under acute financial crisis and the work of the project had slowed down. The appellant has claimed that this being a circumstance beyond its control, it is not liable for the delay in completion of the project. Of course, sl. no.12 of the terms and conditions of the sale agreement dtd. 19.7.2012 provides that, the builder shall not incur any liability for the delay in completion of the apartment beyond the stipulated date on account of any act of God or fury of nature or any restraint

order/orders of injunction issued by a competent court or public functionary or any other circumstances beyond the control of the builder, but the fact that the Directors of the company were in judicial custody for 14 months and that resulted in financial crisis for the company and slow down of the project work cannot be accepted as a circumstance beyond the control of the builder. This is because it is not the plea of the appellant that the criminal case instituted against its Directors was false and also because of the fact that the respondent no.1 who has nothing to do with it cannot be compelled to suffer the loss on account of the stoppage in the construction of the project due to a circumstance arising out of any alleged act or omission on the part of the Directors of the appellant punishable under law. Even Section 6 of the RERA Act explains a situation of force majeure to 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, but does not include a circumstance as pleaded by the appellant i.e. financial crisis of the company due to the judicial custody of its Directors. So, the plea of the appellant with regard to delay in completion of construction of project is not acceptable.

The appellant has categorically alleged that, due to non-payment of the balance consideration amount in time by the respondent no.1 inspite of repeated requests, it had to cancel the flat in question vide letter dtd. 17.7.2023. The correspondence dtd. 18.3.2014 from the appellant to the respondent no.1 (Annexure-3 of the complaint case) shows that the appellant had made a demand for an amount of Rs.2,78,745/- towards roof casting work, but surprisingly the correspondence dtd. 20.12.2016 from the appellant to the

respondent no.1 shows that the dues against the respondent no.1 upto December, 2016 was Rs.2,73,400/-. It is not understood how after a period of 2 years and 9 months the dues against the respondent no.1 instead of enhancing had reduced by Rs.5345/- when he had not made any further payment after payment of the amount of Rs.1,17,000/- upto 20.4.2012. The copy of the correspondence dtd. 28.8.2017 from the appellant to the respondent no.1 shows that the appellant had asked for an amount of Rs.4,68,600/- towards roof casting work, but it is not explained how the dues of Rs.2,73,400/- upto December, 2016 had increased by so much amount within a span of eight months. All the aforesaid correspondences were made by the Project in Charge of the appellant. In this regard, the copy of the letter dt.11.8.2012 of the Executive Director of the appellant to the respondent no.1 is noteworthy. This correspondence reveals that the Executive Director had cautioned the respondent no.1 about some of the staff of the company making various false commitments to the customers and giving written commitments without the knowledge of the Executive Director. It is made clear in the said letter that only correspondences regarding dues and progress of the work will be made by the customer care department, but all other correspondences shall be under the signature of the Executive Director. So, the demand for payment of the amount towards roof casting work in the correspondences dtd. 18.3.2014 and 28.8.2017 and for the total dues upto December, 2016 in the correspondence dtd. 20.12.2016 having been made by the project in Charge and not by the customer care department of the appellant, cannot be accepted as authentic ones from the side of the appellant.

The respondent no.1 is not liable to pay the entire cost of the flat as the appellant has not produced any evidence with regard to its completion and as already mentioned earlier the correspondences made from the side of the appellant to the respondent no.1 towards construction linked payment are found to be not authentic. There being no completion certificate in respect of the project and the same being an ongoing one, the respondent no.1 has rightly instituted the complaint case on 23.8.2023 after issuance of the allotment cancellation letter dtd. 17.7.2023 relating to his flat by the appellant. The complaint case is therefore within time and the contention of the appellant that the filing of the complaint case after a lapse of eleven years from the date of execution of the sale agreement is barred under the law of limitation, is misconceived. As the project has been held to be an ongoing one on the date of commencement of the RERA Act and under its fold, the contention of the appellant that the sale agreement dt.19.7.2012 having expired after 36 months i.e. before the date of commencement of the RERA Act, the respondent no.1 is not an allottee under the RERA Act, is also a misconceived one and is not acceptable.

The appellant-promoter having failed to complete the flat in question and unable to give its possession to the respondent no.1 in accordance with the terms of the agreement for sale, is certainly liable to return the amount deposited by the respondent no.1-allottee who has wished to withdraw from the project, with interest at the prescribed rate, as per section 18 (1) of the RERA Act.

As regards the imposition of interest, the appellant has contended that, the direction to pay interest at the rate of 9.50% per annum from 19.7.2015 is incorrect as the RERA Act

was not in force as on that date. However, the project having been held to be under the fold of the RERA Act, the appellant is liable to pay interest from the date of payment of the amount by the respondent no.1. As per the sale agreement dtd. 19.7.2012, the respondent no.1 has paid Rs.20,000/- on 18.11.2011, Rs.20,000/- on 31.3.2012, Rs.60,000/- on 3.4.2012 and Rs.17,000/- on 20.4.2012 (Rs.1,17,000/- in total) to the appellant. The appellant is therefore liable to pay interest on the aforesaid specific amounts from their respective dates of deposit. The prescribed rate of interest as per Rule 16 of the Odisha Real Estate (Regulation & Development) Rules, 2017 is SBI highest Marginal Cost of Lending Rate plus two percent. It is found that the SBI Marginal Cost of Lending Rate as on the date of the impugned order i.e. 20.4.2024 was 8.65% per annum and therefore the prescribed rate of interest in the present case shall be 8.65% + 2 % i.e. 10.65%.

8) In view of the entire discussions made in the preceding paragraph, the appeal preferred by the appellant is found to be devoid of any merit. So, with the modifications made with regard to the date from which interest is payable and the rate of interest in the impugned order in the preceding paragraph, we hereby dismiss the appeal against the respondents.

The Accounts Officer of this Tribunal is directed to calculate the amount which the appellant-promoter is liable to pay to the respondent no.1 in view of the above order. If on calculation, it is found that the appellant has to pay any excess amount after adjustment of his statutory deposit, the same shall be payable within 45 days of this order. Failure to

pay the excess amount shall entitle the respondent no.1 to realize the same from the appellant in due process of law.

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 Regulatory Authority for information and necessary action. Also send a copy of this order each to the appellant and the respondent no.1.

Justice P.Patnaik
Chairperson

Shri S.K.Rajguru
(Judicial Member)

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

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