BEFORE MAHARASHTRA REAL ESTATE APPELLATE TRIBUNAL, MUMBAI

MISC. APPLICATION NO. 102 OF 2021 {Perjury}
Along With
MISC. APPLICATION NO. 473 OF 2021 {Perjury}
In
APPEAL NO. AT006000000052420 OF 2020
(Complaint No. CC00600000 100584)

M/S. COPPERSMITH ENERGIES AND PROJECT PVT. LTD.
1501-A, Universal Majestic,
Opp. RBK International School,
P.L. Lokhande Marg, Chembur – 400 043. ... *Appellant*

~ versus ~

DIMENSION HOUSING REALTY LLP
101, Tulsi, Pride, Plot No.3,
Postal Colony, Chembur (East),
Mumbai – 400 071. ... *Respondent*

Mr. J.P. Sen, Senior Advocate a/w. Adv. Mr Vaibhav Ghogare for Appellant.
Mr. Mangal Bhandari, Advocate for Respondent.

CORAM : SHRI SHRIRAM R. JAGTAP, MEMBER (J) &
DR. K. SHIVAJI, MEMBER (A)

DATE : 25th OCTOBER 2024

(THROUGH VIDEO CONFERENCE)

JUDGEMENT

[PER: DR. K. SHIVAJI, MEMBER (A)]

Present appeal has been preferred under the Maharashtra Real Estate (Regulation and Development) Act, 2016 (in short "the Act") to quash and set aside the order dated 15th January 2020 passed by learned Member, Maharashtra Real Estate Regulatory Authority, (MahaRERA) in Complaint No. CC 006 0000000 100584, whereby, the captioned complaint

filed by the appellant before MahaRERA, was dismissed by holding that the appellant had invested this amount to the respondent as loan and not against the purchase of the subject property and therefore, the appellant cannot be treated as an allottee in the project.

2. Respondent is a real estate developer, who is constructing a duly registered real estate project (vide known as "TRISHABH SIGNET" located at Chembur (East), Mumbai (in short "the said project'). Appellant has filed the captioned complaint before MahaRERA claiming to be the flats purchaser and allottee in respondent's said project. It has further prayed for direction to respondent to execute agreement for sale under Section 13 of the Act as well as to handover the possession of the said booked flats. For convenience, Appellant and Respondent will be addressed as Complainant and Promoter respectively in their original status before MahaRERA.

3. Brief background giving rise to the present appeal is as under; -

a. **Complainant's case:** Appellant has been allotted flat nos. 701 and 801 by the Respondent's letters dated 24th February 2014 and 05th March 2014 for total consideration of ₹ 1 Crore for each flat and Appellant has paid the total consideration of the two flats of total of ₹ 2 Crores for the said allotments. Respondent has obtained the Occupancy Certificate of the said project in March 2019. Therefore, owing to non-execution of the Agreements for Sale and for not handing over the possessions of the said flats, captioned complaint came to be filed by appellant on 16th August 2019 before MahaRERA praying direction to respondent *inter alia* for execution of the agreements for sale under Section 13 of the Act and also for delivery of possession these flats.

b. Respondent disputed the claims of the complainant by filing its reply before the MahaRERA and submitted that the payments made by the appellant are not in dispute. However, just after a week, the complainant informed the respondent that it is no longer interested in the said flats

and wanted to convert the paid amounts towards the purchase of the flats into unsecured loan to the respondent on interest. Therefore, respondent has not violated nor contravened any provision of the Act and accordingly, the said complaint be dismissed with costs by rejecting the reliefs claimed by the complainant.

c. Upon hearing the parties, learned Member, MahaRERA passed the impugned order dated 15th January 2020 and dismissed the captioned complaint filed by the appellant by holding that the payments made by the complainant to respondent is a loan and is not against the purchase of the said property. Hence, the complainant cannot be treated as an allottee in the project.

d. Aggrieved by this order of MahaRERA, appellant has preferred the captioned appeal, seeking various reliefs including to quash and set aside the impugned order dated 15th January 2020 and to allow the reliefs claimed in the captioned Complaint no. CC 006 0000000 100584.

4. Heard learned counsel for the parties *in extenso.*

5. Appellant has prayed for the aforesaid reliefs by citing following grounds; -

a. In view of the issuance of the allotment letters dated 24th February 2014 and 05th March 2014 by the respondent for the said two flats in the duly registered project of the promoter after the receipt of 100 percent payments of the cost of the flats, appellant is an allottee under the Act. Whereas Section 4(1) of the Maharashtra Ownership of Flat (Regulation of the Promotion of Construction, Sale Management and Transfer) Act of 1963 (in short "MOFA") stipulates that promoter shall not take more than 20 percent of the total consideration of the flats without executing and registering the agreements for sale. However, even after follow-ups, promoter has failed to execute the agreements for sale.

b. Therefore, the impugned order is bad, untenable in law and has been issued without following the basic principles of natural justice by not providing an opportunity to the appellant to file rejoinder nor provided

opportunity for refuting the false allegations raised against the appellant. Moreover, MahaRERA has passed the order without giving cogent reasons for arriving at conclusions reflecting non-application of mind. Thereby, the impugned order is vitiated by non-compliance of the principles of natural justice. Therefore, the impugned order is liable to be set aside because the allotment letters are still in force, subsisting and binding upon the parties, making it evident that complainant continue to be an Allottee in the said project.

c. As such, Appellant has never agreed to terminate and cancel the allotment letters. Whereas respondent has miserably failed to establish that the said allotment letters have been cancelled/ terminated. Accordingly, the said allotment letters have not been terminated as yet. Whereas it is a settled position of law that allotment letters are concluded contracts and are accepted for enforcement under the provisions of the Act.

d. The conclusions arrived at in the impugned order for rejecting the complaint by holding that the said transaction was for the loan transaction by relying on the income tax returns and TDS certificates is completely misconceived and is baseless.

e. MahaRERA has failed to appreciate without referring/ relying upon any communication exchanges between the parties. Therefore, has arrived at the erroneous conclusion therein for rejecting the complaint on frivolous reasons. On various occasions, appellant has requested respondent to execute agreements for sale to which respondent delayed it on the frivolous reasons. Respondent, by email dated 24th November 2015 has forwarded a draft agreement in respect of one of the flats but the appellant has responded to it by requesting to send the draft agreement in respect of both the flats together.

f. In January 2016, it is the respondent, who had requested for further loan of ₹ 2,25,00,000/- from appellant due to certain financial difficulties and

accordingly, appellant had given this amount as a loan. However, respondent has not repaid this amount for which, a Commercial Suit No.47 of 2021 for recovery of the same amount has been instituted before the Hon'ble Bombay High Court.

g. It is only an oral understanding between the representatives of the parties based on the warm and cordial relationship between the appellant and promoter that the said payment made for ₹ 2 Crores towards the consideration of the flat were converted into a temporary loan without finalizing its terms and conditions of the unsecured loan and not even the interest rate etc., were finalized.

h. Even then, respondent has not paid any interest amount to appellant till now and has purportedly credited the interest thereon in the loan account being maintained in the book of respondent itself. The calculation for the TDS at 18 percent interest rate was arbitrarily calculated by the respondent without any basis for which no agreement has been arrived at between the parties.

i. MahaRERA has failed to consider that promoter has miserably failed to deliver the said flats to appellant within the stipulated time in the allotment letters in complete violation of Sections 12 and 18 of the Act. Therefore, impugned order suffers from various infirmities, bad in law and is liable to be quashed and set aside.

j. Only on 16th September 2019, respondent was informed that flat no. 801 is ready for possession and possession has been given to a 3rd party. Therefore, respondent has suppressed this material transaction from the appellant. Accordingly, Appellant urged to allow the appeal by placing reliance on the following citations: -*(a) S. P. Brothers V/s. Biren Ramesh Kadakia [2008 (4) ALLMR 379, (b) Tyagaraja Mudaliyar & Ors. V/s. Vedathanni AIR 1936 PC 70, (c) Ponnu & Anr. V/s. Taluk Land Board, Chittur & Ors. 1981 SCC OnLine Ker 141, (d) Smt. Krishnabai Bhritar Ganpatrao Deshmuck V/s. Appasaheb Tuljaramarao Nimbalkar & Ors.*

(1979) 4 SCC 60 and (e) Smt. Gangabai w/o. Rambilas Gilda V/s. Chhabubai Pukharajji Gandhi (1982) 1 SCC 4.

6. Per Contra, learned counsel for respondent promoter submits that; -

a. Respondent has issued provisional allotment letters dated 24th February 2014 and 05th March 2014 on receipt of payment of ₹ 2 Crores for allotment of flat nos. 701 and 801 @ of ₹ 1 Crore each to the appellant.

b. However, immediately within a week, based on the oral instruction of the appellant itself, that appellant was not interested in purchase of the flats and based on the oral instruction of the appellant itself, these paid amounts of ₹ 2 Crores have been converted into unsecured loan. Respondent, while agreeing to the oral instruction of the appellant, converted the said paid amount of ₹ 2 Crores into unsecured loan and asked appellant to return the originals of the said two provisional allotment letters. However, appellant informed that the originals of the said two provisional allotment letters have been destroyed as the same were null and void.

c. The respondent, thereafter, opened a loan account in the name of appellant and credited this loan amount of ₹ 2 Crores. Accordingly, as on 31st March 2014, respondent has credited₹ 3,00,822/- in the loan account of appellant as interests for the periods from 24th February 2014 (for ₹ 1 Crore) and from 05th March 2014 (for another paid amount of ₹ 1 Crore) till 31st March 2014 respectively and has also deducted TDS of ₹ 30,082/- under 194-A of the Income Tax Act. The TDS certificate was also issued to appellant, and appellant has even duly utilized the said TDS amount, while filing the Income Tax return for that year.

d. Respondent's income tax return was selected for scrutiny for the F.Y 2013-14 i.e. A.Y (Assessment Year 2014-15) by the Income Tax Department and respondent was asked by the Income Tax Department to submit a loan confirmation letter from the appellant. Accordingly, loan confirmation letter duly signed and stamped along with supporting

documents including the details of the PAN number, acknowledgment of income tax returns filed for the relevant year of A.Y 2014-15 and the bank statement reflecting this transaction as required by the income tax department for verifying the said loan amount were filed. All these conclusively confirm the said conversion of the stated paid amounts into unsecured loan. Copies of these documents have been placed on record.

e. Similarly, for the next fiscal year FY 2014-15, interest of ₹ 36,48,733/- was also credited in the loan account of the appellant, the TDS of ₹ 3,64,873/- was also deducted under Section 194-A of the Income Tax Act and the TDS certificate was issued to appellant.

f. In view of the warm and cordial relationship between the parties, in January 2016, appellant again approached with its desire to lend more money. Accordingly, respondent accepted further loan of ₹ 2,25,00 000/- and this loan was also reflected in the loan account of appellant in the respondent's book of account. Respondent continued to credit interest incomes on all these loans including the issuance of TDS, the profit and loss account and ledger account was also maintained by the respondent from FY 2015-16 to FY 2019-20 and these paid amounts are shown as unsecured loans.

g. In view of the above, it is more than evident that the payments made towards the allotment to flat nos. 701 and 801 have already been converted into unsecured loans based on the understanding arrived at between the parties. Therefore, appellant is no longer an allottee.

h. As such, the said two flats, namely flat nos. 701 and 801, which were provisionally allotted to appellant, are already allocated to the 3rd party.

i. In view of above, none of the reliefs claimed by the appellant can be granted and respondent has not violated any of the provisions of the Act. Therefore, the captioned appeal be dismissed with compensatory costs and placed reliance on the following citations: -*(a) Bachhaj Nahar V/s. Nilima Mandal & Anr. AIR 2009 SCC 1103, (b) Tajdeen V/s. Abdul Muthalif*

(2009) 3 MLJ 959, (c) Roop Kumar V/s. Mohan Tedani AIR 2003 SCC 2418 and (d) S. P. Chengalvaraya Naidu V/s. Jagannath 1994 AIR 853.

7. After considering the pleadings advanced by the respective parties including a series of communications exchanged between the parties through emails/ WhatsApp as well as other material on record and based on the oral submissions of the learned counsel for the parties, short point that arises for our determination is whether the impugned order is bad in law, to this, our finding is in the negative for the reasons to follow: -

REASONS

8. It is not in dispute that complainant has been allotted two flats namely the flat nos. 701 and 801 in the duly registered project of respondent by issuance of two separate allotment letters dated 24th February 2014 and 5th March 2024 for total considerations amounts of ₹1,00,00,000 for each flat and the entire consideration amounts of ₹2,00,00,000 of both the flats was paid at the time of the allotment itself.

9. In this backdrop, respondent promoter submits that based on the oral understanding between the parties, the said paid amounts of ₹2,00,00,000 for the purchase of the subject two flats were converted into unsecured loan. Pursuance there to, a loan account was opened in its ledger/account book in the name of the complainant and the interests accrued on the said unsecured loans were also credited in the loan account, being maintained in the name of the complainant itself. Learned counsel for respondent further submits that the interest accrued for the entire periods starting from the date of receipt of these payments even for the fiscal year 2014-15 of ₹ 3,00,822, were credited and was intimated. Beside this, the TDS (Tax Deducted from the Source) on the interest incomes accrued on this unsecured loan including the TDS for the year FY 2014- 15 of ₹30,082 and for subsequent fiscal years were continued to be paid to the Income Tax Department in the name of the complainant under section 194A of the

Income Tax Act and were intimated too. Therefore, appellant is no longer an allottee. Likewise, the interest incomes accrued for the period starting from the fiscal year (FY) 2014 - 15 up to FY 2018-19 were credited in the appellant's loan account, the corresponding TDS amounts were also paid to the Income Tax Department in the name of the complainant and complainant has even availed/utilised the TDS amounts paid/credited by respondent on this said unsecured loan, while filing its income tax returns (ITR) for the respective fiscal years.

10. However, the learned counsel for the appellant vehemently opposed these contentions of respondent by submitting that the allotment letters dated 24th February 2014 and 5th March 2014 have not been cancelled nor terminated. As such, these allotment letters are still legal, valid, subsisting and binding to the parties. Moreover, the said conversion of the paid amounts was converted into unsecured loan only temporarily and informally. As such, written loan agreement has not been formally executed between the parties. Therefore, in view of the continuation of legally valid, subsisting, and binding allotment letters, complainant continues to be an allottee under the provisions of the Act.

11. In view of the above, the pivotal question falls before us for determination is whether the respondent has established that the payments made towards the purchase of the said flats have been converted into unsecured loan and to which, our answer is in the affirmative for the reasons to follows; -

a. On diligent perusal of the record, reveals that, in pursuance to the income tax scrutiny of the accounts of the respondent company for the fiscal year (FY) 2014- 15, appellant has formally confirmed in writing of the said conversion of the said paid amounts into the said unsecured loan (vide page 360). The copy of the confirmation of the said unsecured loan conversion dated 1st April 2014 is duly signed and confirmed on behalf of the complainant company along with its PAN number as on page 360 along with a copy of the bank statement reflecting this transaction as required

by the income tax department for verifying the said loan amount were filed. Accordingly, contentions of the learned counsel for the appellant are contrary to the facts on the record.

b. In addition, appellant has further admitted by filing an additional affidavit (relevant abstract of para 3 of the affidavit is being reproduced below for ready reference) has confirmed the actual receipts of the tax deducted at source (TDS) from the respondent based on the interest incomes accrued on the very same unsecured loan about which, the conversion of the paid amounts into loan is under question.

"3. The loan account of the Appellant was opened by the Respondent in its books of account and the accrued interest on the said amount was not actually paid to the Appellant but was credited to its loan account. As per the table, calculation of interest as annexed at Exhibit '19" to the Addl. Affidavit in Reply, the Respondent has applied 18% interest per annum for financial Year 2013-14 to 2016-17, whereas for Financial Year 2017-18, 12% interest rate was applied an financial Year 2018-19, 9% interest rate was applied. No interest was paid to the Appellant. The said interest calculated by the Respondent was arbitrary. However, the Appellant had ***taken the benefit of the TDS*** *at 10% on the interest calculated by the Respondent from the Financial Year 2013-14 to Financial Year 2018-19. Hereto annexed and marked as Exhibit "A" Collectively are the copies of the 26AS Certificate regarding TDS deducted for the Financial Years 2013-14 to 2018-19 on the interest calculated by the Respondent"*

Thus, Appellant has further confirmed on affidavit that these TDS amounts have been actually availed and utilised, while filing its income tax returns for the corresponding years of the appellant. Learned counsel for Appellant has further confirmed the receipts of these amounts even in its 26AS as well as in Form 16 A statements and also the payments made of the TDS amounts to the Income Tax Department on behalf of the appellant.

c. By availing the monetary benefits of TDS for filing its income tax returns for the FY 2014-15, appellant has not only admitted its receipts but has also confirmed in writing as well as has even acted upon the said converted

unsecured loans itself for its own monetary benefits. Thus, TDS and interest incomes are generated only from out of the very same unsecured loan and these were not possible from the amounts paid for sale transactions. As such, appellant itself has even availed the monetary benefits accrued on the very same converted unsecured loan without raising any protest/objection of the said conversion into unsecured loan. Therefore, appellant is estopped from complaining about the very same conversion as well as cannot turn back and question the very same conversion of the paid amounts into an unsecured loan.

d. Appellant has not objected/ nor protested right from February 2014 onward any time before filing of the captioned complaint, when the interest incomes including the TDSs, interest incomes were credited in 26 AS/ Form 16A statements, in the name of the appellant on the very same unsecured loan account nor appellant has even objected to the payments of TDS in its name to the Income Tax Department. On the contrary, Appellant has availed, utilised and even acted upon these for getting its monetary benefits from out of the very same unsecured loan itself.

e. It is an undisputed fact that the interest accrued on these amounts have been credited in the accounts being maintained by the respondent book in the name of the appellant. However, it is pertinent to note that payments of interest incomes on accrual and cash basis are well recognised accounting methodologies for incomes / receipts accounting system of any legal entities. This is clearly demonstrated by the fact that appellant itself has accepted and has even utilised/acted upon the receipt of the TDS amounts calculated on the basis of the very same interest income credited in its loan account itself being maintained by the respondent promoter without raising any protest nor has demanded earlier for the actual payments of the interest incomes on cash basis any time before.

f. Moreover, it appears that the income tax department has also accepted the said loan conversion/confirmation given by the appellant itself for the

FY 2014- 15 and has accepted the receipt and has even extended benefits to appellant of the said TDS amount calculated based on the interest income accrued on the very same converted unsecured loan amount when, the accounts of the respondent came under scrutiny.

g. Grievance of the appellant with respect to the non-finalisation of the interest rate on the said converted unsecured loan is also not tenable in view of the fact that the total interest amount accrued on the unsecured loan has been clearly credited in its loan account and the TDSs on the very same interest income, which have also been calculated/received, accepted and utilised by the appellant without any protest. Therefore, once the total interest amount was disclosed and accepted then, the interest rate thereon is easily determinable.

h. Learned counsel for the appellant contended that mere acceptance and issuance of TDS certificates do not amount to acknowledgment/admission of the said conversion of the paid amounts into an unsecured loan. He further contended that the TDS certificate is primarily to acknowledge the deduction of tax at source and does not refer to any loan contract between the parties and referred/relied upon the judgment of the **Hon'ble High Court in the case of *S. P. Brothers V/s. Biren Ramesh Kadakia (supra),* wherein, it has been held *inter alia*** that *"..... The issuance of TDS certificates do not amount to an acknowledgement of defendant within the meaning of Section 25 of the Indian Evidence Act and the full Bench judgment of this Court in the case of Jyotsna (supra) puts the matter beyond doubt. The TDS certificate is primarily to acknowledge the deduction of tax at source. The certificate does not refer to any amount of loan or even the rate of interest which is payable on the said principal amount. It does not refer to any contract between the parties and even a transaction. When a written contract is produced before the Court, its contents are the best evidence....."*

And

".... We are unable to accept the contentions raised on behalf of the respondent that issuance of certificate for tax deduction at source would be a document which

will fall in any of the clauses stated under Order 37 Rule 2. As already noticed, a written contract between the parties has neither been pleaded nor any document to that effect placed on record. It is not a debt due on an enactment as understood in legal parlance or a guarantee. Admittedly, the loan was advanced as a friendly loan to which serious dispute has been raised. The dispute raised by the defendant relates to questions of law as well as facts."

i. However, careful perusal of the facts of these two cases demonstrates that appellant in the case at hand, has not only acknowledged and admitted on affidavit that they have even received the TDS from the respondent from out of the very same unsecured loan under question but has also availed utilized and even acted upon the monetary benefit accrued from out of the very same unsecured loan, which is under question. Moreover, appellant in the instant case has further formally confirmed in writing also of the said conversion of the said paid amounts to an unsecured loan (vide page 360). Therefore, appellant has even received/utilized and also acted upon the converted unsecured loan itself without raising any grievance at least during the period the TDS amount have been utilized. Whereas, in the case referred to in the aforesaid judgment of the Hon'ble Bombay High Court on which, the appellant has placed reliance, there is no such confirmation of loan account as well as about the admission for acting upon the TDS and to derive monetary benefit thereon. Therefore, we find the case at hand is quite distinguishable from the facts of the case as referred to in the aforesaid judgment of the Hon'ble Bombay High Court.

j. Other citations and compilation of judgments referred to by learned counsel for appellant are also distinguishable from the facts of the case at hand more particularly, because in the instant case appellant has admitted on affidavit of having acted upon the receipt of the TDS amounts, has also admitted and confirmed in writing about the said conversion of the paid amounts into unsecured loan in pursuance to the scrutiny of the accounts of respondent, vide page no.360. In addition, in view of the judgment of

the Hon'ble Supreme Court in the case of *Ponnu & Anr. V/s. Taluk Land Board, Chittur & Ors. 1981 SCC OnLine Ker 141,* as referred to by the learned counsel for the appellant itself, it has been held that, too much importance should not be attached to the nomenclature of the document, and one may have to look behind the facade or the covering and identify the essence as well as about the reality of the transaction/s. If we apply this ratio of the Hon'ble Supreme court in the instant case at hand then, we find that the confirmation of account about the conversion of the paid amount into the unsecured loan under question, clearly reflects all the trappings and ingredients of unsecured loan. Moreover, the confirmation further demonstrates about the said payments that it has all the features of an converted unsecured loan. Moreover, this account for the FY 2013 - 2014 has been confirmed by none other than appellant itself along with its PAN number thereon. Therefore, upon diligent perusal of the additional affidavit admitting the receipt/ utilization of TDS containing the details of the 26 AS Certificates read with the loan confirmation of the account by the appellant itself, we are of the view that the loan confirmation account is a concluded subsequent loan contract substituting and replacing the earlier sale transactions reflected through the allotment letters. Therefore, we find that the said payment has been formally converted into the said unsecured loan with the formal consents of the appellant in writing as well.

12. In view of the foregoing reasons, we find that appellant has confirmed the conversion of paid amounts into the unsecured loan, which has been duly accepted by the income tax department, appellant itself has also confirmed the receipt and actual utilization of the TDS amount, thereby appellant has even acted upon the said converted loan and utilised it for its own monetary benefits during these fiscal years. Therefore, it is more than crystal clear that appellant, having accepted, acted upon and availed for the monetary benefits of the same unsecured loans after confirming the said converted unsecured loan, the aforementioned contentions of the appellant are legally

not tenable. Accordingly, the paid amounts do not continue to be for the purchase of the flats. As such, these paid amounts have already been formally converted into unsecured loan, thereby appellant is no longer allottee.

13. In view of the foregoing, we are of the considered view that none of the grounds raised by appellant in the captioned appeal are sustainable in the eyes of law and promoters have effectively controverted all the grounds raised in the appeal. Therefore, the impugned order is not bad in law and captioned appeal is devoid of merits, lacks substance, thus, allottees are not entitled to the reliefs prayed for in the appeal under the Act. Consequently, the appeal having no merit, deserves to be dismissed. Thus, we answer the solitary point in the negative and proceed to pass the order as follows; -

ORDER

(i) Captioned Appeal No. AT006000000052420 OF 2020 stands dismissed.

(ii) No order as to costs.

(iii) In view of the disposal of the appeal as above, pending miscellaneous applications will not survive. Hence, stand disposed of.

(iv) In view of the provisions of Section 44(4) of the Act of 2016, a copy of the Judgment be sent to the parties and MahaRERA.

(DR. K. SHIVAJI) **(SHRIRAM R. JAGTAP, J)**