

Court No. - 5

Case :- WRIT - C No. - 13904 of 2020

Petitioner :- Vibhor Vaibhav Infrahomes Pvt. Ltd.

Respondent :- Union Of India And 5 Others

Counsel for Petitioner :- Swapnil Rastogi

Counsel for Respondent :- A.S.G.I.,C.S.C.,Vinay Kumar Pathak,Wasim Masood

Hon'ble Surya Prakash Kesarwani,J.

Hon'ble Dr. Yogendra Kumar Srivastava,J.

1. Heard Sri Siddhartha Singhal, holding brief of Sri Swapnil Rastogi, learned counsel for the petitioner, Sri Vinay Kumar Pathak, learned counsel for Respondent No.1, Girish Vishvakarma, learned standing counsel for Respondent No.2 and Sri Jagdish Prasad holding brief of Sri Wasim Masood, learned counsel for Respondent Nos. 3 and 4.

2. This writ petition has been filed praying for the following reliefs:

“(a) Issue a writ, order or direction in the nature of certiorari calling for the record and quashing the impugned order dated 30.09.2019 passed by Adjudicating Officer, Regional Office, Uttar Pradesh, Real Estate Regulatory Authority, Gautambudh Nagar in Complaint Case No. ADJ/120185832 (Sarika Tulsian and another vs. Vibhor Vaibhav Infrahome Pvt. Ltd.) (Annexure No. 1);

(b) Issue a writ, order or direction in the nature of certiorari calling for the records and quashing the impugned recovery certificate dated 25.06.2020 issued by Adjudicating Officer, Regional Office, Uttar Pradesh, Real Estate Regulatory, Gautambudh Nagar (Annexure No. 2);

(c) Issue an appropriate writ, order or direction declaring the proviso to Section 43(5) of Real Estate (Regulation & Development) Act, 2016 as arbitrary,

ultra vires to the constitution being in conflict and contradictory to the spirit of the Real Estate (Regulation & Development) Act, 2016.”

3. Learned counsel for the petitioner has stated that the petitioner is not pressing the relief no.'c'.

Facts

4. Briefly stated facts of the present case are that the petitioner is the promoter within the meaning of Section 2(zk) of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the “Act, 2016”). The petitioner entered into builder-buyer agreement dated 10.07.2011 with the respondent nos. 5 and 6. Undisputedly as per agreement the petitioner was under a contractual obligation to handover the flat to the respondent nos.5 and 6 within 30 months from the date of agreement. A grace period of 180 days was also provided in the agreement. Thus as per agreement the petitioner was liable to handover the flat complete in all respect to the respondent nos.5 and 6 within $30 + 6 = 36$ months i.e. three years. Thus, the last date for giving possession of the flat by the petitioner to the respondent nos.5 and 6 was 09.07.2014. However, the petitioner could not complete and handover the flat to the respondent nos.5 and 6 within the agreed time and thus violated provisions of Section 18 of the Act, 2016. The actual possession of the flat was received by the respondent nos. 5 and 6 on 26.12.2017. Since the petitioner violated the provisions of Section 18 of the Act, 2016, therefore, the respondent nos.5 and 6 filed an application on 18.01.2018 before the authority as defined in Section 2(i) of the Act, 2016 claiming compensation and interest. Since the respondent nos.5 and 6 have claimed compensation also,

therefore, the authority passed an order dated 22.05.2019 holding that the Adjudicating Officer may be approached in this regard. Thus, the matter came before the Adjudicating Officer under Section 71 of the Act, 2016. The Adjudicating Officer passed the impugned order dated 30.09.2019 awarding compensation and interest. Aggrieved by the aforesaid impugned order, the petitioner has filed present writ petition under Section 226 of the Constitution of India.

Submissions

5. Learned counsel for the petitioner submits as under:

(i) Adjudicating Officer under Section 71 of the Act, 2016 has no power to award interest and compensation, in the event possession of the flat has been taken by the allottee from the promoter.

(ii) Thus, since the impugned order is without jurisdiction and, therefore, neither appeal shall lie under Section 43 (5) of the Act, 2016 nor the appeal is an appropriate remedy.

6. No other point has been argued by the learned counsel for the petitioner before us.

7. In support of his submission learned counsel for the petitioner has relied upon the judgment of this Court dated 06.07.2020 in *Writ-C No. 9120 of 2020 (Habitech Infrastructure Limited Vs. State of U.P. and 2 others)*.

8. Learned standing counsel for the respondent No.2 and learned counsel for the respondent nos.3 and 4 have supported the impugned order and jointly submit that the Adjudicating Officer under Section 71 of the Act, 2016 has ample power to adjudicate upon the compensation or interest and thus the impugned order is not without jurisdiction.

Discussion and Findings

9. Before we proceed to consider the submission of the parties it would be appropriate to reproduce the relevant provisions of the Act, 2016, as under:-

“ Section 18. Return of amount and compensation—

(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

(2) The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land, on which the project is being developed or has been developed, in the manner as provided under this Act, and the claim for compensation under this subsection shall not be barred by limitation provided under any law for the time being in force.

(3) If the promoter fails to discharge any other obligations imposed on him under this Act or the rules or regulations made thereunder or in accordance with the terms and conditions of the agreement for sale, he shall be liable to pay such compensation to the allottees, in the manner as provided under this Act.

Section 38. Powers of Authority.—(1) The Authority shall have powers to impose penalty or interest, in regard to any contravention of obligations cast upon the promoters, the allottees and the real estate agents, under this Act or the rules and the regulations made thereunder.

(2) The Authority shall be guided by the principles of natural justice and, subject to the other provisions of this Act and the rules made thereunder, the Authority shall have powers to regulate its own procedure.

(3) Where an issue is raised relating to agreement, action, omission, practice or procedure that—

(a) has an appreciable prevention, restriction or distortion of competition in connection with the development of a real estate project; or

(b) has effect of market power of monopoly situation being abused for affecting interest of allottees adversely, then the Authority, may suo motu, make reference in respect of such issue to the Competition Commission of India"

Section 43. Establishment of Real Estate Appellate Tribunal—(1) The appropriate Government shall, within a period of one year from the date of coming into force of this Act, by notification, establish an Appellate Tribunal to be known as the-- (name of the State/Union territory) Real Estate Appellate Tribunal.

(2) The appropriate Government may, if it deems necessary, establish one or more benches of the Appellate Tribunal, for various jurisdictions, in the State or Union territory, as the case may be.

(3) Every bench of the Appellate Tribunal shall consist of at least one Judicial Member and one Administrative or Technical Member.

(4) The appropriate Government of two or more States or Union territories may, if it deems fit, establish one single Appellate Tribunal:

Provided that, until the establishment of an Appellate Tribunal under this section, the appropriate Government shall designate, by order, any Appellate Tribunal functioning under any law for the time being in force, to be the Appellate Tribunal to hear appeals under the Act:

Provided further that after the Appellate Tribunal under this section is established, all matters pending with the Appellate Tribunal designated to hear appeals, shall stand transferred to the Appellate Tribunal so established and shall be heard from the stage such appeal is transferred.

(5) Any person aggrieved by any direction or decision or order made by the Authority or by an adjudicating officer under this Act may prefer an appeal before the Appellate Tribunal having jurisdiction over the matter:

Provided that where a promoter files an appeal with the Appellate Tribunal, it shall not be entertained, without the promoter first having deposited with the Appellate Tribunal atleast thirty per cent. of the penalty, or such higher percentage as may be determined by the Appellate Tribunal, or the total amount to be paid to the allottee including interest and compensation imposed on him, if any, or with both, as the case may be, before the said appeal is heard.

Explanation.—For the purpose of this sub-section "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

Section 71. "Power to adjudicate"—(1) For the purpose of adjudging compensation under sections 12, 14, 18 and section 19, the Authority shall appoint in consultation with the appropriate Government one or more judicial officer as deemed necessary, who is or has been a District Judge to be an adjudicating officer for holding an inquiry in the prescribed manner, after giving any person concerned a reasonable opportunity of being heard:

Provided that any person whose complaint in respect of matters covered under sections 12, 14, 18 and section 19 is pending before the Consumer Disputes Redressal Forum or the Consumer Disputes Redressal Commission or the National Consumer Redressal Commission, established under section 9 of the Consumer Protection Act, 1986, on or before the commencement of this Act, he may, with the permission of such Forum or Commission, as the case may be, withdraw the complaint pending before it and file an application before the adjudicating officer under

this Act.

(2) The application for adjudging compensation under sub-section (1), shall be dealt with by the adjudicating officer as expeditiously as possible and dispose of the same within a period of sixty days from the date of receipt of the application:

Provided that where any such application could not be disposed of within the said period of sixty days, the adjudicating officer shall record his reasons in writing for not disposing of the application within that period.

(3) While holding an inquiry the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry and if, on such inquiry, he is satisfied that the person has failed to comply with the provisions of any of the sections specified in sub-section (1), he may direct to pay such compensation or interest, as the case may be, as he thinks fit in accordance with the provisions of any of those sections."

(Emphasis supplied)

10. Learned counsel for the petitioner has not disputed the fact that as per agreement dated 10.07.2011 the petitioner-promoter was liable to handover physical possession of the flats complete in all respect to the Respondent Nos. 5 and 6 within 30 months from the date of agreement. A grace period of 180 days was also provided in the agreement. Thus the flat was liable to be handed over to the Respondent Nos. 5 and 6 by 09.07.2014 whereas possession of the flat was received by the Respondent Nos.5 and 6 from the petitioner on 26.12.2017. Thus, contravention of the agreement is undisputed. Learned counsel for the petitioner also does not dispute the liability of the petitioner for delay in handing over the possession. Thus, the provisions of Section 18 of the Act, as per undisputed facts are attracted on the facts of the

present case.

11. Section 71 of the Act, 2016 confers power upon an Adjudicating Officer to adjudge compensation under Sections 12, 14, 18 and 19. Sub-section (3) of Section 71 provides that if the Adjudicating Officer is satisfied that the person has failed to comply with the provisions of any of the sections specified in Sub-section (1) he may direct to pay such compensation or interest, as the case may be, as he thinks fit in accordance with the provisions of any of those sections. By the impugned order the Adjudicating Officer has awarded compensation and interest as provided under Section 71 of the Act, 2016 for breach of provisions of Section 18 of the Act, 2016. Thus, the impugned order is not without jurisdiction. Consequently, we do not find any merit in the submissions of the learned counsel for the petitioner and we hold that the impugned order passed by the Adjudicating Officer does not suffer from lack of jurisdiction.

12. Section 38(1) of the Act, 2016 confers power upon the 'Authority' to impose **penalty or interest** in regard to contravention of obligations cast upon the promoters, the allottees and the real estate agents under the Act, Rules and Regulations. Power to award compensation or interest has been conferred under Section 71(1)/(3) of the Act, 2016 upon an Adjudicating Officer for adjudging compensation under Section 12, 14, 18 and Section 19 of the Act, 2016. Thus, the power to adjudge compensation has been conferred upon the Adjudicating Officer and not upon the Authority. Therefore, the impugned order passed by the Adjudicating Officer adjudging compensation is well within the four corners of the Section 71 of the Act, 2016.

13. The judgment of this Court in the case of Habitech Infrastructure Ltd. (supra) relied by the learned counsel for the petitioner is clearly distinguishable on facts. In the case of Habitech Infrastructure Ltd. (supra) the facts were that when the promoter failed to fulfill his obligation to handover the flats the allottee made an application for refund of the entire amount along with interest as the project was not completed by the promoter in time. The dispute in that case was confined to refund of amount deposited by the allottee with the promoter and award of interest. This court considering the provisions of Section 38 of the Act, 2016 found that the authority as defined in Section 2(i) of the Act has power to award interest. In the present case the Respondent Nos. 5 and 6 have not withdrawn the amount but they complained and asked for compensation and interest for delay in handing over the flat to them by the petitioner-promoter. Thus, the judgment of this Court in the case of Habitech Infrastructure Ltd. (supra) is clearly distinguishable on facts and does not support the submission of the learned counsel for the petitioner.

14. At this stage, learned counsel for the petitioner now submits that the petitioner may be relegated to remedy of appeal under Section 43(5) of the Act, 2016.

15. It is always open for the petitioner to avail the remedy of appeal under Section 43(5) of the Act in accordance with law, for which no order is required to be passed.

16. For all the reasons aforesaid we do not find any merit in this writ petition. Consequently, the writ is dismissed leaving it open for the petitioner to avail remedy of appeal under Section 43(5) of the Act, 2016. If the petitioner files an

appeal before the Appellate Authority in accordance with law the Appellate Authority shall decide the appeal without being influenced by any of the observations made by this Court touching the merits of the case.

Order Date :- 8.10.2020
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(Dr. Y.K. Srivastava,J.) (S.P. Kesarwani,J.)