

**IN THE WEST BENGAL REAL ESTATE APPELLATE TRIBUNAL
KOLKATA - 700 075**

- Present: 1. Justice Rabindranath Samanta
Hon'ble Chairperson
2. Shri Gour Sundar Banerjee
Hon'ble Judicial Member
3. Dr. Subrat Mukherjee
Hon'ble Administrative Member

WBREAT/APPEAL NO. – 01/2024

M/s MAA BATAI CONSTRUCTION

472/2, Sarat Chatterjee Road,
P.O. & P.S.-Shibpur
Howrah – 711 103.

.....Appellant

Vs.

SMT. BHARATI DAS & ASIS DAS

Uttarayan Apartment, 2nd Floor, Panchbati,
Natagarh Main Road, P.O.-Natagarh, P.S.- Ghola, Sodepur,
Kolkata – 700 113

..... Respondents

Mr. Debasis Chattopadhyay, Advocate

.....For the Appellant

Smt. Bharati Das, the Respondent No. 1

.....Appears in person

Sri Asis Das, the Respondent No. 2

.....Appears through his authorized
representative, the Respondent No. 1

Heard on : **12.04.2024**

Judgment on : **30.04.2024**

Rabindranath Samanta, J:-

Aggrieved by the Order dated 12.06.2023 passed by the West Bengal Real Estate Regulatory Authority (hereinafter referred to as the Regulatory Authority) in Complaint No.WBRERA/COM000040 and COM000662, the Appellant M/s Maa Batai Construction has approached this Tribunal by preferring this Appeal.

By the Impugned Order the learned Regulatory Authority passed the following directions:

“That the Respondent shall refund the Principal amount of Rs.11,00,000/- (Rupees eleven lakhs only) along with interest at the rate of SBI Prime Lending Rate + 2% starting from the respective dates of payments made by the Complainant till the date of realization.

The Refund shall be made by bank transfer to the bank account of the Complainant, within 45(forty five) days from the date of receipt of this order of the Authority, by e-mail.

The Complainant shall send his bank account details in which he wants to take the refund amount to the Respondent by e-mail within 3(three) days from the date of receipt of this Order of the Authority by e-mail.

The Respondent did not get the said project registered under the erstwhile WBHIRA or under WBRERA Authority, which is mandatory. In this case he has not yet obtained Completion Certificate(C.C.) for the project as per Provisions contained in Section 3 of the Real Estate (Regulation and Development) Act, 2016.

The Special Law Officer, WBRERA, is therefore directed to initiate separate proceeding under the Provisions contained in Section 3 of the said Act for non-registration of the said project before the WBRERA Authority.

Complainant is at liberty to file an Execution Application on any plain paper annexing a copy of this Order to this Authority, if the Respondent defaults to comply this order either in full or in part within the specified time period as mentioned in this Order.

In that case Respondent shall be liable to a penalty for everyday during which such default continues which may cumulatively extend upto 5% of the estimated cost of the instant project of M/s Maa Batai Construction, as determined by this Authority, as per the Provision contained in Section 63 of the Real Estate (Regulation and Development) Act, 2016.

The Complainant also prayed for compensation for mental harassment, agony etc. The Complainant is at liberty to file an Application, as per Form-‘N’, WBRERA

Rules, 2021, for compensation before the Adjudicating Officer, to be appointed by this Authority in due course time, praying for compensation as per the Provisions of Section 71 of RERA Act, 2016.”

Shorn of details, the facts which are necessary for adjudication may be stated as under:

The Respondents Smt. Bharati Das and Shri Asis Das, in order to purchase a flat being No.201, measuring about 740sq.ft, on the 2nd floor, of a Real Estate Project(G+3) undertaken by the Appellant, entered into an agreement with the Appellant on 11th August, 2017, at the consideration of Rs.15,54,000/-(Rupees fifteen lakhs fifty four thousand only). The Respondents state that at the time of Execution of the Agreement they paid a sum of Rs.5,00,000/-(Rupees five lakhs only) as first instalment to the Appellant. Thereafter, they paid Rs.2,00,000/-(Rupees two lakhs only) as the 2nd instalment vide money receipt dated 29.05.2018 and paid Rs.3,00,000/-(Rupees three lakhs only) as the 3rd instalment vide money receipt dated 16.07.2018. Again, the Respondents, paid Rs.1,00,000/-(Rupees one lakh only) to the Appellant on 14th September, 2019, vide money receipt dated 21.09.2019. Although the agreement stipulated that the Appellant was to execute and register the sale deed, by 30.09.2018, but, it failed to discharge its obligation. The Real Estate project in which the Respondents booked the flat was of the nature of (G+3), but, finally the Appellant constructed the project as (G+4) without taking any consent from them. By a letter dated 22.01.2021 and by a reminder dated 16.02.2021 the Respondents sought for the Sanctioned Plan of the newly constructed (G+4) project, Completion Certificate and Occupancy Certificate of the building from the Appellant and asked the Appellant to complete the rest works of the flat as specified in the Sale Agreement within the agreed time, but to no effect.

Under the aforesaid circumstances the Respondents initially made a complaint with the West Bengal Housing Industry Regulatory Authority, established under the West Bengal Housing Industry Regulation Act, 2017 and after the Act was struck down as unconstitutional by the Hon'ble Apex Court, the Respondents approached the West Bengal Real Estate Regulatory Authority with a complaint registered as Complaint

No.WBRERA/COM000040. After hearing the parties the learned Regulatory Authority disposed of the complaint by passing the impugned Order as above.

The Appellant as the Respondent in the aforesaid complaint in its objection has denied the allegations as made by the Respondents. It is stated by the Appellant that though the Real Estate project was meant for (G+4), but, due to mistake on the part of Architect the Plan was of (G+3). Ultimately, as per the instruction of the Howrah Zilla Parishad, the Appellant submitted 'as made building plan' of (G+4) to the Sanctioning Authority and this building plan was sanctioned by the Howrah Zilla Parishad. By an Advocate's letter the Appellant asked the Respondents to pay the balance consideration money and get the Sale Deed registered, but, the Respondents paid no heed to the request made by it. Later on, the Appellant by an another Advocate's letter dated 04.10.2021 sent Rs.10,19,388/- (Rupees ten lakhs nineteen thousand three hundred eighty eight only) out of total consideration of Rs. 11,00,000/-(Rupees eleven lakhs only) to the Respondents by way of a cheque deducting the amount of Rs.80,612/- (Rupees eighty thousand six hundred twelve only) spent for the extra works of the flat. But, this letter came back to the Appellant's learned Advocate with postal endorsement 'unclaimed'. In such backdrop, the Appellant cancelled the agreement for sale and sold away the flat to an another intending purchaser.

Admittedly, the Respondents entered into an agreement with the Appellant on 11th August, 2017 to purchase the flat as above at the consideration of Rs.15,54,000/- (Rupees fifteen lakhs fifty four thousand only). It is spelt in the agreement that the construction of the flat shall be completed within eighteen months i.e. by 30.09.2018 tentatively from the date of obtaining the Sanctioned Plan on 31.03.2017 and the flat will be handed over to the purchaser on due payment of total consideration money. As it appears from the agreement, the Real Estate project in respect of which the aforesaid agreement was entered into was of (G+3). It is manifest from the averments of the complaint and the documents on record that the Respondents were aware that the project was of (G+3).

In such context, it will be worthwhile to mention that though the aforesaid agreement was between the Respondents and Appellant, but the Respondent No. 2 put

no signature on the agreement. However, subsequent correspondences exchanged between the parties clearly indicate that the agreement, in fact, was entered into between the Respondents Bharati Das and Asis Das and the Appellant M/s Maa Batai Construction, represented by its proprietor Sushil Kumar Sharma. A reading of the agreement shows that in schedule of payment there is no timeline as to payment of instalments towards the consideration money by the Respondents to the Appellant. However, undisputedly, as stated above, the Respondents paid the 1st instalment of Rs.5,00,000/- vide money receipt dated 05.09.2017, 2nd instalment of Rs.2,00,000/- vide money receipt dated 29.05.2018 and 3rd instalment of Rs.3,00,000/- vide money receipt dated 16.07. 2018. Besides, the Respondents paid Rs.1,00,000/- to the Appellant vide money receipt dated 21.09.2019. Since, there was no objection on the part of the Appellant to the aforesaid payment of instalments and since there was no timeline of payment of instalments in the agreement, it will be deemed that the Appellant has accepted the timeline of payment as made aforesaid by the Respondents. The Appellant was to complete the construction of the flat by 30.09.2018 from the date of obtaining the Sanctioned Plan of the project of (G+3) on 31.03.2017. The letter dated 22.01.2021 and the reminder dated 16.02.2021 of the Respondents evince that the Respondents intended to get the deed of conveyance executed and registered after being satisfied that the Appellant got Sanctioned Plan of the Project(G+4) and obtained Completion Certificate and Occupancy Certificate, issued by the Competent Authority. It goes without any say that the Appellant miserably failed to respond to the queries made by the Respondents.

The various Provisions of the Real Estate (Regulation and Development) Act, 2016, cast obligations and responsibilities on the promoter. Section 11 of the Act enjoins that the promoter shall be responsible for all obligations, responsibilities and functions under the Provisions of the Act or the Rules, made thereunder to the Allottees as per the Agreement for Sale. The promoter shall be responsible to obtain the Completion Certificate or the Occupancy Certificate or the both from the relevant Competent Authority as per local laws or other laws for the time being in force and make it available to the Allottees individually or to the association of Allottees as the case may be.

On the other hand Section 14 of the Act prohibits the promoter from making any addition and alteration in the Sanctioned Plans, Layout Plans and specifications and the nature of fixtures, fittings and amenities describe therein in respect of the apartment which are agreed be taken, without previous consent of that person. However, the promoter may make minor addition or alteration, but, such addition or alteration excludes structural change including an addition to the area or change in height or the removal of any part of a building or any change to the structure, such as the construction or removal or cutting into of any wall or part of a wall, partition, column, beam, joist, floor including mezzanine floor or other support or a change to or closing of any required means of access ingress or egress or a change to the fixtures or equipment etc. The promoter shall not make any other alteration or addition in the Sanctioned Plans, Layout Plans and specifications of the building or the common areas within the project without the previous written consent of at least 2/3^{rds} of the Allottees other than the promoter, who have agreed to take apartment in such building.

As we find, the building plan (G+3) of the project in which the Respondents booked the flat, was sanctioned on 31.03.2017 and the Appellant was to complete the flat and hand over the same to the Respondents by 30.09.2018. As it is evident from the documents on record, the Respondents were to purchase the flat at the consideration of Rs.15,54,000/- and admittedly the Respondents paid Rs.10,00,000/- to the Appellant by 16.07.2018. These exhibit the bonafide or honest intention of the Respondents to purchase the flat by paying the rest amount of Rs.5,54,000/- only within the time as agreed. That a part, the Respondents, admittedly, paid a further amount of Rs.1,00,000/- to the Appellant vide a Money Receipt dated 21.09.2019.

The Appellant has averred that due to mistake on the part of the architect the building plan was made of (G+3) type instead of (G+4) and as such the Appellant submitted a Building Plan (G+4) 'as made plan' to the Howrah Zilla Parishad. The letter dated 22.01.2021 and the reminder dated 16.02.2021 made by the Respondents to the Appellant exhibit that till the month of February, 2021, the Appellant failed to furnish the Sanctioned Plan of the building(G+4), Completion Certificate and Occupancy Certificate to the Respondents. No iota of document is forthcoming from the

side of the Appellant to demonstrate that the Appellant obtained consent either from the Respondents or from 2/3rd Allottees of the Real Estate project. Such acts on the part of the Appellant are of gross violation of the relevant Provisions of the Real Estate(Regulation and Development) Act, 2016, as quoted above.

Learned Counsel Mr. Debasis Chattopadhyay appearing for the Appellant submits that since the Respondents failed to pay the rest consideration money to purchase the flat within the stipulated time, his client having the authority under the agreement cancelled the agreement. Endeavour was made to refund the amount received from the Respondents by sending a cheque to them by a letter. But, the letter which was sent came back to him with postal endorsement 'unclaimed' which denotes that the letter was duly served upon the Respondents. Mr. Chattopadhyay by drawing our attention to Section 16(c) of the Specific Relief Act and Section 55 of the Contract Act submits that the Respondents were never ready and willing to purchase the flat by paying the consideration money within the agreed time which was the essence of the agreement. As such, his client was justified to cancel the agreement and refund the amount. To espouse his argument Learned Counsel has referred to a decision in the case of Priyanka Kumari Vs Shailendra Kumar reported in 2024(1) India Civil Cases 686(S.C.) and a decision in the case of Urvashi Agarwal (since deceased) through L.R.s and Another Vs Kusha Agarwal and Others reported in 2019 Indian Civil Cases 738(S.C.).

Ms. Bharati Das, Respondent No. 1 appearing for self in person and for her husband Mr. Asis Das, Respondent No. 2, submits that they entered into the agreement with the Appellant to purchase the flat in the project undertaken by the Appellant with the Sanctioned Plan (G+3) and not the (G+4). They paid major portion of the consideration money i.e. Rupees ten lakhs to the Appellant before 30th September, 2018. But, since the Appellant failed to handover the Completion Certificate, Occupancy Certificate either of the Sanctioned Plan(G+3) or of the Sanctioned Plan(G+4), they were not in a position to purchase the flat. She also submits that as regards further construction in the nature of (G+4), the Appellant took no consent from her. She vehemently submits that the Appellant miserably failed to discharge its obligations to hand over the flat within the time in compliance of the relevant Provisions of the Real

Estate (Regulation and Development) Act, 2016. As regards refund of the money she submits that the Appellant allegedly sent the letter to them on 04.10.2021 which came back to the Learned Advocate as unclaimed on 12.10.2021. But the flat was sold to one Mr. Phatik Chandra Naskar on 07.10.2021. On such score, she submits that the Appellant illegally terminated the agreement and sold the flat to another person with ill motive.

As held above, it is the gross laches on the part of the Appellant for which the Respondents could not purchase the flat within the agreed time, by 30.09.2018 by paying the rest consideration money. Since, the Appellant failed to obtain the Completion Certificate and Occupancy Certificate from the Competent Authority and furnish the same to the Respondents, within the agreed time such acts on the part of the Appellant amount to its failure to complete the flat and give possession of the same to the Respondents in terms of Section 18 of the Act.

As pointed out by the Respondents, the Appellant sent an Advocate's letter dated 04.10.2021 with a cheque of Rs.10,19,388/-, addressed to the Respondents. But, the letter came back to the Appellant's learned Advocate on 12.10.2021. Without waiting the letter coming back to the learned Advocate of the Appellant, the Appellant sold away the flat to one Phatik Chandra Naskar on 07.10.2021 i.e. prior to returning the letter on 12.10.2021. All these reek of malafide intention of the Appellant to deprive the Respondents of getting the flat which they were legally entitled to get.

In view of the above, the submission advanced by the learned Counsel for the Appellant is not acceptable. The decisions cited at the Bar do not apply to the factual matrix of the matter at hand.

The Chain of events as established above demonstrate that from the very beginning of the project till the alleged cancellation of the agreement by the Appellant, the Appellant has violated all the mandatory Provisions of the Real Estate (Regulation and Development) Act, 2016. According to Section 13 of the Act, a promoter shall not accept any amount from the buyer without first entering into a written Agreement for Sale with the buyer and register the agreement for sale under any law for the time being in force.

The facts as established patently reveal that the Appellant cancelled the agreement whimsically, unilaterally and without any sufficient cause. As such the cancellation of agreement is bad in law and it is set aside.

As observed by the learned Regulatory Authority, the agreement between the parties was not registered. The Respondents in their affidavit in opposition submit in connection with this Appeal, that Sushil Kumar Sharma, the Proprietor of the Appellant, M/s Maa Batai Construction, during hearing before the learned Regulatory Authority through virtual mode had admitted that instead of Registering Agreement for Sale his company used Notarized Agreement. Such averments in the affidavit of the Respondents remain uncontroverted.

As discussed above, the Appellant failed to complete the flat and hand over possession of the same to the Respondents after obtaining the Completion Certificate, Occupancy Certificate from the Concerned Authority, within the time as agreed between the parties. Besides, the Appellant without taking consent of the Allottees, on its own, constructed another floor on the building by submitting a Building Plan(G+4) later on. This manifests that the Appellant has miserably failed to discharge its obligations/responsibilities as cast on it by the various Provisions of the Real Estate(Regulation and Development) Act, 2016. The Appellant did not register its project with the Regulatory Authority. However, the Proprietor of the Appellant admitted before the learned Regulatory Authority that he applied for registration of the project with the Regulatory Authority and the same was pending.

In view of the above, we find that the directions given by the learned Regulatory Authority to return the amount with statutory interest thereon to the Respondents till realisation of the amount, payment of compensation to be adjudicated by the Adjudicating Officer to be appointed are quite justified and we do not find any illegality in the order of the learned Regulatory Authority.

Therefore, the Appeal having no merit should be dismissed.

Accordingly, the Appeal is dismissed on contest with cost of Rs.10,000/- (Rupees ten thousand only) to be paid by the Appellant to the Respondents, within 15(fifteen) days from this day.

The Order dated 12.06.2023 passed by the learned Regulatory Authority is hereby affirmed.

The Appellant has already paid Rs.11,00,000/-(Rupees eleven lakhs only) as Principal amount and Rs.1,19,583/-(Rupees one lakh nineteen thousand five hundred eighty three only) as Interest to the Respondents/Complainants. Besides, the Appellant has deposited an amount of Rs.8,74,773/-(Rupees eight lakhs seventy four thousand seven hundred seventy three only) as SBI Prime Lending Rate +2% as per Section 43(5) of the Real Estate (Regulation and Development) Act, 2016.

The Secretary of this Tribunal is directed to disburse the amount of Rs.8,74,773/- with interest, if any accrued thereon, to the Respondents/Complainants if no Appeal is preferred after the Appeal period is over after deduction of TDS.

Thus, the Appeal stands disposed of. Order of stay stands vacated.

Let a copy of this Judgment be communicated to all Concerned by e-mail, immediately.

Sd/-

Dr. Subrat Mukherjee
Technical/Administrative Member
West Bengal Real Estate
Appellate Tribunal

Sd/-

Shri Gour Sundar Banerjee
Judicial Member
West Bengal Real Estate
Appellate Tribunal

Sd/-

Justice Rabindranath Samanta
Chairperson
West Bengal Real Estate
Appellate Tribunal

By Order of WBREAT

Dated: 30-04-24



Authorised Signatory

Section Officer
W. B. Real Estate Appellate Tribunal
West Bengal